HOT TIPS IN HOT MARKETS

Off the back of 2020, it comes as no surprise that the global demand and supply graph for 2021 reveals an imbalance in the favour of demand. There are various reasons for this - interrupted trade routes and Covid-19 related delays, to name a few.

One of the consequences of this imbalance, is the rise in freight rates seen across a number of sectors of the market. Whilst the up-turn is undoubtedly welcomed, it brings with it numerous disputes for us to assist our Members in resolving. Charterers are frequently trying to hang onto vessels which were chartered in when the market was low, for as long as possible. Conversely, owners are keen to get their vessels back so they too can have their share of the rising market pie.

Against this background, we summarise the typical areas of disputes encountered by our Members and provide some practical tips on how Members can protect themselves when faced with such disputes and in the future.

BY CATHERINE O'CONNOR

Late Redelivery

What is late? Under a time charter, the charterer is obliged to redeliver the vessel at the end of the agreed charter period.

Typically, the agreed charter period will be qualified by the word "*about*" (as at line 14 of the NYPE '46 form), in which case a margin will be applied. The exact length of the margin will be determined on a case-by-case depending upon the factual circumstances in question, including the length of the charter. For example, in "*The Democritos*" [1976][1] the tribunal applied a 5-day margin to the otherwise firm period of "*about 4 to 6 months*".

Similarly, where the charter is for a fixed duration e.g. "6 months" or "until 31 December 2021", the English Courts have generally been willing to imply a reasonable tolerance, in recognition of the fact that it is difficult for a charterer to calculate the exact date when a voyage will complete[2]. Such tolerance is likely to be similar to that applied for "*about*".

Where, on the other hand, a firm period has been agreed which already has a tolerance margin built in (e.g. "6 day +/- 15 days CHOPT") the charterer must redeliver the vessel prior to the expiry of the agreed period, and no additional tolerance will generally be applied.[3]

1 [1976] 2 Lloyd's Rep 149
2 See "*The London Explorer*" - *London and Overseas Freighters v Timber Shipping Co SA* [1971] 1 Lloyds Rep 523
3 See "*The Dione*" - *Alma Shipping Corporation of Monro*

In addition, if a charter period is expressly defined in terms of a maximum period (e.g. "2 months minimum, 3 months maximum"), the English Courts will again not apply any further tolerance.[4]

Legitimate Last Orders

Charterers also have a duty only to give legitimate voyage orders, which can reasonably be expected to be completed within the charter period.

This duty is a continuing one, so even if an order is legitimate at the time when it is given, it can subsequently become illegitimate if there is a change of circumstances which would result in the Vessel being delayed past the end of the relevant charter period.[5]

Last Voyage Clauses

To address this last voyage concern, some charters incorporate express clauses which either absolve charterers of liability for damages if their final voyage exceeds the charter period (see clause 19 of the Shelltime 4 form, also "*The Ambor*" [2000][6]), or render lawful orders which cannot be completed within the agreed charter period.

Right to Refuse Illegitimate Orders

If charterers do give an illegitimate order, owners are entitled to refuse to perform and insist upon fresh orders. In the event that charterers persist in refusing to provide legitimate voyage orders, such conduct may be regarded as repudiatory, thereby entitling owners to bring the charter to an end and claim damages.[7]

Election / Waiver

If, on the other hand, owners unequivocally elect to follow charterers' orders despite knowing that they are illegitimate, they will still be entitled to claim damages. However, they will not be permitted to subsequently change their mind and refuse to perform.[8]

Damages

If a vessel is redelivered late however, then in addition to the payment of hire at the charter rate, owners will also be entitled to claim damages at the market rate for the duration of the overrun i.e. the period between the last date on which the vessel could lawfull have been redelivered and when she was actually redelivered.[9]

Alternatively, if there is no available market, owners will be entitled to claim damages which would put them back in the same financial position as if the vessel had been redelivered in accordance with the charter terms.

In certain limited circumstances it may also be possible to claim damages for other losses arising out of the vessel's late redelivery. For example, if at the time when the original charter was entered into, owners brought the laycan of the vessel's next fixture to charterers' attention, charterers may be answerable in damages for any losses incurred as a result. On the facts however this is unlikely to apply in most cases.[10]

Practical Points to Consider

The following are some key practical points for both owners and charterers to bear in mind when approaching these types of issues:

- Take care when negotiating and drafting the charter terms which define the charter period. For example, it will be in charterers' interests to stipulate some sort of tolerance (e.g. "About 60 days") and/or incorporate a last voyage clause.

On the other hand, an owner wishing to discourage late redelivery in order to safeguard the performance of a lucrative or important subsequent fixture, should consider expressing the charter duration in maximum terms (e.g. 4-6 months maximum). If, in addition, the owner puts charterers on notice of the subsequent fixture at the time of entering into the charter, this may improve owners' position on damages as well as discourage charterers from giving voyage orders which might risk a late redelivery.

- Whether an order is, or is not, legitimate can become the source of much debate in practise.

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via v Mantovani [1975] Lloyd's Rep 115

4 "*The Mareva A.S.*" - *Mareva Navigation Co Ltd v Canaria Armadora S.A.* [1977] 1 Lloyd's Rep 368

5 *"The Gregos" - Torvald Klaveness A/S v Arni Maritime Corporation* [1995] 1 Lloyd's Rep 1

6 *Marimpex Mineraloel Handelsgesellschaft mbH & Co KB v Compagnie de Gestion et d'Exploitation Ltd* LMLN 549

7 *Ibid* – footnote 5

8 "*The Kanchenjunga*" [1987]

9 *"The Peonia" - Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd* [1991] 1 Lloyd's Rep 100 & "*The Black Falcon" Shipping Corporation Of India Ltd v NSB Niederelbe Schiffahrtsgesellschaft M.B.H & Co*. [1991] 1 Lloyd's Rep. 77

10 *The Achilleas" - Transfield Shipping Inc. -v- Mercator Shipping Inc* [2007] 1 All ER (Comm) 379)

Ultimately, this question will turn upon the facts and evidence available. It is therefore important that the parties adopt a pro-active approach to evidence gathering, such as obtaining copies of vessel line-ups, reports from local agents regarding congestion and any relevant previous voyage information, in order to support their position both at the time of making the decision to accept or reject orders and in any potential litigation.

- Finally, any owner on the receiving end of an illegitimate order (either at the time when it was given or which subsequently becomes illegitimate) that they do not wish to accept and perform, should ensure that they act promptly in rejecting the order and that any rejection is recorded clearly in writing, so as to avoid any waiver arguments.

A Right to Add Off-Hire?

Recently, we have also seen several disputes concerning charterers' entitlement to extend the charter by adding off-hire to the charter period. As a matter of English law at least, adding on off-hire is only permitted if the parties have expressly agreed terms to that effect (see e.g. Clause 1(c) of ExxonMobile Time 2000).

Where such a right is incorporated, then the charterers will generally be entitled to the benefit of the additional period permitted, on top of any contractual tolerance to the charter period e.g. +/- 15 days.[11]

The most common issue in dispute tends to be the more fundamental question of whether or not the vessel was, in fact, off-hire during the period in question. Given that this generally turns upon the underlying facts and/or the wording of the off-hire clauses, such disputes are often not easily resolved.

Practical Points to Consider

One way to get around the issue of whether or not the vessel was off-hire, is to expressly stipulate in the extension clause that only undisputed off-hire is to be added.

In addition, owners may consider it beneficial to insert a requirement that charterers must give notice of their intention to add permitted off-hire periods to the charter period within a particular time frame after either the occurrence of the off-hire or before the firm period expires (e.g. 1 month). This would achieve greater certainty for both parties and assist owners in planning the vessel's future employment.

11 "*The Kriti Akti*" [2004]

NORWEGIAN SALEFORM 2012 - DAMAGES PAYABLE FOR BREACH OF OBLIGATION TO SIGN THE MOA

In the August 2021 edition, we looked at whether signing the MOA is a condition precedent to the formation of a contract and concluded that whilst the signature of the MOA under Salefrom 2012 is a contractual term obliging the buyer to sign the contract, it is not a condition precedent.

The buyer is nevertheless obliged to sign the MOA within a reasonable period of time and where they fail to do so, the sellers are entitled to accept the buyers` failure as a repudiation of the contract, treat the contract as coming to an end and claim the losses flowing from the repudiation.

BY EGIL ANDRÉ BERGLUND

Is the deposit a recoverable loss?

What are the losses? Can the sellers claim damages equalling the deposit, even if their losses are less than the deposit? The starting point is yes - in "*The Blankenstein*"[1] the Court held that the sellers would be entitled to damages for the buyers` failure to sign the MOA and those damages must include the value of the right to recover and retain the deposit itself, hence the damages included the full deposit payable.

"*The Blankenstein*" was cited with approval by the Court of Appeal in the more recent case of "*The Griffon*"[2] which involved a Saleform 1993 MOA. In "*The Griffon*", the MOA had been signed but the deposit was not paid within three days of signing as had been agreed under clause 2.

Clause 2 provided; "*Buyers shall pay a deposit within 3 banking days after this Agreement is signed by both parties and exchanged*", which wording is essentially identical to clause 2 of Saleform 2012. The central issue in "*The Griffon*" was how much compensation the sellers were entitled to under clause 13

1 *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 Lloyd`s Rep 93

2 *Griffon Shipping LLC v Firodi Shipping Ltd* [2014] 1 Lloyds Rep 471

of the MOA, given the buyers` admitted failure to pay the deposit on time.

The Court of Appeal emphasised that the buyers' obligation to pay the deposit in clause 2 was as; "*security for the correct fulfilment*" of the MOA. They also described it as an "*earnest of performance*" and held that the sellers' right to receive the deposit was "*unconditional*". As such once the MOA had come into effect, they found the sellers were automatically; "*invested with an accrued right to sue for the deposit as an agreed sum forfeitable in the event of failure by the buyers correctly to fulfil the agreement*".

The presumption was that neither party intended to abandon any remedies for its breach, such that clear words had to be used in order to rebut that presumption. The Court held that the first limb of clause 13 (which was drafted in identical words to clause 13 in Saleform 2012) did not include any such clear express words intended to deprive the sellers of their accrued right to sue for the deposit.

Thus the rights unconditionally acquired by the sellers prior to termination, survived termination by the sellers. The sellers therefore retained the right to sue for the deposit as an agreed sum recoverable in debt. Alternatively, the sellers had an accrued right to sue for damages for breach of the obligation to pay the deposit; the measure of which was the amount of the deposit itself.

The Court held that the word "*compensation*" in clause 13 was wide enough to embrace the deposit which had not been paid. The Court of Appeal held the sellers were entitled to this amount, even though the deposit exceeded the amount of actual loss they may had suffered.

Conclusion

To summarize, the wording of the clauses as amended in *"The Blankenstein"* and *"The Griffon"* were identical to clause 2 and clause 13 in Saleform 2012. The conclusions reached in *"The Blankenstein"* and *"The Griffon"* are precedence for the proposition that:

(i) the signature of a MOA under Saleform 2012 is not a condition precedent for the formation of contract, however
(ii) the signature of the parties will be required within a reasonable time after the contract terms have been agreed, and
(iii) If the MOA is not signed within a reasonable time, the innocent party can claim damages equalling at least the deposit, even if such deposit exceeds the actual losses suffered.

Do contact us if you have any queries arising in relation to this issue or the Norwegian Saleform 2012 more generally and don't forget that Nordisk also has a Transactions Group to assist Members (and non-members) with asset or share based transactions, along with all aspects of financing.

NEW NORDISK LAWYER - HELLE MARIE KJÆRSTAD

We are very pleased to announce that Helle Marie Kjærstad is joining our Team in Oslo on 1 November 2021.

Helle is an English solicitor, with 20 years of experience as a shipping and offshore services lawyer, specialising in litigation, dispute resolution as well as projects work within these industries. Some of our Members may already be acquainted with Helle, as she joins us from the shipping and oilfield services team at Schjødt, where she had been a partner. Prior to that she was a partner in Michelet & Co (which merged with Schjødt in 2019) and in the Shipping and Offshore Group of Reed Smith in London, after first spending six years at Stephenson Harwood.

Helle will primarily assist our FD&D and Offshore Teams and we very much look forward to having her experience and expertise on board.

Welcome to Nordisk Helle!

Photos:
Page 1 - Piet Sinke (www.maasmondmaritime.com)
Page 3 - Courtesy of DOF
Page 4 - Courtesy of Solstad Offshore