

The Obligation to Pay Hire in Time Charterparties: *The Astra*

**Analysis of the legal grounds for the classification of the obligation
to pay hire as a condition**

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1. INTRODUCTION

The obligation to pay hire in time charterparties is one of the most important charterers' obligations vis-à-vis the ship-owners. Hire functions as remuneration for ship-owners' services under time charterparty and covers ship-owners' expenses which they incur in relation to the services they provide. Charterers' default in payment of hire may therefore cause problems in ship-owners' everyday financial operations and expose them to serious liquidity problems.

The importance of both charterers' obligation to pay hire and corresponding ship-owners' right to timeous hire payment explains the significance of remedies for charterers' payment default. The ship-owners need protection of their right to timeous hire payment, whereas the charterers need certainty in their legal position in case they are found to be in payment default. Thus, the available remedies are important for both the ship-owners and the charterers.

The system of available remedies for charterers' default in payment of hire in time charterparties under English law is dual. There are legal remedies available at common law and contractual remedies available according to certain contractual terms.

Legal literature suggests that legal remedies for defaults in payment of hire under English law are surprisingly uncertain and on occasions may also be considered by the shipping industry as inadequate¹.

Uncertainty in available legal remedies for defaults in payment of hire under English law stems, at least partially, from controversial construction of the contractual obligation to pay hire. Both legal literature² and practitioners³ – until the recent decision in *The Astra* case – were more likely to say that the obligation to pay hire under English law is characterized as an intermediate (or innominate) term or

¹ Thomas, §7.7.

² *Time Charters*, §16.132: “(...) the better view is that obligation to pay hire is by nature an intermediate term (...);” Thomas, §7.69: “(...) parties are resigned to its status [status of obligation to pay hire] as a warranty (...).”

³ Reed Smith report *Is payment of hire a condition? A long standing controversy resolved*

<http://www.reedsmith.com/Is-payment-of-hire-a-condition-a-long-standing-controversy-resolved-04-18-2013/>;

INCE&CO report *The Astra: Single Hire Default Entitles Owners to Withdraw and Claim Loss of Profit for Remaining Charter Period* <http://incelaw.com/documents/pdf/strands/shipping/article/the-astra>;

Steamship Mutual report *Non-payment of Hire – Right to Withdraw*

<http://www.steamshipmutual.com/publications/Articles/Astra0613.htm>.

even a warranty rather than a condition. The position that the obligation to pay hire is an intermediate term, however, due to the absence of clear judicial authority was uncertain and there were indeed suggestions to the contrary⁴.

Intermediate term implies that the innocent party's right to terminate a contract at common law and to claim damages for loss of bargain (i.e. losses which accrue as a result of a premature determination of a contract) arises only in case of a serious breach, which deprives the innocent party not in default of substantially the whole benefit of the contract (as opposed to conditions, any breach of which entitles the innocent party to the same). In the context of the obligation to pay hire, this means that in order for the ship-owners to be entitled to the above-mentioned remedies the ship-owners must assess the gravity of charterers' default in payment of hire (i.e. whether it constitutes charterers' repudiatory breach⁵ or not). This is, however, not an easy assessment to make, since situations of charterers' payment defaults are highly fact dependent and two missed hire payments may suffice in one case, but not necessarily in another. Furthermore, the ship-owners must exercise their right to terminate at common law at the right time. Too early as well as too late exercise may lead to the ship-owners themselves being in repudiatory breach. The subtlety of ship-owners' slippery election between acceptance of charterers' repudiatory breach with subsequent termination of time charterparty and affirmation of time charterparty is reflected in a recent *Fortune Plum* case.

Legal literature suggests that the uncertainty and limitations of legal remedies for charterers' payment default contributed, at least in part, to the emergence of contractual remedies⁶. It is indeed common practice to have an express right of withdrawal for charterers' payment default drafted into standard time charterparties⁷. The withdrawal clause by its very nature grants an express termination right for the ship-owners and entitles them to withdraw the vessel upon non-payment of hire irrespective of any further factual circumstances, provided the procedure stipulated in the contract is strictly complied

⁴ Comments that the obligation to pay hire is a condition are found in *Contractual Duties: Performance, Breach, Termination and Remedies*, §11-014; McMeel, §23.10.

⁵ For the sake of clarity it is submitted that in the thesis (i) any breach of a condition; (ii) serious breach of an intermediate term, which deprives the innocent party of substantially the whole benefit of the contract, and (iii) evincing an inability (incapacity) to perform or intention not to perform or to perform inconsistently with the contract are referred as "repudiatory breach".

⁶ Thomas, §7.11.

⁷ Cf. New York Produce Exchange (NYPE) 1946 form clause 5, "Shelltime 4" issued December 1984 amended 2003 lines 196–199, Baltimore form 1939 as revised 2001 lines 86–92.

with⁸. Simultaneously, the ship-owners are entitled to claim unpaid hire due as at the date of withdrawal.

It is submitted that in a rising market the withdrawal clause is indeed capable to eliminate ship-owners' difficulties associated with the construction of the obligation to pay hire as an intermediate term, because it provides the ship-owners with a tool to get the vessel back by terminating the charterparty upon non-payment of hire and because the question of damages for loss of bargain in a rising market simply does not arise (as the withdrawn vessel is normally subsequently employed at a more profitable hire rates).

But this is not the same when the market is falling. In a falling market, the withdrawal clause only grants the express termination right for the ship-owners and in the absence of charterers' repudiatory breach damages for loss of bargain are not available. Since the damages for loss of bargain in such situation equals to the difference between the charterparty hire rate and the hire rate of a subsequent charterparty, which in a falling market would normally be substantially lower (or there may be no substitute charterparty at all due to the hardship in the market), the availability of damages for loss of bargain is important, but, however, dependent on charterers being in repudiatory breach.

Given the fact that nowadays standard time charterparties normally include withdrawal clauses⁹ it is namely on the point of damages for loss of bargain the discussion whether the obligation to pay hire is an intermediate term or a condition is legally and commercially significant.

Relatively recent case law – the Commercial Court's judge Flaux J's judgment in *The Astra* – purports to provide an answer and to eliminate the uncertainty related to the construction of the obligation to pay hire by labeling the obligation to pay hire punctually in clause 5 of the NYPE as a condition.

Since the NYPE form, which is commonly used by the market, has wider application to other charterparty forms that contain similar hire payment clauses, it is submitted that Flaux J's decision concerns not only those time charterparties, which are/will be concluded on the NYPE, but also those on other standard time charterparty forms. For this reason Flaux J's decision in *The Astra* case is not only one of the most discussed recent decisions among those working in shipping, but it has been

⁸ Notably, the withdrawal clause may be drafted as giving the right to withdraw the vessel only after expiry of a certain grace period.

⁹ Cf. supra note 7.

appraised as “one of the most controversial”¹⁰ and “potentially ground-breaking”¹¹ judgments in recent years.

This thesis thus has two major objectives:

- (1) to analyze the legal grounds on which it was found in *The Astra* that the obligation to pay hire in clause 5 of the NYPE is a condition, and
- (2) to analyze the legal and commercial effects of *The Astra*.

The thesis consists of four parts. In the first part the short introduction into the research question and the aim of the research was presented. The following two parts are devoted for the above listed objectives of the thesis. The first of the two parts comprises of three main sections. In the first one (2.1) the nature of time charterparties as well as brief characteristics of the obligation to pay hire are presented. It is noted that this section aims to present only those aspects of both time charterparties and the obligation to pay hire which are important for the purposes of the thesis and thus is limited in its scope. In the second section (2.2) the classification of contractual terms is analyzed with the particular focus on conditions. In addition, the construction of the obligation to pay hire in time charterparties as a contractual term prior to *The Astra* is presented, including presentation of the general legal position in situations of charterers’ default in payment of hire. The third section (2.3) is devoted for *The Astra* case and the analysis of the legal grounds on which it is based. The third part aims to fulfill the tasks of the second objective and to present analysis of the legal effects and commercial implications of *The Astra*. The last part summarizes the findings and presents concluding remarks on the research question.

¹⁰ Shirley, §56.

¹¹ Butler, Kouzoupis.

2. THE OBLIGATION TO PAY HIRE IN TIME CHARTER PARTIES

2.1. The nature of time charterparties and the obligation to pay hire

The significance and characteristics of the obligation to pay hire are first and foremost determined by the nature of time charterparty.

A time charterparty may be defined as a contract for a period or for a trip under which, in return for the payment of hire, the vessel's employment is put under the orders of the charterers, while possession remains with the ship-owners who provide the crew and pay the ordinary running costs, characteristically excluding specific voyage costs such as fuel and cargo handling and port charges which are paid for by the charterers¹². Although the exact allocation of costs and responsibilities between the ship-owners and the charterers is subject to time charterparty clauses, the distinctive feature of time charterparty is that it is a contract of services, according to which ship-owners, in exchange of charterers' obligation to pay hire, undertake to make services of a ship and her crew, i.e. earning capacity of a ship, available to the charterers¹³. It follows from the definition of a time charterparty as a contract of services that no right of possession of a ship under time charterparty is transferred to the charterers¹⁴. Namely on this point time charterparties are to be contrasted with demise charterparties which are contracts for the leasing of a ship under which the charterers take possession of the ship and also provide their own crew and ship management to operate her¹⁵.

In functional terms, the charterers get the right to manage the vessel in terms of commercial employment, i.e. the charterers get the right to give orders as to cargoes to be loaded and voyages to be undertaken, and undertake to pay the agreed rate of hire, whereas the ship-owners undertake to perform services in accordance with charterers' orders, provided they are given in conformity with time charterparty. In legal terms, however, it is an exchange of promises that takes place – ship-owners' promise to put services of a ship and her crew at charterers' disposal is given in exchange of charterers'

¹² *Voyage Charters*, §1.1.

¹³ *The Scaptrade* at 256 per Lord Diplock; *The Laconia* at 319 per Lord Wilberforce.

¹⁴ *The Tankexpress* at 50 per Lord Porter.

¹⁵ *Time Charters*, §I.6.

promise to pay hire. In this respect, hire operates as consideration given by the charterers to the ship-owners for the services of a ship and her crew made available¹⁶.

It follows from the allocation of functions between the ship-owners and the charterers in a time charterparty that it is the charterers who bear all the risks associated with the commercial operation of the ship, which means that the charterers enjoy the full benefit of the earnings of the vessel or, conversely, they bear all the detriment if trading of the vessel turns out to be unprofitable due to adverse market conditions. For this reason hire as remuneration for ship-owners' services in time charterparty is typically calculated per time unit (per day, semi-monthly, per month etc.), regardless of actual earnings of the vessel, and is paid in advance¹⁷. In this way ship-owners by virtue of hire payable periodically under time charterparty avoid the commercial risks associated with trading of the vessel and receive the benefit of regular and defined cash flow¹⁸, whereas the charterers by way of payment of hire get the right to exploit the vessel as a revenue-generating chattel¹⁹.

Thus, from an economic perspective, payment of hire functions as remuneration for ship-owners' services under a time charterparty and covers ship-owners' expenses in relation to the services they provide²⁰. In this respect charterers' obligation to pay hire plays an important role in terms of ship-owners' liquidity and their ability to perform contractual services²¹. However, there is no firm and definite answer in the authorities as to whether charterers' payment of hire and ship-owners' services are interdependent so that the former is a condition precedent to the latter²².

¹⁶ *The Tankexpress* at 53 per Lord Wright.

¹⁷ Cf. NYPE 1946 clause 5, "Shelltime 4" issued December 1984 amended December 2003 line 185, Baltimore 1939 as revised 2001 lines 80–92.

¹⁸ *Time Charters*, §I.45.

¹⁹ *Ibid.*, §I.39.

²⁰ The ship-owners typically bear fixed costs, associated with the services they provide, which normally do not depend on the voyages being performed by the vessel or ports being called at (e.g. insurance, ship maintenance costs, provisions, crew wages, stores et al.), cf. NYPE 1946 clause 1, "Shelltime 4" issued December 1984 amended December 2003 lines 148–159, Baltimore 1939 as revised 2001 lines 37–47. However, hire may also be used to cover other ship-owners' expenses, such as interest and principal on ship-owners' mortgage loan, cf. *Scandinavian Maritime Law: The Norwegian Perspective*, p.435.

²¹ *The Scaptrade* at 257-258 per Lord Diplock.

²² This issue will be addressed later in the thesis, cf. sections 2.2.1.3 and 2.3.5.2.

From a legal perspective, however, hire is to be paid irrespective of both actual services being provided (actual use of the ship by the charterers) and actual expenses being incurred by the ship-owners²³. This is explained by the very nature of time charterparty, the allocation of risks between the ship-owners and the charterers in time charterparty²⁴ and the fact that hire in time charterparties is earned upon services of a ship and her crew being made available to the charterers²⁵. This also means that unless certain exceptions apply, hire is to be paid for the whole contractual period between delivery and redelivery of the ship²⁶. In this respect the obligation to pay hire is often characterized as continuous and unconditional²⁷.

Another important legal characteristic of the obligation to pay hire is that it is an absolute obligation. It means that in case hire is not paid when due, the charterers are in default of payment of hire, i.e. in breach of time charterparty, irrespective of fault²⁸ (unless qualifications of the obligation are provided in time charterparties which is not the case with standard charterparty forms).

Given the characteristics above it follows that charterers' obligation to pay hire is one of the most basic charterers' obligations in time charterparties.

²³ Actual expenses may be of interest in time charterparties containing the so-called "escalation clauses".

²⁴ *The Gregos* at 4 per Lord Mustill.

²⁵ *The Aquafait* at 68 per Cooke J.

²⁶ *Time Charters*, §I.45; *Scrutton on Charterparties and Bills of Lading*, §16-009.

²⁷ Thomas, §7.5; *Time Charters*, §I.45.

²⁸ Thomas, §7.4; *Time Charters*, §16.73.

2.2. Classification of the obligation to pay hire as a contractual term

2.2.1. Classification of contractual terms: conditions, warranties, intermediate terms

2.2.1.1. General on classification of contractual terms

Historically, contractual terms under English law were classified as conditions and warranties, the dichotomy of which is referred to as orthodox²⁹. In the 1960's after the decision of the Court of Appeal in *Hongkong Fir* case, however, it was recognized that there is a third category of intermediate (or innominate) terms³⁰. It is generally accepted therefore that contractual terms under English law currently fall into three main categories – conditions, warranties and intermediate terms³¹.

“Condition” as a term has many meanings and is used in a variety of senses³². However, when a term “condition” is used to refer to a contractual undertaking, it means a contractual duty, a breach of which entitles the innocent party, if he so chooses, to treat himself as discharged from further performance under the contract, and to claim damages for loss sustained by the breach³³. Conversely, a “warranty”³⁴

²⁹ Legal literature suggests that conditions and warranties have evolved from the rules of pleading rather than substantive law, namely, from the distinction of dependent and independent promises, terminology of which was employed by the courts since 16th century. It was towards the end of the 19th century when terms “dependent” and “independent” were often replaced by the terms “condition” and “warranty” (cf. Carter, Hodgekiss, p.31–42).

³⁰ Legal literature suggests that although the third category of intermediate terms is often seen as the modern doctrine, it has older roots (*Anson's Law of Contract*, p.140). Treitel refers to intermediate terms as to “the invention or perhaps more accurately [as] the rediscovery of a third type of contract term” (Treitel (2002), p.113). However, it does not depreciate the significance of Diplock LJ's judgment in *Hongkong Fir*, which is claimed to be the most important judicial contribution to English contract law in the 20th century (Ibid.).

³¹ Legal literature is not entirely uniform concerning the question of how many categories of contractual terms there are under English law. Some scholars enlist “fundamental term” as fourth category (cf. Treitel (2002), p. 127–138); some suggest that the better way of classification is the dichotomy of conditions and non-conditions (cf. Poole, p.302). However, majority of authorities support the threefold division of conditions, warranties and intermediate terms (e.g. *Chitty on Contracts*, §§12-019–12-024; *Treitel on The Law of Contract*, §18-048; *Contractual Duties: Performance, Breach, Termination and Remedies*, §10-001).

³² *Chitty on Contracts*, §§12-025–12-030; McMeel, §§20.01–20.07.

³³ *Chitty on Contracts*, §12-019; *Atiyah's Introduction to The Law of Contract*, p.193–194.

³⁴ As in case of conditions, “warranty” as a term may also be used in a variety of senses (cf. *Chitty on Contracts*, §12-031–12-033, McMeel, §§20.26–20.32).

is a contractual undertaking, a breach of which does not entitle the innocent party to treat himself as discharged, but to claim damages only³⁵.

An intermediate term is neither a condition, nor a warranty. A breach of an intermediate term may entitle the innocent party to treat himself as discharged, but this will depend on the nature and consequences of the breach³⁶. As Lord Diplock stated in *Hongkong Fir* case:

“There are, however, many contractual undertakings of a more complex character which cannot be categorized as being “conditions” or “warranties”....Of such undertakings all that can be predicated is that some breaches 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 “warranty”.

It follows that a breach of an intermediate term which deprives the innocent party from substantially the whole benefit of the contract entitles the innocent party to treat himself as discharged, whereas any other less serious breach sounds in damages only.

It may be summarized thus that contractual terms are classified into conditions, warranties and intermediate terms by way of available remedies at common law upon the breach of each contractual term. It is namely the availability of the remedy of the right to terminate the contract, which distinguishes the types of contractual terms.

As regards damages, successful termination at common law entitles the innocent party to claim damages for loss of bargain (damages for future loss, which accrue as a result of premature determination of a contract, or post-termination damages)³⁷, which are not possible to claim when there is no successful termination at common law merely for the reason that there is no future loss as the contract is not terminated and thus stands. For the sake of clarity and consistency, however, it should

³⁵ *Chitty on Contracts*, §12-019. Notably, certain exceptions exist and a breach of warranty may entitle the innocent party to terminate the contract, but this is true only in certain contexts where warranty has its specific “archaic” usage, e.g. in insurance (cf. *Contractual Duties: Performance, Breach, Termination and Remedies*, §10-007).

³⁶ *Ibid.*, §12-020.

³⁷ *McMeel*, §20.10, §23.31.

be noted that the legal basis of damages for loss of bargain is not the act of termination, but the breach itself which is treated in law as repudiatory³⁸.

Thus, from the common law position, the legal consequences of any breach of a condition and a serious breach of an intermediate term which deprives the innocent party from substantially the whole benefit of the contract, are the same – the innocent party may treat the contract *as repudiated*³⁹, i.e. the innocent party may, at his election, exercise the common law right to terminate the contract and claim damages for loss of bargain. Likewise, the legal consequences of any breach of a warranty and a breach of an intermediate term which does not deprive the innocent party from substantially the whole benefit of the contract are the same in the sense that the innocent party is not entitled to terminate the contract at common law and will claim damages assessed in the normal way, i.e. the amounts required so far as possible to put the innocent party back to the position he would have been in but for the breach.

The difference in the available remedies upon breach of contractual terms and especially the uncertainty of determining a repudiatory breach of an intermediate term manifests the significance of classification of contractual terms into particular categories.

2.2.1.2. The two-stage classification test

Prior to *Hongkong Fir* decision the test for distinguishing conditions and warranties was one of construction (the term-analysis test). With *Hongkong Fir* decision a test which requires analysis of the breach was introduced (the breach-analysis test). The two different tests which brought some confusion to the law of contractual terms were reconciled in *Bunge v. Tradax* decided by House of Lords and it is now settled that in order to construe a condition it is not necessary to show that every breach of a particular term deprives the innocent party from a substantially whole benefit of the contract⁴⁰.

³⁸ Peel, p.523. It is suggested that if the legal basis of loss of bargain damages were the act of termination, the loss of bargain damages would be also available for the act of termination pursuant to the express termination clause in a contract, which is not the case.

³⁹ McMeel, §§20.08–20.11.

⁴⁰ Cf. Carter, Hodgekiss, p.31–32, 50; McMeel, §20.14.

It is suggested thus that unless a particular contractual term falls into statutory or judicial classification the test of classification of a particular contractual term is two-stage: the one of construction and the one of the effect of breach⁴¹. As Lord Scarman put it in *Bunge v. Tradax* case⁴²:

“The first question is always, therefore, whether, upon true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty. If the stipulation is one, which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor, or very grave consequences, it is innominate.... Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances..., that a particular term is a condition or only a warranty, it is an innominate term, the remedy for a breach of which depends upon the nature, consequences, and effect of the breach”.

Legal literature suggests that in practice, since it is very rare for a term to be classified by courts as a warranty, the aforementioned two-stage test is a contest between conditions and intermediate terms⁴³. It is submitted therefore that the practical application of the test is as follows: first, the question whether upon the true construction of the contract a particular contractual term is a condition must be examined; second, if the answer to the first question is negative, the term is an intermediate term, and at this point the analysis of the effect of the breach is to be employed in order to determine the applicable remedy. Since the latter stage of the test deals with the effect of the breach, which is employed for the purpose of determination of applicable remedy, the essential question to be answered is such: when is a contractual term a condition?

2.2.1.3. When is a contractual term a condition?

It is stipulated in *Chitty on Contracts* that a contractual term generally will be held to be a condition⁴⁴:

- (i) if it is expressly so provided by statute;
- (ii) if it has been so categorized as the result of previous judicial decision;
- (iii) if it is so designated in the contract or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract; or

⁴¹ McMeel, §20.13.

⁴² *Bunge v. Tradax* at 7.

⁴³ McMeel, §20.14.

⁴⁴ *Chitty on Contracts*, §12-040. The *Chitty's* list of instances when a contractual term will be held to be a condition is not only used by other scholars (e.g. *Contractual Duties: Performance, Breach, Termination and Remedies*, §§10-009–10-010; *Anson's Law of Contract*, p.146–149), but was also approved by the Court of Appeal in *The Seaflower*.

- (iv) if the nature of the contract or 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 complied with.

It may be added that a contractual term will be held to be a condition if it is a stipulation as to time of performance and if such stipulation is of the essence of the contract⁴⁵. As a matter of fact, time stipulations as an instance of a condition fall either under (iii) or (iv) in the aforementioned *Chitty's* list, because the stipulations as to time may be construed as being of the essence either if it is expressly stated as such by the parties, or if the court infers from the nature of the subject-matter of the contract or surrounding circumstances that the parties intended them to have that effect⁴⁶. Nevertheless, it is suggested that stipulations as to time has its own history and terminology which justifies, although perhaps not very satisfactorily, a separate discussion⁴⁷. Indeed, time stipulations are often discussed as a separate ground for classification of a contractual term as a condition by the courts, as happened also in *The Astra*. Thus, for the purposes of the thesis, time stipulations are indicated as a separate case of when a term might be found to be a condition, provided such stipulation is of the essence of the contract.

Taking into account the above-mentioned *Chitty's* list and since the cases of (i) statutory and (ii) judicial classification of terms are relatively simple, it is submitted that the cases belonging to (iii) and (iv) of the *Chitty's* list deserve further elaboration.

With regard to (iii) it must be noted that generally usage of the phrase “of the essence” in a contract will be considered as an indicator that a term is a condition, whereas usage of the word “condition” might not suffice⁴⁸. It is also noted that the express provision of the innocent party’s right to treat himself as discharged, taken in isolation and by its own, does not necessarily give the effect of the clause, upon breach of which such right is granted, being a condition⁴⁹.

⁴⁵ *Chitty on Contracts*, §12-039.

⁴⁶ *Ibid.*, §12-037.

⁴⁷ *Treitel on The Law of Contract*, §18-089.

⁴⁸ *McMeel*, §20.19.

⁴⁹ This issue is an important one in terms of this thesis and is addressed later in the thesis, cf. section 2.3.5.1.

Classification (iv) involves the question of how to apply the first limb of a two-stage test⁵⁰ which is the so-called term-analysis test. It is suggested⁵¹ that the explanation given by Lord Kerr in *The Golodetz* case⁵² in orthodox language is instructive when he, citing Fletcher Moulton J in *Wallace v. Pratt* case, stated that conditions are terms

“...which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all”,

and continued that in situations where the commercial necessity for the characterization of a contractual term as a condition is not self-evident

“...the issue whether or not a particular term of a contract is to be characterized as a condition must inevitably involve a value judgment about the commercial significance of the term in question...”⁵³.

Notably, Lord Kerr’s approach in *The Golodetz* was accepted by the House of Lords in *The Naxos*⁵⁴.

Thus, it is the evaluation of the significance of a particular contractual term in a given commercial setting and “general scheme and tenor of the contract”⁵⁵ which serves as a test for the identification of a contractual term as a condition. This approach does reflect the position under English law as it is in line with *dicta* in the House of Lords in *Bunge v. Tradax* and in *The Gregos*. In the former the construction of a contractual term in the light of the surrounding circumstances⁵⁶ as well as the importance of considering the factual matrix – the nature, purpose and circumstances of the contract⁵⁷ – was emphasized, whereas in the latter the evaluation of the practical importance of a particular contractual term in question in the scheme of the contract was highlighted⁵⁸.

⁵⁰ Cf. section 2.2.1.2.

⁵¹ Treitel (1990), p.188.

⁵² *The Golodetz* at 282–283.

⁵³ It is noted that Lord Kerr uses term “characterization”. Indeed, once commercial background is taken into account for considering whether or not a term is a condition, the exercise is one of characterization, rather than pure construction (interpretation), cf. McMeel, §20.25.

⁵⁴ *The Naxos* at 36 per Lord Ackner.

⁵⁵ *Ibid.* at 31 per Lord Brandon of Oakbrook.

⁵⁶ *Bunge v. Tradax* at 8 per Lord Lowry.

⁵⁷ *Bunge v. Tradax* at 7 per Lord Scarman.

⁵⁸ *The Gregos* at 9 per Lord Mustill.

Admittedly, Lord Kerr in *The Golodetz* held that, if a contractual term is a condition precedent to the performance of other terms by the other party, the commercial necessity for such contractual term to be characterized as a condition is self-evident⁵⁹. However, it is not always the case and the last argument against or in favour for construction of a particular contractual term as a condition is found in the arsenal of policy considerations⁶⁰.

2.2.1.4. Why is a term construed as a condition?

The underlying policy consideration for contractual terms to be classified as conditions is certainty (as parties to a contract know exactly where they stand and what the results of even a trivial breach of a particular term would be).⁶¹ However, there are situations when certainty is traded for flexibility and promotion of interests of justice – these are the underlying policy considerations of intermediate terms⁶². Intermediate terms restrict the innocent party’s right to terminate a contract for breaches which do not deprive the innocent party of substantially the whole benefit of the contract, and thus prevent the innocent party from terminating for ulterior motives, such as escaping from a bargain which turned out to be unprofitable or snatching the more profitable opportunity⁶³. As Lord Roskill put it in *The Hansa Nord*

“...contracts are made to be performed and not to be avoided according to the whims of market fluctuations and where there is a free choice between two possible constructions I think the Court should tend to prefer that construction which will ensure performance...”⁶⁴.

However, certainty is still of considerable importance. The famous statement of Lord Bridge in *The Chikuma* reads as follows:

“The ideal at which the courts should aim, in construing such clauses [withdrawal of a vessel clauses], is to produce a result that in any given situation both parties seeking legal advice...can expect the same

⁵⁹ More on the effect of conditions precedent see section 2.3.5.2.

⁶⁰ Treitel (1990), p.189.

⁶¹ *Chitty on Contracts*, §12-034, *Treitel on the Law of Contract*, §18-050.

⁶² *Ibid.*

⁶³ *Treitel on the Law of Contract*, §18-050.

⁶⁴ *The Hansa Nord* at 457 per Lord Roskill. The policy argument was accepted also in *The Gregos* at 9 per Lord Mustill.

clear and confident answer from their advisers and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court”⁶⁵.

Generally, it may be said that the contest between conditions and intermediate terms is a contest between certainty and predictability on the one side, and flexibility and interests of justice on the other. Nevertheless, this does not imply that courts classify contractual terms on the grounds of whichever underlying values they consider to be just in a particular case – the policy considerations are not *per se* a ground for classification. As famously put by Lord Wilberforce in *Bunge v. Tradax*:

“...the Courts should not be reluctant, *if the intentions of the parties as shown by the contract so indicate*, to hold that an obligation has the force of condition...”⁶⁶ (emphasis added).

Thus, it is ultimately the parties’ intentions that are decisive.

2.2.2. Construction of the obligation to pay hire prior to *The Astra*

As indicated in the Introduction, the obligation to pay hire prior to *The Astra* was generally seen as not a condition of a contract. This general understanding, however, had no firm judicial authority. Very few cases had indeed touched upon a question whether the obligation to pay hire in clause 5 of the NYPE or any other standard charterparty was a condition or not as well as whether default in payment of hire leading to withdrawal of a vessel entitled the ship-owners to claim damages for loss of bargain.

One of the main authorities supporting the construction that the obligation to pay hire is not a condition, is the [then] Admiralty Court’s decision in *The Brimnes* rendered by Brandon J. *The Brimnes* case concerned the withdrawal of a vessel upon the exercise of a ship-owners’ right in clause 5 of the NYPE (dated 22 November 1968) as a result of the charterers late payment of hire which was due on 1 April, 1970. The vessel was withdrawn on 2 April, 1970, being the same day as charterers’ belated payment of hire was made. It should be noted that almost over the whole period of the

⁶⁵ *The Chikuma* at 377. For the sake of consistency, it is noted that this part of Lord’s Bridge speech has not gone unchallenged as Lord Denning has expressed critical views about it in his last book *The Closing Chapter* in support to Dr. F. A. Mann’s critical comments about the same in his article *Uncertain Certainty* (cf. Reynolds, p.189).

⁶⁶ *Bunge v. Tradax* at 6.

charterparty (from December, 1968, until April, 1970) the charterers were invariably late in paying hire and the ship-owners complained about that as from January, 1970⁶⁷.

Brandon J. decided that the ship-owners were entitled pursuant to clause 5 of the NYPE to withdraw the ship on the ground of charterers' failure to pay hire punctually. However, Brandon J. also decided that the ship-owners were not entitled to withdraw the ship on the ground of breach of an essential term (i.e. a condition of a contract) or of repudiation. Brandon J said in the judgment that "there is nothing in the clause 5 [of the NYPE] which shows clearly that the parties intended the obligation to pay hire punctually to be an essential term of a contract, as distinct from being a term, for breach of which an express right to withdraw was given"⁶⁸. However, the latter part of the judgment is considered to be *obiter* since the Brandon J's finding that the withdrawal pursuant to clause 5 was lawful was upheld by the Court of Appeal and, notably, the Court of Appeal did not address the condition point directly.

Another case to be mentioned in support of Brandon J's findings in *The Brimnes*, is *The Kos* in which Andrew Smith J's made an *obiter* statement that "the general view is...that the failure to pay hire when it is due is a breach of an intermediate term, and not necessarily repudiatory"⁶⁹.

At the same time however, there were other, albeit *obiter*, pronouncements by the courts to the contrary⁷⁰, as a result of which, it is suggested, the classification of the obligation to pay hire has always been subject to conflicting opinions⁷¹. It seems that the uncertainty surrounding the authorities has influenced the market players, their legal advisers and even scholars to opt for the relatively "safer" construction of the obligation to pay hire as an intermediate term⁷².

⁶⁷ *The Brimnes* also concerned an extensive discussion, since there was uncertainty as to the facts, whether the notice of withdrawal preceded belated payment of hire or not – in the light of *The Georgios C* this was an important issue to be considered and will be, however, addressed later in the thesis, cf. section 2.3.5.4.

⁶⁸ *The Brimnes* at 482.

⁶⁹ *The Kos* at 95.

⁷⁰ E.g. the *dicta* of the House of Lords in *The Tankexpress*, *The Laconia*, *The Mihaios Xilas*, *United Scientifics Holdings*, *The Afovos*, which will be addressed in section 2.3.5.2.

⁷¹ Carter (2012), p.290.

⁷² Cf. *supra* notes 2,3. The preferred construction is referred to as "safer", since, given the uncertainties in judicial authorities and if the obligation to pay hire would not be held to be a condition, non-repudiatory charterers' breach of the obligation to pay hire would not suffice for the ship-owners to get loss of bargain damages. Thus, in order to get damages the ship-owners would need to wait until it would be "safe" to claim charterers being in repudiatory breach.

It is submitted that due to uncertainty in the authorities, a substitution of one of the essential characteristics of a condition – the innocent party’s right to treat himself as discharged from further performance upon any breach with a subsequent right to terminate the contract at common law – has therefore as a rule been included in standard time charterparties by way of the express ship-owners’ right to withdraw the vessel upon charterers’ default of punctual payment of hire, i.e. by way of express termination provision (the so-called withdrawal clause)⁷³. Given the fact that most of the withdrawal cases prior to *The Astra* were those in a rising market, where the withdrawn vessel was subsequently employed at a more profitable rate, – the question of another essential characteristic of a condition – the innocent party’s right to claim damages for loss of bargain – naturally did not arise⁷⁴. It may be said thus that the cautiousness of the market by way of including express termination provisions in standard time charterparties combined with favourable market conditions are those reasons why the question whether the obligation to pay hire is a condition or not finds no firm answer in case law.

As mentioned in the Introduction, the obligation to pay hire considered as an intermediate term implies that, provided as is the rule that a standard time charterparty contains a withdrawal clause (express termination provision), ship-owners’ right to claim damages for loss of bargain arises only when charterers’ default in payment of hire constitutes a repudiatory breach⁷⁵. Thus, the generally accepted position prior to *The Astra* was that in order for the ship-owners to treat themselves as discharged from further performance (in case there was no withdrawal clause in a contract) and in any event (whether in the absence of the withdrawal clause or not) claim damages for loss of bargain it was necessary to show that the charterers were in repudiatory breach.

It was suggested that damages for loss of bargain are not available solely upon exercise of an express termination provision⁷⁶ (when there is no repudiatory breach), because the ship-owners by exercise of

⁷³ Cf. supra note 6.

⁷⁴ Cf. an overview of withdrawal cases by Meng.

⁷⁵ Cf. also section 2.2.1.1.

⁷⁶ Here and later in the thesis the “express termination provision” or “express right to terminate” refers to express termination provision in a contract when express right to terminate is granted upon breach of a certain term of a contract (as opposed to other possible formulations of express termination provisions where express right to terminate may be granted upon occurrence of a certain event and not a breach of a contractual term).

an express right to withdraw the vessel “breaks the chain of causation”⁷⁷ and the loss of bargain is not therefore “effectively caused”⁷⁸ by charterers’ failure to pay hire on time. In this respect, it is stated that the party, exercising its express right to terminate, becomes “the author of his own misfortune”, because the party gives up voluntarily its right to insist on future performance and accordingly any substitutionary relief in lieu thereof⁷⁹. In other words, the legal basis of damages for loss of bargain was namely a repudiatory breach, which entitles the innocent party to treat himself as discharged from further performance. In this case it was not the innocent party’s decision to terminate the contract, but the breach itself, which destroyed the bargain⁸⁰.

Demonstrating repudiatory breach, however, is not without difficulties. What kind of charterers’ default in payment of hire and when does it indeed constitute charterers’ repudiatory breach? – were the questions that the ship-owners and their legal advisers found not easy to answer.

Case law demonstrates that what default constitutes charterers’ repudiatory breach and when is very much fact-dependent. In *The Brimnes* one missed hire payment, even in the context of relatively long history of multiple charterers’ defaults in payment of hire (almost constant late hire payment), did not suffice to find charterers in repudiatory breach. It seems that the court put weight on the fact that the ship-owners did not complain about the first 13 out of 14 payments being late and thus one hire payment being late did not amount to the evinced intention by the charterers not to be bound by the terms of the charterparty⁸¹. Similarly, in the *Fortune Plum*, the arbitration tribunal did not consider a pattern of persistent late hire payments (six hire payments being few days late and three hire payments being a week or more late) to be “seriously worrying”⁸², most probably because the ship-owners did not complain about hire payments being late. In *The Afovos* one missed half-monthly hire payment was

⁷⁷ *The Kos* at 95.

⁷⁸ *Ibid.*

⁷⁹ McMeel, §23.31.

⁸⁰ Peel, p.523. Alternatively to the causation theory, it is explained that damages for loss of bargain are not available upon mere exercise of express termination right because the party at the time of termination has not been discharged which is the necessary legal basis for damages of loss of bargain – cf. Carter (2012), p.291, where author states that the reasoning that the cause of the loss of the bargain is the promisee’s decision to terminate “seems a commercially naive application of the causation concept”.

⁸¹ *The Brimnes* at 483.

⁸² *Fortune Plum* at 620. Notably, the tribunal’s approach was different with respect to subsequent hire payments, one of which was paid in three installments, the last of which was paid more than a month late.

held not to have the effect of depriving the ship-owners of substantially the whole benefit of the charterparty⁸³ and thus charterers' default was not repudiatory. In *Leslie Shipping* charterers' repudiatory breach was found on the ground of two missed hire payments (the first non-payment of hire was by agreement covered by 2 bills of exchange, issued by the ship-owners, accepted by the charterers and then later dishonoured by them. In addition, the following hire payment was not paid)⁸⁴. In *Merlin* case Greer J decided that "continuous non-payment"⁸⁵ of hire, which in fact consisted of three missed payments of hire, was a valid ground to award damages for loss of bargain.

It followed from the case law that one missed hire payment rarely satisfied the repudiation test⁸⁶ nor was it possible to guarantee that two missed payments would. It was more likely that charterers' behavior and evinced intentions as well as ship-owners' attitude and behavior in respect of the late payments of hire were weightier considerations than simply the number of missed hire payments. For this reason it was very often difficult to establish with certainty whether charterers were in repudiatory breach or not.

Another difficulty in addition to determination whether the charterers were in repudiatory breach on particular facts, was the need for the ship-owners to exercise their right to terminate at common law at the right time. If termination of a contract (on the grounds of charterers' repudiatory breach) was exercised too early – the ship-owners were at risk that the charterers would not be found to be in repudiatory breach, whereas if termination was too late – the ship-owners were at risk to be found to have affirmed the contract. Both situations would have led to the ship-owners themselves being in repudiatory breach⁸⁷. As indicated in the Introduction, the subtlety of timeous ship-owners' election

⁸³ *The Afonos* per Lord Diplock at 341.

⁸⁴ Although it is argued that Greer J's language with respect to repudiation is not that clear, it is submitted that damages for loss of bargain were awarded in that case on the ground of charterers' repudiatory breach. Greer J, referring to the non-payment of two hire payments, stated "Would not any shipowner be entitled to suppose from conduct of that sort that the charterer was not going to pay the hire for the subsequent months of the charter?...that would amount to repudiation of a fundamental part of this contract".

⁸⁵ *Merlin* at 186.

⁸⁶ *Time Charters* at §16.75.

⁸⁷ However, provided the termination of a charterparty was exercised pursuant to express withdrawal clause, which is normally included in most time charterparties, the former situation – when the charterers are not found to be in repudiatory breach – would result in ship-owners being deprived of loss of bargain damages and not being in repudiatory breach.

between acceptance of charterers' repudiatory breach with subsequent termination of time charterparty and affirmation of time charterparty is reflected in *Fortune Plum* case. In this case ship-owners terminated a time charterparty on the grounds that charterers were in repudiatory breach (on the basis of several missed hire payments and dishonoured promises to pay). However, the arbitration tribunal found the ship-owners having affirmed the charterparty by conduct and being in repudiatory breach themselves. It turned out that the ship-owners unreasonably delayed their decision to accept charterers' repudiatory breach (the tribunal held that reasonable ship-owners were entitled to conclude that charterers were in repudiatory breach on 7 November 2011 and the reasonable time to decide whether to accept it as per facts expired on 11 November 2011 and thus termination on 14 November 2011 was late). The ship-owners' appeal, however, succeeded on continued renunciation point (whether the ship-owners were entitled to accept continuing charterers' renunciation) in respect of which the case was remitted to the tribunal.

2.3. Construction of the obligation to pay hire in *The Astra*: the obligation to pay hire is a condition

2.3.1. Introductory remarks

As indicated in the Introduction, *The Astra*, a recent judgment rendered by the Commercial Court's judge Flaux J, holding that the obligation to pay hire punctually under clause 5 of the NYPE (whether on its own or in conjunction with the anti-technicality clause) is a condition, induced a lot of discussion among legal practitioners and is largely seen as debatable. This section aims to analyze *The Astra*, namely the legal grounds on which the decision is based, and discuss if there is room for contrary conclusion that the obligation to pay hire under clause 5 of the NYPE is not a condition, but an intermediate term. Before the analysis, the background facts, the arbitrators' decision and the legal grounds on which the Commercial Court's judgment is based are presented.

2.3.2. The background facts

The vessel *Astra* was chartered on an amended NYPE 1946 form dated 6 October 2008 for a period of five years. Clause 5 of the NYPE required the charterers Kuwait Rocks Co to make punctual and regular payment of hire 30 days in advance, breach of which would give the ship-owners AMN Bulkcarriers Inc an option to withdraw the vessel and terminate the charterparty. The charterparty also contained an anti-technicality clause incorporated in clause 31 which required the ship-owners to give the charterers two banking days' notice of a failure to make a hire payment before they could exercise their right to terminate.

After the charterparty was concluded hire rates fell and the agreed hire rate (US\$28,600 per day) was soon above market. The charterers therefore were unable to trade the vessel profitably and thus sought reductions in hire. Several times the charterers came up with various proposals of a reduction in the hire rate and threatened repeatedly that, if the ship-owners did not agree, they would declare bankruptcy. In July 2009 the ship-owners agreed to reduce the hire rate (the newly agreed rate being of US\$21,500 per day) for one year and the parties concluded an addendum clause 4 of which (in the judgment referred to as the Compensation Clause) *inter alia* stipulated that

“[i]n the event of the termination or cancelation of the Charter by reason of any breach by or failure of the Charterers to perform their obligations, Charterers shall...pay the Owners compensation for future loss of earnings...”.

The re-negotiated charterparty, however, did not put an end to charterers’ requests for further reductions in the hire rate and threats that, unless the hire rate was further reduced, the charterers would declare bankruptcy. In July 2010, upon expiry of the one year period of the reduced hire rate, the parties reached a compromise agreement, which the charterers failed to comply with by non-payment of hire. The ship-owners subsequently served an anti-technicality notice and on 3 August 2010 withdrew the vessel, terminated the charterparty and claimed that the charterers were in repudiatory breach.

Within one month the ship-owners mitigated their loss by fixing the vessel on a substitute charter (at the rate of US\$17,500 per day) and, faced with a very substantial loss of hire, commenced arbitration proceedings against the charterers.

2.3.3. The arbitrators’ decision

In the arbitration proceedings the ship-owners claimed that they were entitled to recover damages for future loss of earnings for the remainder period of the charterparty on the basis that (i) the charterers were in breach of a condition in not paying hire and/or (ii) in repudiatory/renunciatory breach of the charterparty.

As to (i), the arbitrators rejected ship-owners’ argument that the obligation under clause 5 of the NYPE to pay hire was a condition on the basis that, whilst their instinct as commercial arbitrators would be to treat the obligation to pay hire pursuant to clause 5 of the NYPE as a condition, they were not persuaded that was the current state of English law⁸⁸.

As to (ii), the arbitrators upheld ship-owners’ argument that the charterers were in repudiatory/renunciatory breach on the basis that the totality of the evidence (namely, the repeated threats by the charterers that they would declare bankruptcy compounded by a failure to comply with the compromise agreement reached in July 2010) could only be interpreted as an intention by the

⁸⁸ *The Astra* at 73(§14).

charterers to perform at the very least the forthcoming part of the charterparty in a manner that was not consistent with it⁸⁹.

The charterers appealed on two questions of law contending that the arbitrators erred in law (i) by applying the wrong test for repudiation/renunciation and (ii) by failing to find that the Compensation Clause was a penalty clause. The ship-owners in their respondents' notice also challenged the arbitrators' finding that (iii) the obligation to pay hire under clause 5 of the NYPE was not a condition.

2.3.4. The Commercial Court's decision: the obligation to pay hire is a condition

Flaux J in his judgment dismissed charterers' appeal on both grounds, although noted that the second question whether the Compensation Clause was a penalty clause is academic, because having dismissed the appeal on the repudiation/renunciation point, the ship-owners were entitled to recover damages for loss of bargain pursuant to normal principles of the law of contract⁹⁰.

As to the issue raised by the ship-owners that the arbitrators erred in law when they found that the obligation to pay hire under clause 5 of the NYPE was not a condition, Flaux J found in favour of the ship-owners and concluded that clause 5 of the NYPE is a condition (whether on its own or in conjunction with the anti-technicality clause). This conclusion was supported by extensive and detailed review of the authorities which nearly over the last 100 years touched upon the question whether the obligation to pay hire is a condition and was based on the following four essential reasons:

- (i) clause 5 of the NYPE provides a right to withdraw the vessel whenever there is a failure to make punctual payment of hire, i.e. the right of withdrawal pursuant to clause 5 exists irrespective of the gravity of the breach of the obligation to pay hire, and "this is a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition"⁹¹;
- (ii) the general rule in commercial contracts is that time stipulations are considered of the essence and thus conditions – according to the *obiter dicta* statements of the House of Lords, except for

⁸⁹ Ibid. at 75(§19).

⁹⁰ Ibid. at 77(§29).

⁹¹ Ibid. at 95(§109).

The Brimnes case, which was not followed, the obligation to pay hire punctually is a provision where time is of the essence⁹²;

- (iii) the importance to businessmen of certainty in commercial transactions⁹³;
- (iv) *obiter* statements in *Stocznia v. Latco* and *Stocznia v Gearbulk* supported the conclusion that the obligation to pay hire is a condition.

Alternatively, Flaux J held that even if his conclusion that the obligation to pay hire punctually under clause 5 of the NYPE (whether on its own or in conjunction with the anti-technicality clause) is a condition was wrong, the Compensation Clause elevated the obligation to pay hire to the status of a condition.

2.3.5. The analysis of the legal grounds on which *The Astra* is based

2.3.5.1. The express right of withdrawal as an indication of parties' intentions

As already indicated above, one of the essential reasons for the conclusion that clause 5 of the NYPE is a condition given by Flaux J in *The Astra* was the fact that clause 5 of the NYPE provides a right to withdraw the vessel whenever there is a failure to make punctual payment of hire. According to the learned judge the contractual right to terminate the charterparty irrespective of the gravity of the breach of the obligation to pay hire “is a strong indication” of the parties’ intention that any failure to pay hire punctually goes to the root of the contract and thus that the provision is a condition.

To support this conclusion Flaux J relied on Moore-Bick LJ reasoning in *Stocznia v Gearbulk* and dismissed the suggestion in *Time Charters* that the right to withdraw only adds to the obligation to pay hire a characteristic of a condition⁹⁴ stating that the argument is “somewhat heretical” as an “obligation either is a condition or it is not”⁹⁵.

⁹² *Ibid.* at 95–96(§§110–114).

⁹³ *Ibid.* at 96(§§115–116).

⁹⁴ *Time Charters* §16.13 reads as follows “It may be that the judicial remarks recorded above should not be understood as meaning that Clause 5 is a condition, but only that its draftsman, by adding an option to withdraw to the obligation to pay hire, has given to that obligation one characteristic of a condition, namely that any breach gives a right of termination”.

⁹⁵ *The Astra* at 96(§118).

As to the reasoning in *Stocznia v Gearbulk* Flaux J stated that

“...there are obvious differences between the structure of that contract and the charterparty in the present case...and there are no terms of the charterparty which provide a remedy of liquidated damages. Nonetheless, it does seem to me that the reasoning of Moore-Bick LJ is of some assistance, particularly because *it makes clear that where the right to terminate for a particular breach indicates that, on the true construction of the contract in question, the breach goes to the root of the contract, in other words the term is a condition or essential term, upon termination, the innocent party will be entitled to claim damages for loss of bargain*”⁹⁶ (emphasis added).

It is submitted that what in fact Flaux J is stating is that if, upon true construction of the contract, the clause, upon breach of which the express termination right arises, is a condition, the innocent party is entitled to claim damages for loss of bargain. With respect, such a conclusion only mirrors what is indeed settled law. It is submitted that, according to the current state of English law, an express contractual right to terminate the contract co-exists alongside its common law rights (unless there is an express and clear agreement to the contrary)⁹⁷. Besides that, it is not clear how Flaux J’s conclusion does support the later Flaux J’s finding that contractual right to terminate the charterparty irrespective of the gravity of the breach of the obligation to pay hire “is a strong indication” that the provision in question is a condition. It seems that Flaux J fails to read the Moore-Brick LJ speech in *Stocznia v. Gearbulk* in the light of the particular facts of the case where it was found that, contrasted with the provisions of liquidated damages, the express contractual right to terminate was construed as arising only in cases of repudiatory breaches. It is submitted that the above cited Flaux J’s sum up of Moore-Brick’s LJ speech in *Stocznia v. Gearbulk* thus only takes us that far that the question whether clause 5 of the NYPE is a condition is indeed a question of construction.

It is also suggested that Flaux J was too dismissive of the argument in *Time Charters*, because “it is hard to see why it should be heretical to suggest that a contractual obligation, albeit classified by the common law (or indeed by the parties) as an intermediate term, can, if the parties so choose, be supported by a right to terminate on any breach, leaving only the right to claim damages for loss of bargain to be dependent on the seriousness of the breach”⁹⁸.

⁹⁶ *The Astra* at 92(§99).

⁹⁷ This is clearly stated by Peel (at p.536) with references to cases including *Stocznia v. Gearbulk* and, in addition, also confirmed in a recent *Newland Shipping* case.

⁹⁸ Shirley, §25.

While it is generally true, as indicated in the *Chitty's* list in sub-section 2.2.1.2., that a contractual term “will be held to be a condition...if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract”⁹⁹, the law on this point is not that straightforward.

It is submitted that there may be situations when parties to a contract expressly provide in the contract that one party shall be entitled to terminate in the event of a specified breach of the contract by the other, but do not intend the obligation upon breach of which the right to terminate arises to elevate to the status of a condition. Indeed, there is case law which is in line with the submission.

In the Court of Appeal's case *Financings Ltd v. Baldock* a hire-purchase agreement for a truck was terminated under an express provision allowing termination for non-payment of hire, since the hirer was two instalments in arrears. The hire-purchase agreement also contained an express right to repossess and a minimum payment clause, entitling the ship-owners to two-thirds of the total cost of hiring in the event of termination. Since the agreement did not make time of payment of the essence and there was no express agreement that hire payment clause was a condition, the Court of Appeal held that as the hirer's default was not sufficient to constitute a repudiatory breach and the minimum payment clause was a penalty, the finance company was not entitled to damages for loss of bargain.

In contrast, in the Court of Appeal's case the *Lombard* which, as admitted by Nicholls LJ, had no practical difference from *Financings Ltd v. Baldock* case it was decided that the plaintiff finance company which terminated a contract for hire-purchase of a computer for failure of hire payment was entitled to damages for loss of bargain. The decision which the Court of Appeal reached with unease differed from the *Financings Ltd v. Baldock* case only on one point which “skilled draftsman can easily side-step”¹⁰⁰, that is because a punctual hire payment was expressly made of the essence in the contract and thus a condition. Notably, the Court of Appeal did not consider *Financings Ltd v. Baldock* not to be good law and indeed noted that *Financings Ltd v. Baldock* was followed in a number of cases¹⁰¹.

It is explained that the real basis for the decision in *Financings Ltd v. Baldock* is the legal ground of damages for loss of bargain. It is suggested that the legal basis of damages for loss of bargain is a repudiatory breach which has the forward-looking aspect that a non-repudiatory breach lacks and this

⁹⁹ *Chitty on Contracts*, §12-040.

¹⁰⁰ *Lombard* per Nicholls LJ.

¹⁰¹ *Ibid.* per Nicholls LJ.

is most obvious when the repudiatory breach takes the form of renunciation, i.e. the defendant evinces an intention not to perform the contract, but substantial failure to perform and breach of a condition are treated in law in the same way¹⁰². Although these logics of damages for loss of bargain were attempted to criticize¹⁰³, it is compelling that this is namely the current state of English law.

Financings Ltd v. Baldock thus has its critics¹⁰⁴ and supporters¹⁰⁵ but for the purposes of this thesis it adequately illustrates that there may be contractual terms which are given a characteristic of a condition, namely a right to terminate upon any breach, but do not confer automatically upon the innocent party damages for loss of bargain and thus are not conditions in its classic sense¹⁰⁶.

As Peel puts it in *Treitel on the Law of Contract* the rationale of express termination clauses is to prevent disputes from arising as to often difficult question whether the failure in performance is sufficiently serious to justify termination and they take effect even though there is no substantial failure¹⁰⁷. This indeed corresponds with the Thomas' view that uncertainty and limitations of legal remedies for charterers' payment default contributed to emergence of contractual remedies, e.g. the right to withdraw upon failure of punctual hire payment¹⁰⁸.

On the other hand, an indirect support for the proposition that express termination right upon a breach of a contractual term does not inevitably means that a term breached is a condition rests in *The Antaios* case. The House of Lords in *The Antaios* held that the withdrawal clause (express termination right) may not be invoked upon *any* breach of the charterparty (unless a breach amounts to repudiation). It must be noticed, however, that in cases where a court has to deal with an express termination right granted upon *any* breach of a contract, courts incline into the analysis of commercial reasonableness

¹⁰² Cf. analysis in Peel, p.523. For alternative, but compelling explanation see Carter (2012), where he *inter alia* explains why an express right to terminate a contract for breach does not of itself classify the obligations to which it applies as conditions, warranties or intermediate terms as well as why exercise of an express right to terminate for breach is not a sufficient basis for the recovery of loss of bargain damages.

¹⁰³ Opeskin, p.317.

¹⁰⁴ Ibid. p.293-326; McMeel, §23.38; McKendrick, *Contract Law: Text, Cases and Materials*, p.773.

¹⁰⁵ Bojczuk (1987); *Treitel on The Law of Contract*, §18-069.

¹⁰⁶ As eloquently it is said by Carter: "Although it is true to say that if a term is a condition any breach entitles the promisee to terminate the contract, the converse proposition is not correct" (Carter (2012), p.288).

¹⁰⁷ *Treitel on The Law of Contract*, §18-061.

¹⁰⁸ Thomas, §7.11.

and business commonsense as indicators of the parties' intentions and only when it is found that upon true construction of the contract the parties did intend that express termination right shall be invoked upon any breach, termination is held to be valid¹⁰⁹.

As has been demonstrated, the express contractual right of termination solely on its own cannot be validly regarded as a strong indicator that the contractual clause upon breach of which the express right of termination may be exercised is a condition.

It is therefore submitted that an express termination right in clause 5 of the NYPE (i.e. withdrawal clause) solely on its own does not necessarily indicate that the parties did intend that every failure of punctual payment of hire would go to the root of the charterparty. It is parties' intentions that matter, but they are not to be deduced solely from the express contractual right of termination. Whether the clause in a contract upon breach of which express contractual right to terminate is granted is a condition therefore is a question of construction, which has to be answered by use of construction techniques. The fact that there is an express contractual right to terminate may support the conclusion that the clause is a condition, but not vice versa.

2.3.5.2. The obligation to pay hire punctually is of the essence of the charterparty

Another essential reason for the conclusion that clause 5 of the NYPE is a condition given by Flaux J in *The Astra* was that the obligation to pay hire punctually is a provision where time is of the essence and thus a condition.

In support of the proposition that the obligation to pay hire is a provision where time is of the essence, Flaux J largely relied on *Bunge v. Tradax* which he reads as giving a firm ground for the proposition that "the general rule in mercantile contracts, where there is a "time" provision requiring something to be done by a certain time or payment to be made by a certain time, is that time is considered of the essence"¹¹⁰. While it is generally true that stipulations as to time in commercial setting are treated differently from those in non-commercial contracts, it is respectfully submitted that there is no presumption of fact or rule of law that time is of the essence in mercantile contracts such that

¹⁰⁹ *Contractual Duties: Performance, Breach, Termination and Remedies*, §§10-031–10-046.

¹¹⁰ *The Astra* at 95(§110).

stipulation as to time in such a contract may, on its true construction, be found not of the essence and thus an intermediate term¹¹¹.

In the light of post-*Bunge v. Tradax* cases¹¹² it is suggested that the *Bunge v. Tradax* case, where the interdependence between of the buyers' obligation to give 15 consecutive days loading notice and the sellers' obligation to nominate a port was examined, should be read not as formulating a general rule, but as stating that a term as to time will be treated as a condition when a term is a condition precedent to the ability of the other party to perform its obligation pursuant to another term¹¹³. It is indicated¹¹⁴ that such a limited reading of *Bunge v. Tradax* case may be found in a more recent *Aktor*¹¹⁵ case.

As to the obligation to pay hire, there is no firm authority whether the obligation to pay hire is a condition precedent to the provision of services by the ship-owners to the charterers. Nevertheless, in *The Agios Giorgis Mocatta J* commented that there was force in the argument, based on *The Brimnes* and *Leslie Shipping*, that the obligation to pay hire under clause 5 of the NYPE is not a condition precedent to immediate further performance by the ship-owners¹¹⁶. Flaux J, however, dismissed the relevance of *The Agios Giorgis* because of the different factual situation and, implicitly, because of its reliance on *The Brimnes*¹¹⁷. Notably, Flaux J did not address the *dicta* in *The Tankexpress* by Lord Porter where he commented on the interdependence of the payment of hire and provision of the services of the ship and, albeit tended to, but did not conclude that there is no interdependence between the two¹¹⁸. However, since there is no firm authority that the obligation to pay hire is a condition

¹¹¹ *Chitty on Contracts*, §12-037; *Treitel on the Law of Contract*, §18-091; *Contractual Duties: Performance, Breach, Termination and Remedies*, §11-008–11-009.

¹¹² E.g. *The Golodetz* (a term as to opening a letter of credit was not a condition precedent and thus not a condition), *The Naxos* (a term requiring sellers to have goods ready to be delivered to buyers at any time within contract period so that the buyer's ship was not held longer than necessary was held to be a condition); *Universal Bulk Carriers Ltd* (a term relating to laytime notice was not a condition, because it was not a condition precedent to performance of the other party's obligations).

¹¹³ Clarke, p.31. Attention is drawn to the Lord Roskill's speech in *Bunge v. Tradax* at 15.

¹¹⁴ Shirley, §38.

¹¹⁵ *The Aktor* decided by Christopher Clarke J: "Lord Roskill accepted that in a mercantile contract when a term has to be performed by one party as a condition precedent to the liability of the other party to perform another term...the term as to time of performance of the former obligation would in general be treated as a condition".

¹¹⁶ *The Agios Giorgis* at 202.

¹¹⁷ *The Astra* at 86(§§73–74).

¹¹⁸ *The Tankexpress* at 50.

precedent to ship-owners' ability to provide services agreed under a time charterparty, the hard and fast *Bunge v. Tradax* rule of stipulations as to time it is submitted is inapplicable.

Given the limited reading of *Bunge v. Tradax*, it is suggested that time stipulations are little different from other stipulations in commercial contracts¹¹⁹. It follows from case law that in the absence of express agreement courts will construe time stipulations in commercial contracts as of the essence by making a value judgment about the commercial significance of the term in question in its factual and contractual setting¹²⁰. Courts tend to find time stipulations to be of the essence in cases where non-/late performance may prejudice existing contractual strings¹²¹ or undermine commercial certainty¹²², but in any event the importance of a term in question will be judged in the light of the whole contractual context¹²³.

Notably, payment obligations in sale contracts are not treated to be of the essence, unless there are facts or circumstances which attach the fundamental importance to them, e.g. in case of perishable goods or if the buyer fails to pay deposit on time¹²⁴. No similar parallel may be drawn from cases of deposits with the payments of hire as deposits establish buyer's seriousness about completing the contract of sale¹²⁵ and no such crucial importance may be attached to periodical payments of hire.

It is submitted that there is no support in the authorities, apart from *obiter* statements, that the obligation to pay hire in time charterparties is an exception to the rule that performance on time is not of the essence. To support the contrary view Flaux J referred¹²⁶ to the *dicta* of the House of Lords in *The Tankexpress*, *The Laconia*, *The Mihaios Xilas*, *United Scientifics Holdings*, and *The Afovos*.

The first three cases are concerned with the interpretation of express withdrawal clause where courts have supported the literal application of the clause and elaborated on the obligation to pay hire as absolute obligation¹²⁷, stating that if payment of hire is not made on time there is default in payment irrespective of any reason that the charterers may have and regardless if late payment is tendered

¹¹⁹ Clarke, p.31.

¹²⁰ Lawson, p.21.

¹²¹ E.g. in cases of sale-chains or "string" contracts, cf. *The Naxos*; *The Mavro Vetricanic*.

¹²² E.g. in cases of stipulations as to time of ship's expected readiness to load, cf. *The Mihalis Angelos*.

¹²³ *Contractual Duties: Performance, Breach, Termination and Remedies*, §11-003.

¹²⁴ *Treitel on The Law of Contract*, §18-093.

¹²⁵ Shirley, §43.

¹²⁶ *The Astra* at 95(§110).

¹²⁷ Cf. section 2.1.

before withdrawal or not¹²⁸. Namely in this respect the argumentation of commercial certainty was employed in these cases and not, with respect, as suggested by Flaux J¹²⁹, to support that the obligation to pay hire is a condition.

The fourth case, namely, *United Scientific Holdings* is a case concerned with rent review clauses in tenancy contracts (thus not a time charterparty case at all) and the only *obiter* statement in that case that “in a charterparty a stipulated time of payment of hire is of the essence”¹³⁰ was made without reference to authorities and thus is of little help.

The only case that “presents difficulty...that clause 5 is not a condition”¹³¹ is indeed *The Afovos*, the statements of Lord Diplock in which give an impression that clause 5 of the NYPE is construed as a condition. However, the „difficulty“ is not irresolvable. For this it is necessary to look at the case as a whole, not only to the extract of Lord Diplock’s speech, which, as is suggested, has muddied the waters¹³².

The Afovos case concerned withdrawal under clause 5 of the NYPE, where ship-owners gave a premature notice of withdrawal and thus it was ineffective with the consequence that withdrawal was held to be unlawful. However, on the assumption that when the ship-owners gave their notice it was clear that charterers’ payment would not be received on time, the ship-owners argued that they could invoke the doctrine of anticipatory breach. Since no repudiatory breach was found (one single missed hire payment did not amount to a repudiatory breach), the doctrine of anticipatory breach was inapplicable¹³³.

It is suggested that ship-owners’ “argument was misconceived”, because clause 5 was not a condition and the charterparty simply conferred an express right to give a notice on the occurrence of a specified event which had not occurred¹³⁴. In other words, had the clause 5 of the NYPE been considered to be a

¹²⁸ *The Tankexpress* at 51 per Lord Porter, at 53 per Lord Wright, at 56 per Lord Uthwatt, *The Laconia* at 317–318 per Lord Wilberforce; *The Mihaios Xilas* at 312–313 per Lord Scarman;

¹²⁹ *The Astra* at 86(§78) per Flaux J: „I agree...that the emphasis on the importance of certainty where punctual payment of hire is required tends to point to the clause being a condition“.

¹³⁰ *The Astra* at 87(§81).

¹³¹ *The Astra* at 90(§91).

¹³² Carter (2012), p.289.

¹³³ The doctrine of anticipatory breach is only applicable to repudiatory breaches and as suggested by Poole (at p. 308): “the doctrine should more properly be referred to as “breach by anticipatory repudiation”.

¹³⁴ *Ibid.*

condition in *The Afovos*, the ship-owners' argument of anticipatory breach most probably would have succeeded (because the failure to pay hire on time would have been held by definition to be a repudiatory breach). Namely for this reason Lord Diplock's speech is suggested to add some complication to the case¹³⁵.

In the light of the aforementioned, it is possible to see that Lord Diplock was treating clause 5 of the NYPE as *Time Charters* suggest having one characteristic of a condition when he said

“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 charterparty then remaining unperformed”¹³⁶ (emphasis added).

And most probably misapplying the term “condition” when he stated that

“But although failure by the charterers in punctual payment of any installment, however brief the delay involved may be, *is made a breach of condition* it is not also thereby converted into a fundamental breach; and it is to fundamental breaches alone that the doctrine of anticipatory breach is applicable”¹³⁷ (emphasis added).

Given the analysis above, it is doubtful whether the authorities support that clause 5 of the NYPE is to be considered of the essence of the charterparty and thus a condition.

In contrast, in *The Gregos*, decided by the House of Lords, the redelivery clause as to time was not held to be a condition although given the commercial setting of chartering business the exact redelivery time may be and very often is very important, failure to comply with which may result in the ship-owners losing subsequent time charterparties and thus being exposed to substantial loss. Thus, it is far from being straightforward that time stipulations in time charterparties are of the essence and therefore conditions.

2.3.5.3. *The Brimnes* distinguished – the anti-technicality clause

As indicated above, Flaux J held that time of payment in clause 5 of the NYPE was of the essence of the charterparty and supported this conclusion with reference to the *dicta* of the House of Lords, although Flaux J conceded that *The Brimnes* was of the contrary effect. To overcome the difficulty of *The Brimnes*, Flaux J stated that the anti-technicality clause in clause 31 distinguished *The Brimnes* from the present case.

¹³⁵ Carter (2012), p.289.

¹³⁶ *The Afovos* at 341.

¹³⁷ *Ibid.*

Flaux J concluded that the anti-technicality clause made time of the essence if otherwise time was not of the essence. To support this conclusion Flaux J relied on *Stocznia v. Latco*, a shipbuilding case where Lord Rix held:

“*In a contract where a vessel is to be built with funds provided by the purchaser in stages, an installment notice is to be given requiring payment within 5 banking days, and a further 21 days of grace are then allowed, I do not see why provision for what is then called default entitling rescission should not be regarded as setting a condition of the contract*”¹³⁸ (emphasis added).

It is submitted that *Stocznia v. Latco* does not suggest that the 21 days grace period made time of payment of the essence and thus a condition – it is most probably the contract itself “where a vessel is to be built with funds provided by the purchaser in stages” suggests the significance of payment within the agreed period. Indeed, time charterparties and shipbuilding contracts are by their very nature different and periodical hire payments cannot be simply equated with keel-laying instalments, which are not necessarily condition precedent to the performance of the yard but are milestone payments in a way that hire payments are not¹³⁹.

Similarly, Flaux J’s reference to *The Mahakam* case to support his reasoning that the existence of the anti-technicality clause makes the obligation to pay hire a condition is of little persuasive value. *The Mahakam* case differs from the situation in *The Astra*, first, because the case concerned bareboat charterers’ obligation to pay hire and, second, bareboat charterers’ obligation to pay hire on time was expressly made *of the essence* in the contract. Notably, in *The Mahakam* parties’ intentions to consider charterer’s payment obligation as a condition were deduced from express stipulation that time is of the essence and the general commercial setting and the scheme of the bareboat charterparty was not addressed in the judgment¹⁴⁰.

2.3.5.4. *The Brimnes* wrongly decided

However, Flaux J went even further and stated that he would, even in the absence of the anti-technicality clause, albeit with some hesitation, decline to follow *The Brimnes*¹⁴¹. Flaux J gave three

¹³⁸ *The Astra* at 90(§93).

¹³⁹ Shirley §41.

¹⁴⁰ Hypothetically, it would not be easy to escape considerable force of the argument in the context of time charterparties if there was no express stipulation “of the essence” in *The Mahakam* case and if it was held that the obligation to pay hire in bareboat charterparties is a condition as per its importance in the contract scheme and commercial setting. However, this is not the case and thus *The Mahakam* cannot be accepted as instructive *dicta*.

¹⁴¹ *The Astra* at 96(§114).

reasons. First, *The Brimnes*, according to Flaux J, cannot be reconciled with the *dicta* of the House of Lords in *The Tankexpress*, *The Laconia*, *Mihalios Xilas*, *United Scientific Holdings*, *Bunge v Tradax*, and *The Afvos*. Second, *The Brimnes* was based on *The Georgios C* which was subsequently overruled by the House of Lords in *The Laconia*. Third, Brandon J's conclusion in *The Brimnes* involved acceptance of the argument that the word "punctual" added little or nothing to the word "payment" standing alone, an argument the validity of which depended on the correctness of *The Georgios C*.

While it is suggested that there is uncertainty on authorities and *The Brimnes* might not represent the current state of English law¹⁴², there are points to be made in favour of *The Brimnes*.

First, as demonstrated above it is not that straightforward that the *dicta* of the House of Lords points to the obligation to pay hire punctually being of the essence and thus a condition.

Second, it is debatable whether Brandon J's judgment was indeed made by extensive reliance on *The Georgios C*. Although *The Georgios C* was cited quite extensively in *The Brimnes*, it must not be overlooked that *The Georgios C* at the time *The Brimnes* was decided represented the law and thus could not be ignored. But most importantly it is the fact that *The Georgios C* was distinguished in *The Brimnes* and namely on the point which subsequently was overruled by the House of Lords in *The Laconia*. It is suggested that Brandon J was not satisfied with the reasoning of the Court of Appeal in *The Georgios C* and being unable to overrule it distinguished it¹⁴³. In any event it is difficult not to notice the acceptance of *The Brimnes* expressed by the House of Lords in *The Laconia*¹⁴⁴, even though not directly on the condition point.

And finally, it is difficult to follow Flaux J's argument that Brandon J in *The Brimnes* accepted that word "punctual" added little or nothing to the word "payment" and for this reason *The Brimnes* should not be followed. It indeed seems implicit that Brandon J did not consider word "punctual" being capable of making the obligation an essential term of the contract when he decided that the obligation to pay hire in clause 5 of the NYPE was not a condition¹⁴⁵. However, is there any authority indicating

¹⁴² Shirley §50.

¹⁴³ Indirect support for the proposition may be found in *The Laconia* at 323–324 per Lord Salmon: "In *The Brimnes*, *The Georgios C* was distinguished since it could not be overruled".

¹⁴⁴ *The Laconia* at 318 per Lord Wilberforce, at 323–324 per Lord Salmon, at 332 per Lord Russell.

¹⁴⁵ *The Brimnes* at 482.

that word “punctual” in a contract does have the same effect as words “of the essence”¹⁴⁶? It is submitted that if the word “punctual” would equate to the words “time of the essence” the decision in *The Astra* as well as other cases prior to *The Astra* concerning the construction of withdrawal clauses would have had much less complication. It seems that Flaux J does not pay enough attention to the fact that Brandon J in *The Brimnes*, opting for different construction of withdrawal clause than that in *The Georgios C*, did indeed attribute importance to the word “punctual” (and its meaning that once hire is not paid before or on the due date the payment of hire is not punctual and therefore the right of withdrawal is not lost by mere tender of payment after the due date). Namely on this aspect *The Brimnes* was expressly accepted by the House of Lords in *The Laconia* and later applied in *The Chikuma*.

2.3.5.5. The need for certainty upon failure to make punctual payment of hire

The third essential reason for the conclusion that clause 5 of the NYPE is a condition given by Flaux J in *The Astra* was the importance to businessmen of certainty in commercial transactions.

The situation, where the ship-owners, faced with non-payment of hire in a falling market would be left with no remedy in damages at all (except the cases where the charterers would be in repudiatory breach) and in order to claim damages they would need to “wait and see” until they were in a position to say that the charterers were in repudiatory breach, according to Flaux J, “is inimical to certainty”¹⁴⁷.

As indicated earlier in the thesis it is true that classification of contractual terms as conditions does indeed promote certainty, but certainty is not *per se* a basis for classification of contractual terms as conditions¹⁴⁸. Thus it is the parties’ intentions drawn from the particular context and contractual setting which determines which of the rival values, i.e. whether certainty or flexibility, are to be favoured. There is no hard and fast rule which would stipulate that certainty is to be preferred for flexibility – if it was, there probably was no need for intermediate terms. However, it is true that it is in a commercial setting where certainty is most often given priority. As in the case of time stipulations¹⁴⁹, the choice between certainty and flexibility is to the large extent determined by the results of the value judgment about the commercial significance of the term in question in its factual and contractual setting. It is submitted therefore that it is a question of construction the answer to which depends how significant

¹⁴⁶ Cf. section 2.3.5.2.

¹⁴⁷ *The Astra* at 96(§116).

¹⁴⁸ Cf. sections 2.2.1.2. and 2.2.1.3.

¹⁴⁹ Cf. section 2.3.5.2.

the punctual payment of hire is to be held in time charterparty context and it is indeed debatable whether the obligation to pay hire construed as a condition for the sake of certainty does not undermine the values with which the emergence of intermediate terms is associated.

2.3.5.6. The *obiter* judicial support

As indicated above, the fourth essential reason for the conclusion that clause 5 of the NYPE is a condition given by Flaux J in *The Astra* was that the *obiter* statements in *Stocznia v. Latco* and *Stocznia v. Gearbulk* supported this conclusion. These cases were commented upon in sections above¹⁵⁰ and are thus not repeated here.

2.3.6. Concluding remarks. Could *The Astra* have been decided differently?

Given the objective of this part of the thesis indicated in the Introduction and in the view of the discussion above, it is submitted that there is considerable room for questioning the legal grounds on which *The Astra* is based.

Although Flaux J indicated four essential reasons on which he based his conclusion in *The Astra* that the obligation to pay hire is a condition, it is submitted that *The Astra* is mainly based on the following:

First, Flaux J relied on his interpretation of *Bunge v. Tradax* stating that according to the *Bunge v. Tradax* time stipulations in mercantile contracts are of the essence and thus conditions – as demonstrated in the thesis¹⁵¹ *Bunge v. Tradax* should probably be read in a more limited manner;

Second, Flaux J indicated that *dicta* of the House of Lords in *The Tankexpress*, *The Laconia*, *The Mihaios Xilas*, *United Scientific Holdings* and *The Afovos* supported the idea that the obligation to pay hire is a provision where time is of the essence – as discussed in the thesis¹⁵² these cases are of little persuasive value since they either are non-time charterparty cases or because the reasoning of the court in these cases did not concern the issue whether obligation to pay hire is a condition but the construction of withdrawal clauses;

¹⁵⁰ Cf. section 2.3.5.1. and 2.3.5.2.

¹⁵¹ Cf. section 2.3.5.2.

¹⁵² Cf. sections 2.3.5.2. and 2.3.5.4.

Third, Flaux J relied considerably on non-time charter party cases, i.e. shipbuilding (*Stocznia v. Latco*, *Stocznia v Gearbulk*) and bareboat charterparty (*Mahakam*) cases, - and given the fundamental differences between such contracts and a time charterparty (as set out above) it is difficult to accept them as persuasive arguments¹⁵³;

Last but not least, Flaux J could not have reached his conclusion that the obligation to pay hire in clause 5 of the NYPE is a condition without declining to follow *The Brimnes* – however, the reasoning not to follow *The Brimnes* is also open to debate¹⁵⁴.

Notwithstanding the above, it must be admitted that since there is no firm judicial authority on the matter the issue of characterization of the obligation to pay hire as a contractual term is controversial and probably will be until there is some further judicial development. Taking into account the above-mentioned *Chitty's list* of cases when a contractual term generally will be held to be a condition, it is submitted that the potential support for the proposition that the obligation to pay hire in clause 5 of the NYPE is an intermediate term lies in the analysis of parties' intentions, inferred from the nature of the contract and/or subject-matter and/or circumstances of the case¹⁵⁵.

Since standard time charterparties are not genuinely negotiated contracts by the parties and the content of these contracts has evolved through years, the source where the parties' intentions could be inferred from is most probably the commercial setting wherein the obligation to pay hire is found to be.

As analyzed in the thesis¹⁵⁶, according to Lord Kerr's approach in *The Golodetz* which was subsequently accepted by the House of Lords, the analysis of the commercial significance of the contractual term in question is two-fold: first, it is necessary to look whether the contractual term is a condition precedent to the performance of other term(s) by the other party; second, if the contractual term is not a condition precedent, the significance of a particular contractual term in a given commercial setting must be evaluated.

¹⁵³ Cf. section 2.3.5.3.

¹⁵⁴ Cf. sections 2.3.5.3. and 2.3.5.4.

¹⁵⁵ As enlisted by *Chitty* in the above-mentioned list, case (iv), cf. Section 2.2.1.3.

¹⁵⁶ Cf. section 2.2.1.3.

The first element, i.e. the interdependence of charterers' obligation to pay hire and ship-owners' obligation to provide services (whether the former is a condition precedent to the latter or not), is an important one, even though, admittedly, not decisive¹⁵⁷. As indicated above¹⁵⁸, the *dicta* in *The Agios Giorgis* and *The Tankexpress*, albeit *obiter*, support the view that the obligation to pay hire is not a condition precedent to the immediate performance of the ship-owners. In the absence of a firm judicial authority on this point, however, it may be said that from commercial perspective the interdependence of charterers' obligation to pay hire and ship-owners' obligation to perform services cannot be equated to the interdependence of the buyers' obligation to give 15 consecutive days loading notice and the sellers' obligation to nominate port as it was held in *Bunge v. Tradax*. General business logics suggests that one non-/late payment of hire without more in the context of commercial setting of time charterparty, where hire is paid periodically at certain time intervals, may not undermine ship-owners' position so that charterers' default could be considered as going to the root of the contract, if to use the Lord Kerr's words in *The Golodetz* case¹⁵⁹. It is therefore submitted that there is considerable force in the argument that charterers' obligation to pay hire is not a condition precedent to the ship-owners obligation to perform services and thus, in the absence of policy considerations to the contrary, not a condition.

If to follow Lord Kerr's approach in *The Golodetz* and if to ignore the possible arguments favouring the obligation to pay hire is a condition precedent to ship-owners' obligation to perform, it is namely the value judgment about the commercial significance of the obligation which has to be made.

Although a value judgment is a synonym of a subjective approach to a question, in certain situations, e.g. as in *The Golodetz* or *The Astra*, such exercise may be said to be unavoidable. As it was analyzed in the thesis¹⁶⁰, the commercial risk associated with trading of the vessel lies with the charterers, whereas the ship-owners by fixing the vessel with a time charterparty enjoy the benefits of regular and defined cash flow. From the ship-owners perspective, it is indeed charterers' capability to make punctual hire payments that is at stake. Since there are no subsequent contracts that may fall upon charterers' failure to pay hire punctually as it is in cases of sale-chains or "string" contracts¹⁶¹, it is

¹⁵⁷ It is not decisive, because policy considerations may support construction of a term in question as not a condition, cf. section 2.2.1.3.

¹⁵⁸ Cf. section 2.3.5.2.

¹⁵⁹ Cf. *supra* note 53.

¹⁶⁰ Cf. section 2.2.

¹⁶¹ Cf. section 2.3.5.2.

difficult to state with certainty that any breach of charterers' obligation to pay hire goes to the root of the charterparty. In addition, from commercial perspective the construction of the obligation to pay hire as an intermediate term finds support in court's reasoning in *The Gregos*, where a redelivery clause in time charterparty was held to be not a condition, although admittedly the breach of such clause exposes the ship-owners probably to greater risk (as subsequent charterparty may be at stake) than the breach of the obligation to pay hire does. At this point Lord Roskill's words in *The Hansa Nord* may be instructive when he said "...where there is a free choice between two possible constructions...the Court should tend to prefer that construction which will ensure performance"¹⁶².

To sum up, it is submitted that the question whether the obligation to pay hire is a condition or not is indeed controversial and arguments supporting both constructions may be found. As demonstrated by the above-discussion in the thesis the judicial *dicta* are mostly *obiter* and in most cases, where *obiter* pronouncements concerning the construction question are made, it is collateral issues to the construction question that are dealt with and not the straightforward question whether the obligation to pay hire is a condition. However, it is submitted that if in *The Astra* more attention had been paid to the question of commercial significance of the obligation to pay hire as well as to the analysis of the commercial setting and the interdependence of both charterers' obligation to pay hire and ship-owners' obligation to perform services, the conclusion in *the Astra* could have been different or, at least, the reasoning of the same conclusion would have been of greater persuasive value.

¹⁶² Cf. supra note 64.

3. LEGAL EFFECTS AND COMMERCIAL IMPLICATIONS OF THE ASTRA AND CHARACTERIZATION OF THE OBLIGATION TO PAY HIRE AS A CONDITION

3.1. Introductory remarks

It is worth noting that it is not crystal clear whether Flaux J's judgment on the condition point is *obiter* (and thus persuasive) or is it a judgment decided on a number of grounds (and thus binding). Flaux J's comment that the question whether or not the obligation to pay hire in clause 5 of the NYPE was a condition *could be* said to be academic¹⁶³ contributes to the uncertainty.

Nevertheless, *The Astra* is indeed "the most definitive judicial pronouncement on this issue [of the construction of the obligation to pay hire] to date"¹⁶⁴. This part of the thesis thus aims to analyze legal and commercial effects of *The Astra*.

3.2. Legal effects of *The Astra*. Post-*Astra* case law

The practitioners agree that *The Astra* is unlikely to provide the final word on the issue and that until the higher court pronounces its position or at least until there is a binding decision directly on point the obligation to pay hire cannot be considered with certainty as a condition and Flaux J's findings in *The Astra* will possibly be of persuasive value only¹⁶⁵. Interestingly, an absolutely fresh 7th edition of *Time Charters* (2014) shares the same opinion¹⁶⁶.

Even if not binding, *The Astra* nevertheless brings along certain legal implications.

First, the charterers are exposed to greater risk when making deductions from hire. If prior to *The Astra* short payment of hire would not be immediately considered to be repudiatory, post-*Astra* short payment is considerably more risky because the smallest of underpayments potentially entitle a ship-owner to terminate and claim what could be substantial damages for loss of bargain.

¹⁶³ *The Astra* at 77(§33).

¹⁶⁴ Steamship Mutual report *Non-Payment of Hire – Right to Withdraw*
<http://www.steamshipmutual.com/publications/Articles/Astra0613.htm>.

¹⁶⁵ *Ibid.*, cf. *supra* note 3.

¹⁶⁶ *Time Charters*, 7th ed., §16.131.

Second, it is submitted that *The Astra* makes ship-owners' and charterers' legal position probably more uncertain than prior to *The Astra*. This is so because it is not clear if *The Astra* will be followed as Flaux J's pronouncement on condition point is more likely to be *obiter* and not to carry the weight of a precedent. Thus, the question then arises – would the ship-owners be successful if they terminate the charterparty upon one missed charterers' payment of hire or even one short payment of hire (which would not amount to a repudiatory breach¹⁶⁷) in the hope of receiving substantial loss of bargain damages? If it turns out that *The Astra* is not followed and the obligation to pay hire in question is not a condition the ship-owners, having terminated the charterparty as if for breach of a condition, may find themselves in a position of having lost a good charterparty and being only entitled to claim unpaid hire up to the date of termination¹⁶⁸. From charterers' perspective *The Astra* does contribute to the uncertainty of charterers' legal position, which in any event means that the charterers need to be more careful in order to avoid any inadvertence in payments of hire and especially cautious in their finance management in order to have cash flow as smooth as possible.

It is submitted that taking into account the two above-mentioned points both the ship-owners and the charterers are likely to reconsider the wording of the standard time charterparty forms. However, the real legal effects of *The Astra* are probably to be seen after a longer course of time as the post-*Astra* case law have not addressed the condition point yet.

In a recent London arbitration case 7/14 (LMLN 20 March 2014) the charterers who failed to pay three hire payments were found to be in repudiatory breach on the grounds that the charterers had evinced that they would not or could not perform the contract (which was concluded on the NYPE), even though the charterers had attempted to draft their messages to the ship-owners so as to evince an intention to perform the charterparty in future¹⁶⁹. The arbitration tribunal did not find difficulty to

¹⁶⁷ Repudiatory in a sense of (i) a serious breach of an intermediate term, which deprives the innocent party of substantially the whole benefit of the contract, and/or (ii) evincing an inability (incapacity) to perform or intention not to perform or to perform inconsistently with the contract are referred as “repudiatory breach”.

¹⁶⁸ Provided that the charterparty contains withdrawal clause, which is normally the case, and the ship-owners have strictly complied with the procedure of termination (withdrawal) therein.

¹⁶⁹ INCE&CO report *Charterer who expressed intention to perform in future nonetheless held to be in repudiatory breach* http://incelaw.com/en/knowledge-bank/publications/charterer-who-expressed-intention-to-perform-in-future-nonetheless-held-to-be-in-repudiatory-breach?utm_campaign=Shipping+E-Brief+Summer+2014&utm_source=emailCampaign&utm_medium=email&utm_content.

conclude that the charterers were in repudiatory breach because the charterers failed to pay three installments of hire and in addition to that they failed to respond properly to unequivocal ship-owners' questions concerning charterers' future intentions to pay hire¹⁷⁰. The case did not address the question of the construction of the obligation to pay hire and it seems the argument of possible waiver by the ship-owners was not raised.

In another recent case of *Januzaj v Valilas*, although a non-shipping case, decided by the Court of Appeal, the issue of what amounts to a repudiatory breach in the context of an innominate term to make regular payments was considered and, if to put the judgment in the shipping context, it would follow that the ship-owners should be wary of attempting to terminate for non-payments if the ship-owners know or ought to know that the charterers will eventually be able to pay everything that is due, because the court will treat those non-payments as being late rather than not paid at all, with the consequences more likely sounding in damages only, unless the delay is extreme¹⁷¹. It is submitted that, although *Januzaj v Valilas* is probably distinguishable from the cases where the charterers are in default in payment of hire, the case provides some assistance in reasoning that payment obligations in a commercial context are construed as intermediate terms and not necessarily "of the essence".

In the light of the discussion above, the legal effects of *The Astra* remains to be seen.

3.3. Commercial implications of *The Astra*

From commercial perspective, *The Astra* favouring the construction of the obligation to pay hire as a condition, which according to the current state of English law implies that the ship-owners are entitled to terminate the charterparty at common law and claim damages for loss of bargain upon any, even trivial charterers' breach, signifies a shift of balance to the ship-owners side.

The ship-owners faced with the charterers failing to make punctual hire payments in a falling market are at a relatively stronger position when demanding that payments were made on time as well as when they are invited by the charterers to re-negotiate the original charterparty terms (notwithstanding the

¹⁷⁰ Ibid.

¹⁷¹ INCE&CO report *A Check-up for Shipowners Januzaj v Valilas* [2014] EWCA Civ 436, <http://www.stonechambers.com/news-pages/31.07.14--article--a-check-up-for-shipowners---januzaj-v-valilas--2014--ewca-civ-436---james-smithdale.asp>.

legal uncertainties¹⁷²); whereas the charterers are exposed to greater commercial risks, since unsuccessful trading of the chartered vessel in a falling market is also associated with probable ship-owners' claim of damages for loss of bargain.

However, the claims of damages for loss of bargain for the ship-owners is of interest only in a falling market and for this reason further developments in case law are not be expected to come up soon.

3.4. Concluding remarks. Any prospects for development in the law of damages for loss of bargain?

Given the objective of this part of the thesis indicated in the Introduction and in the view of the discussion above, it is submitted that the legal effects of *The Astra* remains to be seen. It is indeed interesting how the market players, first and foremost the ship-owners and their legal advisers, in the post-*Astra* light will act and arrange their legal position in situations of charterers' default in payment of hire. And it is also interesting how the courts will develop the law of damages for loss of bargain.

It is a rule under English law that the breach of a contract discharging the innocent party from further performance entitles the innocent party to terminate the contract at common law and to claim damages for loss of bargain, i.e. the source of the innocent party's power to terminate at common law and to claim damages for loss of bargain is the same – repudiatory breach. Notably, apart from the repudiatory breach in a form of the evinced inability (incapacity) to perform or intention not to perform or to perform inconsistently with the contract, a contract may be repudiated due to breach of a condition or upon serious breach of an intermediate term which deprives the innocent party from substantially the whole benefit of a contract. Given the difficulties of construction of certain contractual terms and the significance of classification of contractual terms into particular categories, first and foremost, because of the immediate availability of damages for loss of bargain if the contractual term is held to be a condition, legal literature presents ideas for development in the context of cases when the construction of a contractual term as a condition brings along unsatisfactory result as happened in *Lombard* case, namely, the award of damages for loss of bargain.

Peel in *Treitel on the Law of Contract* in his discussion about the legal effects of *Financings v. Baldock* and *Lombard* cases suggests that damages for loss of bargain should be available only when “there has

¹⁷² Cf. section 3.2.

been substantial failure to perform, or the term broken amounted to a condition other than a consequence of the parties' express classification"¹⁷³. It follows that Peel is indeed suggesting a separate category of contractual terms – conditions as a consequence of parties' express classification – a breach of which would not entitle the innocent party to claim damages for loss of bargain, whereas the usual “conditions” would.

Similarly, Christopher Langley and Rebecca Loveridge suggests that there are grounds to divide the powers of the innocent to terminate at common law and to claim damages for loss of bargain, the latter, as suggested by the authors, should depend on the magnitude of the breach, if the contractual term breached is a “condition” as agreed by the parties¹⁷⁴.

The above-mentioned ideas propose development in the law of damages for loss of bargain, namely, when they are claimed upon breach of a condition which is classified as such as a consequence of parties' agreement. In the light of *The Astra* it would mean that in order for the shipowners to get damages for loss of bargain, the gravity of charterers' default should be taken into consideration. Although the proposition supposes considerable change in the law of damages for loss of bargain under English law, the possibility and probability of the development may not be fully excluded.

¹⁷³ *Treitel on the Law of Contract*, §18-069.

¹⁷⁴ Langley, Loveridge.

4. CONCLUSION

The analysis of *The Astra* in this thesis has attempted to demonstrate that there is considerable room for questioning the legal grounds on which Flaux J based his conclusion that the obligation to pay hire in clause 5 of the NYPE is a condition. It has also been attempted to show that if the learned judge had paid more attention in *The Astra* to the question of commercial significance of the obligation to pay hire as well as to the analysis of the commercial setting and the interdependence of both charterers' obligation to pay hire and ship-owners' obligation to perform services, the conclusion in *the Astra* which the judge reached could have been that the obligation to pay hire in clause 5 of the NYPE is an intermediate term or, at least, the reasoning of the same conclusion that the obligation is a condition would have been of greater persuasive value.

The attempted insight into legal effects and commercial implications of *The Astra* has shown that the question whether *The Astra* will produce measurable effects or will it remain as indeed one of the most debatable decisions in recent years is still open and probably will be as such until the shipping market faces significant downs in freight rates as it occurred in 2008, since *The Astra* presents significant changes of shipowners' legal and commercial position namely in a falling market.

TABLE OF REFERENCES

English case law

House of Lords' cases

<i>Bunge v. Tradax</i>	Bunge Corporation v. Tradax Export S.A. [1981] 2 Lloyd's Rep. 1
<i>The Afvos</i>	Afvos Shipping Co. S.A. v. R. Pagnan and F.Lli [1983] 1 Lloyd's Rep. 335
<i>The Antaios</i>	Antaios Companja Naviera S.A. v. Salen Rederierna A.B. [1984] 2 Lloyd's Rep. 235
<i>The Chikuma</i>	A/S Awilco v. Fulvia S.pA. DI Navigazione [1981] 1 Lloyd's Rep. 371
<i>The Gregos</i>	Torvald Klaveness A/S v. Arni Maritime Corporation [1995] 1 Lloyd's Rep. 1
<i>The Laconia</i>	Mardof Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia [1977] 1 Lloyd's Rep. p. 315
<i>The Mihaios Xilas</i>	China National Foreign Trade Transportation Corporation v. Evlogia Shipping Co. S.A. [1979] 2 Lloyd's Rep. 303
<i>The Naxos</i>	Compagnie Commerciale Sucres Et Denerees v. C. Czarnikow Ltd. [1991] 1 Lloyd's Rep. 29
<i>The Scaptrade</i>	Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana [1983] 2 Lloyd's Rep. 253
<i>The Tankexpress</i>	A/S Tankexpress v. Compagnie Financiere Belge des Petroles S/A [1948] 82 Lloyd's Rep. 43
<i>United Scientific Holdings</i>	United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904

Court of Appeal's cases

<i>Financings Ltd v. Baldock</i>	Financings Ltd v. Baldock [1963] (C.A.) (unreported)
<i>Lombard</i>	Lombard North Central Plc v. Laurence Arthur Butterworth [1986] EWCA Civ 5
<i>The Seaflower</i>	B.S. & N. Ltd. (BVI) v. Micado Shipping Ltd. (Malta) [2001] 1 Lloyd's Rep. 341

<i>Stocznia v Gearbulk</i>	Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] 1 Lloyd's Rep. 461
<i>Stocznia v. Latco</i>	Stocznia Gdanska S.A. v. Latvian Shipping Co., Latreefer Inc. and others [2002] 2 Lloyd's Rep. 436
<i>The Brimnes</i>	Tenax Steamship Co. Ltd. v. The "Brimnes" (Owners) [1974] 2 Lloyd's Rep. 241
<i>Hongkong Fir</i>	Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd. [1961] 2 Lloyd's Rep. 478
<i>The Golodetz</i>	State Trading Corporation of India Limited v M. Golodetz Limited [1989] 2 Lloyd's Rep. 277
<i>The Georgios C</i>	Empresa Cubana De Fletes v. Lagonisi Shipping Company Ltd. [1971] 1 Lloyd's Rep. 7
<i>The Mihalis Angelos</i>	Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H [1970] 2 Lloyd's Rep. 43
<i>Universal Bulk Carriers</i>	Universal Bulk Carriers Ltd v Andre Et Cie [2001] 2 Lloyd's Rep. 65

Queen's Bench Division cases

<i>Fortune Plum</i>	White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Limited [2013] 2 Lloyd's Rep. 618
<i>Valilas v. Januzaj</i>	Ioannis Valilas v. Valdet Januzaj [2014] EWCA Civ 436
<i>Leslie Shipping</i>	Leslie Shipping Company v. Welstead [1921] Lloyd's List Law Rep. 251.
<i>Merlin</i>	Merlin Shipping Company Ltd. v. Welstead [1921] Lloyd's List Law Rep. 185
<i>Newland Shipping</i>	Newland Shipping and Forwarding Ltd v. Toba Trading FCZ [2014] EWHC 661
<i>The Agios Giorgis</i>	Steelwood Carriers Inc. of Monrovia Liberia v. Evimeria Compania Naviera S.A. of Panama [1976] 2 Lloyd's Rep. 192
<i>The Aktor</i>	PT Berlian Laju Tanker TB and another v Nuse Shipping Ltd [2008] 1 Lloyd's Rep. Plus 60
<i>The Aquafaith</i>	Isabella Shipowner SA v Shagang Shipping Co Ltd [2012] 2 Lloyd's Rep. 61
<i>The Astra</i>	Kuwait Rocks Co v AMN Bulcarriers Inc [2013] 2 Lloyd's Rep. 69
<i>The Brimnes</i>	Tenax Steamship Co. Ltd. v. The "Brimnes" (Owners) [1972] 2 Lloyd's Rep. 465

<i>The Kos</i>	ENE KOS v PETROLEO BRASILEIRO SA [2010] 1 Lloyd's Rep. 87
<i>The Mahakam</i>	Parbulk II A/S v Heritage Maritime Ltd SA [2011] 1 Lloyd's Rep. 87
<i>The Mavro Vetric</i>	Greenwich Marine Inc. v. Federal Commerce & Navigation Co. Ltd. [1985] 1 Lloyd's Rep. 580
Arbitration cases	London arbitration case 7/14 (LMLN 20 March 2014)

Books & Articles

<i>Anson's Law of Contract</i>	Anson's Law of Contract, 29 th ed. (Oxford: Oxford University Press, 2010)
<i>Atiyah's Introduction to The Law of Contract</i>	Atiyah, Smith, <i>Atiyah's Introduction to The Law of Contract</i> , 6 th ed., (Oxford: Clarendon Press, 2005)
Bojczuk	Bojczuk, <i>When a condition is not a condition?</i> , J.B.L 1987, Sept, 353-362
Butler, Kouzoupis	Butler, Kouzoupis, <i>An end on deductions?</i> , Maritime Risk International, 24 May 2013, accessible via www.i-law.com
Carter (2012)	Carter, <i>Discharge as the basis for termination for breach of contract</i> , L.Q.R. 2012, 128(Apr), 283-302
Carter (2013)	Carter, <i>Deposits and "time of the essence"</i> , L.Q.R. 2013, 129(Apr), 149-152
Carter, Hodgekiss	Carter, Hodgekiss, <i>Conditions and Warranties: Forebears and Descendants</i> , 8 Sydney L. Rev. 31 1977
<i>Chitty on Contracts</i>	Chitty, <i>Chitty on Contracts</i> , 31 st ed., (London: Sweet & Maxwell, 2012)
Clarke	Clarke, <i>Time and the essence of mercantile contracts: the law loses its way</i> , 50 Cambridge L.J 14 1991
<i>Contractual Duties: Performance, Breach, Termination and Remedies</i>	Andrews et al., <i>Contractual Duties: Performance, Breach, Termination and Remedies</i> , (London: Sweet & Maxwell, 2011)
Girvin	Girvin, <i>Time charter overlap: determining legitimacy and the operation of repudiatory breach of contract</i> , J.B.L. 1995, Mar, 200-209
Hjalmarsson, Yang	Hjalmarsson, Yang Liu, <i>Charterer's failure to pay hire: owners' right to damages where the vessel is withdrawn</i> , (2013) 13 STL 4 1 accessible via

Liu	www.i-law.com
Langley, Loveridge	Langley, Loveridge, <i>Termination as a response to unjust enrichment</i> , LMCLQ , 13 February 2012, accessible via www.i-law.com
Lawson	Lawson, <i>Performance on time: an essential condition?</i> , I.C.C.L.R. 1990, 1(1), 20-24
McKendrick	McKendrick, <i>Contract Law: Text, Cases and Materials</i> , 5 th ed., (Oxford: Oxford University Press, 2012)
McMeel	McMeel, <i>The Construction of Contracts Interpretation, Implication and Rectification</i> , 2 nd ed., (New York: Oxford University Press, 2011)
Meng	Tan Lee Meng, <i>The Shipowner's Right to Withdraw his Vessel Upon Non-payment of Hire</i> , 22 Malaya L. Rev. 20 (1980)
Opeskin	Opeskin, <i>Damages for breach of contract terminated under express terms</i>
Peel	Peel, <i>The termination paradox</i> , LMCLQ, 18 November 2013, accessible via www.i-law.com
Poole	Poole, <i>Textbook on Contract Law</i> , 11 th ed., (Oxford: Oxford University Press, 2012)
Reynolds	Reynolds, <i>Maritime and other influences on the common law</i> , LMCLQ, 1 May 2002, accessible via www.i-law.com
<i>Scandinavian Maritime Law: The Norwegian Perspective</i>	Falkanger, Bull, Bautaset, <i>Scandinavian Maritime Law: The Norwegian Perspective</i> , 3 rd ed., (Oslo: Universitetsforlaget, 2011)
<i>Scrutton on Charterparties and Bills of Lading</i>	Eder, Bennett, Berry, Foxton, Smith, <i>Scrutton on Charterparties and Bills of Lading</i> , 22 nd. ed., (London: Sweet & Maxwell, 2011)
Shirley	James Shirley, <i>Is the obligation to pay hire on time under clause 5 of NYPE a condition?</i> accessible via www.stonechambers.com
Thomas	Thomas, <i>Time charterparty hire: issues relating to contractual remedies for default and off-hire clauses</i> , in <i>Legal issues relating to time charter parties</i> , (London: Informa, 2008)
<i>Time Charters</i>	Coghlin et al., <i>Time Charters</i> , 6 th ed., (London: Informa, 2008)
7 th edition of <i>Time Charters</i>	Coghlin et al., <i>Time Charters</i> , 7 th ed., 2014, accessible via www.i-law.com
<i>Treitel on The Law of Contract</i>	Peel, <i>Treitel on The Law of Contract</i> , 13 th ed., (London: Sweet & Maxwell, 2011)

- Treitel (1990) Treitel, "*Conditions*" and "*conditions precedent*", L.Q.R. 1990, 106(Apr), 185-192
- Treitel (2002) Treitel, *Types of Contractual Terms in Some Landmarks of Twentieth Century Contract Law*, (Oxford: Oxford University Press, 2002)

Online reports, last visited 22 October 2014

INCE&CO report *The Astra: Single Hire Default Entitles Owners to Withdraw and Claim Loss of Profit for Remaining Charter Period* <http://incelaw.com/documents/pdf/strands/shipping/article/the-astra>

INCE&CO report *A Check-up for Shipowners Januzaj v Valilas [2014] EWCA Civ 436*, <http://www.stonechambers.com/news-pages/31.07.14--article--a-check-up-for-shipowners---januzaj-v-valilas--2014--ewca-civ-436---james-smithdale.asp>, last visited 12 October 2014

INCE&CO report *Charterer who expressed intention to perform in future nonetheless held to be in repudiatory breach* http://incelaw.com/en/knowledge-bank/publications/charterer-who-expressed-intention-to-perform-in-future-nonetheless-held-to-be-in-repudiatory-breach?utm_campaign=Shipping+E-Brief+Summer+2014&utm_source=emailCampaign&utm_medium=email&utm_content

Reed Smith report *Is payment of hire a condition? A long standing controversy resolved* <http://www.reedsmith.com/Is-payment-of-hire-a-condition-a-long-standing-controversy-resolved-04-18-2013/>

Steamship Mutual report *Non-payment of Hire – Right to Withdraw* <http://www.steamshipmutual.com/publications/Articles/Astra0613.htm>