

Overcoming contract challenges in the current market
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Economic context

- > Oil prices
- > Overcapacity



Key clauses

- > Charter period
- > Last voyage clauses
- > Cancelling
- > Non-payment of hire
- > Off-hire
- > Liabilities
- > Governing law and jurisdiction

The Period of Hire (Charter Period)

- > Charter period commences at time of delivery
- > Parties must agree the charter period and any extensions
- > Extension of charter period (optional)

Last voyage clause (automatic extension)

- > Clause 1(c) and Box 11(i) of Supplytime 2005

“(c) The Charter Period shall automatically be extended for the time required to complete the voyage or well (whichever is stated in Box 11(i)) in progress, such time not to exceed the period stated in Box 11(ii).”

Cancelling

Typical provisions:

- > If vessel not delivered by midnight on the stated date, Charterers may cancel Charter Party
- > However, if Owners are unable to deliver by stated date, they can give notice to Charterers any time before delivery and state by when they can deliver
- > Charterers have 24 hours to decide whether to cancel
- > If Charterers do not give notice (within 24 hours), the later date specified in Owners' notice will be the new cancelling date

Cancelling

- > Charterers may seek to amend these provisions as follows:
 - > Amend to read “they shall give notice in writing to Charterers as early as possible prior to the delivery date...”
 - > Increase 24 hours to (e.g.) 72 hours
 - > Delete words “In the event the Charterers cancel the Charter Party, it shall terminate on terms that neither party shall be liable to the other for any losses incurred by reason of the non-delivery of the Vessel or the cancellation of the Charter Party.”

Non-payment of hire

- > Hire must be paid continuously, on time and in full throughout the charter party unless:
 - a) There is an express clause to the contrary (e.g. an off-hire clause) or
 - b) A breach of charter occurs which deprives the charterers use of the ship
- > In such cases, the charterer may make reasonable deductions from the hire in line with the wrong he has suffered

Non-payment of Hire – common amendments

Common Charterer driven amendments:

- > delete Adjustment of Hire clause on the basis that this is a risk that Owners should bear
- > Increase grace period
- > Delete clause entitling owners to suspend performance

Common Owner driven amendments:

- > Reinstate wording from last paragraph of clause 10(e) Supplytime '89 (deleted in 2005 form):
 - > "Owners...shall have no responsibility whatsoever for any consequences thereof...and any extra expenses resulting from such suspension shall be for the Charterers' account"
- > NB 2005 form is already largely Owner friendly

Suspension of Hire (Off-hire)

Clause 13 of Supplytime 2005

"(a) If as a result of any deficiency of Crew or of the Owners' stores, strike of Master, Officers and Crew, breakdown of machinery, damage to hull or other accidents to the Vessel, the Vessel is prevented from working, no Hire shall be payable in respect of any time lost and any Hire paid in advance shall be adjusted accordingly..."

Liabilities

Knock-for-knock regime for damage to party's property and personal injury/death of employees

Allocation of other risks:

- Anything towed by the Vessel
- Cargo
- Pollution
- Wreck removal
- Losses caused by hazardous and noxious substances

Governing law and jurisdiction

- > Arbitration v Courts
- > Choice of jurisdiction

Early termination

- > At Charterers' convenience
- > For cause

Worth negotiating?

- > Timing: pre/post termination
- > Consider the possible outcomes
- > Negotiations can be "open" or "without prejudice"

When can a party lawfully terminate?

- > Express contractual term
- > At common law



Contractual right to terminate

Examples of express provisions:

- > Insolvency
- > Material Breach
- > Convenience (on notice)
- > Change of control
- > Force majeure



Termination at common law

- > Frustration
- > Breach of condition
- > Breach of innominate term/repudiatory breach
- > Renunciation/anticipatory breach

Frustration

Occurs when, after an unforeseen intervening event, the contractual obligations become fundamentally different or renders the contract impossible to fulfil.

The termination of the contract is automatic.

Examples:

- > Physical impossibility
- > Supervening illegality
- > Extreme delay



Types of contract terms

- > Condition
- > Innominate or intermediate term
- > Warranty

Breach of an innominate term/repudiatory

- > A breach so serious as to deprive the victim of substantially the whole benefit of the contract
- > A lesser breach, in contrast, will only give rise to a claim in damages.

Repudiatory breach

- > Election
- > Repudiatory breach does not terminate the contract automatically
- > Innocent party must elect to either:
 - > Affirm the contract
 - > Accept the repudiation

Renunciation / anticipatory repudiatory breach

Renunciation occurs where one party by words or conduct evinces an intention not to perform

Anticipatory breach – renunciation that occurs before the time fixed for performance

What is required:

- > Absolute refusal / clear and unambiguous assertion
- > Reasonable person to conclude that the party is no longer intending to be bound by the contractual provisions

Questions?

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Thank you.