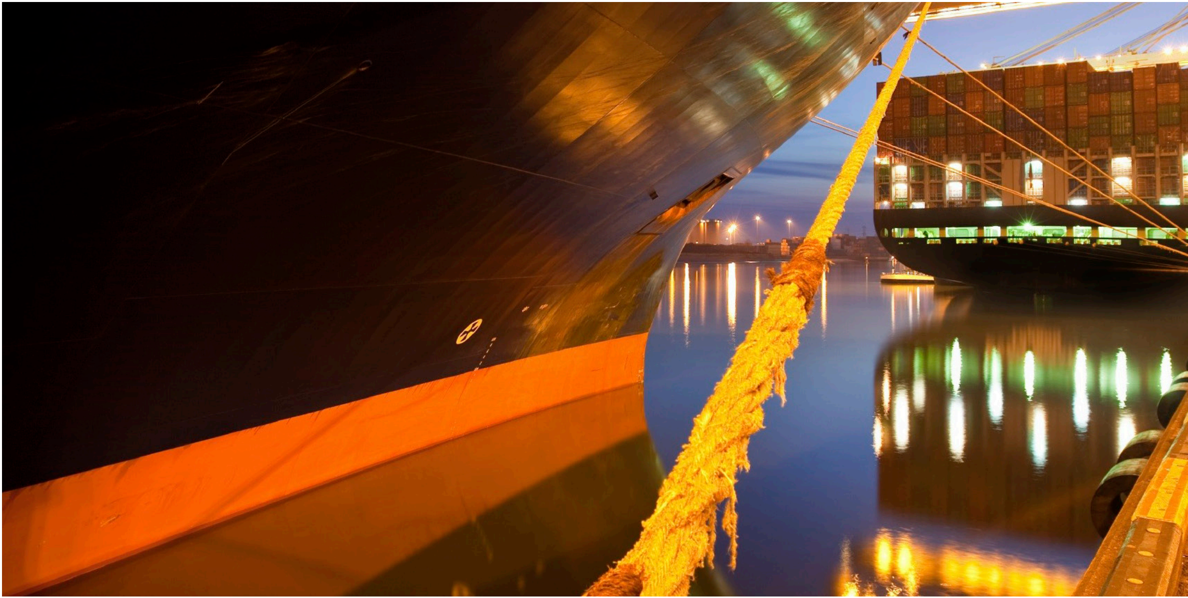

NEW LMAA TERMS 2017

The London Maritime Arbitrators Association (LMAA) has issued a new set of LMAA Terms, aiming to secure timely and cost-effective arbitrations. The new terms will apply to appointments of arbitrators under the LMAA Terms made on or after 1 May 2017. The LMAA Small Claims Procedure and the LMAA Intermediate Claims Procedure are also revised; entering into effect from the same date as the LMAA Terms 2017.

Appointment of Sole Arbitrator

Under the current LMAA Terms 2012, one would have to apply to the High Court to appoint a sole arbitrator if the parties failed to agree. Such a procedure resulted in significant time delays and increased costs. The new terms provide for the President of the LMAA to appoint a sole arbitrator in these circumstances.

BY BENEDICTE HAAVIK URRANG

The LMAA Terms 2017 further includes a mechanism for an arbitrator appointed by one party to become the sole arbitrator should the other party fail to appoint its own arbitrator. This mechanism is already found in section 17 of the Arbitration Act of 1996.

Limitation of the Number of Submission

To avoid the never-ending exchange of submissions, a revision is made to the Second Schedule of the LMAA Terms 2017. The parties must now obtain the tribunal's permission to serve additional submissions after the service of the Reply.

Focus on Efficiency and Costs

The Second Schedule further obliges the parties and the tribunal to adopt measures to make the arbitration as time- and cost-efficient as possible, and to actively consider the guidelines found in the LMAA Checklist.

In order to achieve this, paragraph 19 (b) of the Second Schedule states that the tribunal, when deciding on the liability of costs, shall be entitled to take into account "unreasonable or inefficient conduct", including non-compliance with the LMAA Checklist.

Small Claims Procedure

The LMAA Small Claims Procedure 2017 now contains an express financial limit of USD 100,000 for the Small Claims Procedure to apply, where the parties have agreed no limit. This limit applies independently to claims and counterclaims.

Arbitration Clause

Examples of arbitration clauses concerning LMAA arbitration are found on LMAA's website[1]. These are rather extensive, and a shorter version is suggested as follows:

"This contract is governed by English law and all disputes arising under or in connection with it shall be referred to arbitration in London. Arbitration shall be conducted in accordance with the LMAA Terms applicable at the date of the commencement of the arbitration proceedings. In cases where neither the claim nor any counterclaim exceeds the sum of USD xxx,xxx (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced."

1 http://www.lmaa.london/terms-incorporation-clause.aspx

THE NEW SUPPLYTIME 2017

BY KNUT ERLING ØYEHAUG

On 21 June 2017 BIMCO released the latest version of their bestselling contract, the Supplytime form. This is the fourth version of Supplytime, following its predecessors Supplytime (1975), Supplytime 89 and Supplytime 2005.

In their press release, BIMCO points out that over the past 10 years or so the gap between the terms of Supplytime 2005 and the terms required by charterers have widened, making the time appropriate for a revision. The revision project was started in 2015. The BIMCO drafting team held several meetings and in August 2016 a consultation draft was distributed to certain industry participants for comments. Fur-

ther work was carried out by the drafting team, and at a meeting on 6 June 2017 the BIMCO Documentary Committee adopted the document.

As a side point, in 2013 BIMCO released the Windtime, a standard time charterparty for transfer of windfarm personnel and equipment. This document was based on the Supplytime 2005 but included several changes and updates. After the release of Windtime many believed that the next version of Supplytime would be a further development of the Windtime, but as it turned out, BIMCO decided to use Supplytime 2005 as their basis rather than Windtime when drafting the new version. Accordingly, users of Supplytime 2017 will recognise significant parts from the Supplytime 2005, and it is fair to say that Supplytime 2017 includes a number of well-known clauses and concepts. However, as pointed out by BIMCO in their press release, the document "has been updated to reflect contemporary shipping practice and legal developments in the offshore sector", and they also highlight that it has "a purer knock-for-knock regime and is more neutrally balanced than its predecessor".

Although the structure and solutions from Supplytime 2005 have largely been maintained, the new contract also includes important changes and updates. We will highlight a few:

Since the introduction of Supplytime 89 the liability and indemnity regime has been based on a knock-for-knock principle. Not surprisingly this has been maintained in the 2017 version, but the knock-for-knock regime has now also been strengthened by deleting several exceptions to it in the 2005 version. Further, the scope of application of the knock-for-knock regime has been extended, by making the definitions of "Charterer's Group" and "Owner's Group" wider than in the 2005 version. Another amendment to the liability and indemnity regime in clause 14 is the change of the previous "consequential damages" clause. Clause 14 (b) is now headed "excluded losses", and has been amended to take account of certain shortfalls in the previous clause that have become apparent through English case law in recent years.

In clause 5 (b) the charterers have now been granted much wider rights of audits and inspections than in the 2005 version. This change is in line with market developments and clauses found in contracts with oil majors and other major charterers.

Another area where the document has been substantially upgraded is in relation to fuel. The traditional approach in time charters is that charterers shall take over and pay for fuel on board on delivery and that owners shall take over and pay for fuel on redelivery. This is still the default position under Supplytime 2017 clause 10, but in addition, the clause now provides an alternative whereby payment of fuel on delivery and redelivery shall only be dealt

with upon redelivery, so that the charterers shall pay the owners, or the owners shall credit the charterers, for the difference in quantity on delivery and redelivery respectively. Similar options are found in the Windtime form as well as the dry cargo form NYPE 2015. Presumably, the alternative arrangement is best suited for short term charters such as a cargo run or rig move. The clause now also has more comprehensive provisions about procedures for bunkering etc.

Clause 13 of Supplytime 2017 deals with off-hire, maintenance and dry-docking etc. The structure from the previous form is maintained, but a number of amendments have been made. According to clause 13 (c) of the 2005 form, owners were entitled to 24 hours on hire per month or pro rata for maintenance, repairs etc., and to the extent there were unused maintenance days at the end of the charter period, owners were entitled to be compensated for the same at the charter rate. In the 2017 form owners are still entitled to a 24 hours maintenance allowance per month. However, whilst the vessel is considered on hire when accrued maintenance days are used, the clause now provides that during such periods charterers' obligations under the "charterers to provide" provision in clause 9 (a) shall be suspended, meaning that charterers do not have an obligation to provide and pay for fuel etc. in such periods. Further, and contrary to the 2005 version, the clause now makes it clear that owners are not entitled to be compensated for unused maintenance days at the end of the charter period. The previous version was of course favourable to owners, but it is fair to say that the new version is more in line with existing practice among major oil companies and other major charterers. Another significant change is that the previously generous arrangement, whereby the vessel was on hire on its way to and from a dry-docking port, has now been amended so that the vessel goes off-hire at the time and place where she is placed at owners' disposal, and remains off-hire until she is placed at the charterers' disposal at the place where she was originally released.

While the 2005 form only had a rather limited clause dealing with layup, perhaps as a result of the challenging times with numerous layups over the last few years, the new form has a more comprehensive layup clause. According to clause 33 there is now a regime where charterers shall notify owners of the intention to put the vessel into layup, following which owners shall provide charterers with a description and justification of the nature and extent of the layup, owners' reasonable estimate of costs and time required to place the vessel in layup, and owners' reasonable estimate of daily savings and of the costs to reactivate the vessel at the end of the layup period. Upon receipt of owners' information as aforesaid, charterers shall confirm whether they require the vessel to be laid up. The arrangement is fairly similar to what is otherwise found in change order/variation clauses in other types of contracts. The clause also has provisions related to reactivation, and deals with the situation where the vessel is still in layup on the date of expiry or earlier termination of the charter, where owners shall be entitled to a certain amount of hire as well as the costs of reactivating the vessel etc.

Finally, a number of new standard BIMCO clauses adopted after 2005 have been inserted in the 2017 version, including clauses dealing with infectious or contagious deceases, anti-corruption, sanctions, MLC 2006 etc. Further, the 2017 form now includes the BIMCO dispute resolution clause 2016, which includes Singapore arbitration as an alternative to London and New York.

Overall, we consider the Supplytime 2017 to be a thorough and well-written document, and given its solid foundation in the 2005 form, which has been widely accepted and used in the market, we see no reason why Supplytime 2017 should not become equally successful. However, as we have seen many times when new charterparty revisions are released, the previous versions continue to be used by some for quite a long time. It would not be surprising therefore, if it takes a couple of years before the new form is more frequently used than the previous one.

CHANGE IN CAPITAL VALUE OF A SHIP – IRRELEVANT WHEN CONSIDERING LOSS OF PROFIT UNDER A TIME CHARTER

Fulton Shipping v. Globalia Business Travel ("The New Flamenco") [2017] UKSC 43

The Supreme Court has in a recent decision provided further clarification regarding the issue of mitigation following a repudiation of a charterparty.

Background

The Vessel was chartered by the Charterers for a period from 13 February 2004 until 2 November 2009. The Charterers however re-delivered the Vessel early, in October 2007, in repudiatory breach of Charterparty. The Owners accepted the Charterers' repudiatory breach in re-delivering early, and claimed damages.

BY OLA GRANHUS MEDIÅS

Shortly before the redelivery of the Vessel, the Owners entered into a memorandum of agreement for the sale of the Vessel for the amount of USD 23,765,000.

The Owners commenced arbitration proceedings claiming loss of profits for the remainder of the charter party period., At the time of the arbitration hearing in May 2013, it became apparent that there was a significant difference between the value of the Vessel in October 2007 when the Vessel was sold, and the value of the Vessel had she been sold in November 2009, when the Vessel could have been contractually re-delivered. The arbitrator, relying on expert evidence, found that the Vessel in November 2009 would have been worth USD 7,000,000.

The Charterers argued that the Owners were bound to bring the sale profit into account and give credit for the difference between the purchase price for the Vessel in October 2007 and her estimated value in November 2009 – a difference that amount-

ed to USD 16,765,000.

The Owners argued that the difference in value was irrelevant and should not be considered. It was obvious to the Parties that, if the Charterers' argument succeeded, the credit would be sufficient to wipe out Owners' claim altogether.

The salient questions the arbitrator had to decide were whether:

(i) changes in the capital value of the ship had any relevance to the Owners' claim for damages for future revenues,

(ii) the loss of hire was mitigated by the fact that the Owners sold in a high market, and that during the unexpired period the Vessel's value declined, and

(iii) the Owners avoided a loss by selling in 2007 which could be used by the Charterers as a benefit to reduce the claim for loss of hire.

These questions were answered by the arbitrator in the affirmative, with the effect that the amount of USD 16,765,000 had to be deducted from the Owners' claim. The Owners appealed to the High Court on the question of the relevance of the alleged benefit.

High Court

Popplewell J held that the arbitrator had erred at law, finding that the alleged benefit was irrelevant because there was no causative connection between Charterers' breach and Owners' benefit. Owners' commercial decision to sell was occasioned by the fall in the market value for cruise vessels and not Charterers' breach. Furthermore, the Vessel was the Owners' investment and it would not be fair or just to appropriate the proceeds from the sale as credit in a claim for damages. The Charterers appealed.

Court of Appeal

The Court of Appeal overturned Popplewell J's decision; favouring the view of the arbitrator. The Court of Appeal concluded that the sale of the Vessel had been made in response to the repudiation, so there was a sufficient causative connection to bring the benefit into account. Following this train of thought, the Court of Appeal held that if the market for second hand cruise vessels had gone the other way during the period from October 2007 to November 2009, the Owners would had been entitled to treat the difference in value as a recoverable loss, thus increasing Owners' claim for damages. The Owners appealed.

Supreme Court

The Supreme Court overturned the decision of the Court of Appeal, agreeing with the decision from the High Court. In a key passage of the judgment, Lord Clarke stated as follows in relation to the question of whether a benefit should be taken into account or not:

"The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation.

… The repudiation resulted in a prospective loss of income for a period of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time. Indeed, it could have been sold during the term of the charterparty. If the Owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the value which was no part of the subject matter of the charterparty and had nothing to do with the charterers."

Commenting on the position also touched upon by the Court of Appeal in event of a rise in the market during the relevant period of time, Lord Clarke stated:

"As I see it, the absence of a relevant causal link is the reason why they could not have claimed the difference in the market of the vessel if the market value would have risen between the time of the sale in 2007 and the time when the charterparty would have terminated in November 2009. For the same reason, the owners cannot be required to bring into account the benefit gained by the fall in value."

The Supreme Court also commented upon the implication of there being no available market for the vessel, such that Owners had no choice other than to sell the Vessel;

"The analysis is the same even if the owners' commercial reason for selling is that there is no work for the vessel. At the most, that means that the premature termination is the occasion for selling the vessel. It is not the legal cause of it. There is equally no reason to assume that the relevant comparator is a sale in November

2009. A sale would not have followed from the lawful redelivery at the end of the charterparty term, any more than it followed from the premature termination in 2007. The causal link fails at both ends of the transaction."

The Supreme Court also commented on the question of whether the sale of the Vessel would be regarded as an act of mitigation, to which the Supreme Court said it did not:

"For the same reasons the sale of the ship was not on the face of it an act of successful mitigation. If there had been an available charter market, the loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate. The sale of the vessel would have been irrelevant. In the absence of an available market, the measure of the loss is the difference between the contract rate and what was or ought reasonably to have been earned from employment of the vessel under shorter charterparties, as for example on the spot market. The relevant mitigation in that context is the acquisition of an income stream alternative to the income stream under the original charterparty. The sale of the vessel was not itself an act of mitigation because it was incapable of mitigation the loss of the income stream."

Implications of the judgment

The Supreme Court judgment brings clarity to the issue of mitigation of loss. After the Court of Appeal judgment, it was uncertain whether the failure to sell a vessel could be seen as a failure to mitigate. The Supreme Court decision however makes it unlikely that such an argument would succeed and takes a more predictable approach to the calculation of damages and mitigation.

The Supreme Court has also clarified that changes in the sale price of the vessel should not be relevant to any claim for loss of profits under a time charter party, provided that the decision to sell the vessel is not caused by the breach of charterparty.