

# Drafting of LNG Charters

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## Introduction

This paper deals with aspects of the drafting of liquefied natural gas (LNG) charters. This is obviously a big topic and I will therefore concentrate on certain areas. Those areas are:

1. the type of charter used;
2. the relationship between the Owner, the Charterer, the Builder and the Banks;
3. particular points to look for in long term charters; and
4. dispute resolution. Always important to a lawyer, but also to the client.

## Background

LNG is a rapidly growing market and in the area which I have some particular expertise, Qatar, there are interests in over 75 LNG vessels both built and to be delivered in the next few years. Some of these vessels, for example Q-Max, are very large indeed. Traditionally, LNG chartering was done on the basis of an individual project. The sale contract was entered into between the Seller and the Buyer and LNG vessels were built to service that particular project and were on long term charter to the Charterer or an Affiliate of the Charterer.

That has now begun to change, although it is perhaps, still early to talk about there being a spot market for LNG. There are now Contracts of Affreightment, short term time charters, voyage charters, cargo swaps and single cargo contracts. However, I think that the focus is still on the long term time charter and that is what I am going to talk about today.

## *Type of Charterparty*

As I have already said, the majority of the long term projects currently underway are supported by long term time charters which are traditionally based on the well known tanker time charter forms, Shelltime 4 and ExxonMobiltime 2000. I am going to concentrate on ExxonMobiltime 2000 as this is the contract with which I am most familiar. In the work I have done over the last 5 or 6 years, I have grown quite sick of some of the clauses in ExxonMobiltime 2000! Nevertheless, it will help to illustrate points that Owners and Charterers should concentrate on.

## *Relationships*

The main relationship, obviously, and the one in which I will spend most time, is the relationship between an Owner and a Time Charterer. However, both Banks and Builders are also important. They all have a part to play and, particularly so far as the Banks are concerned, some of the clauses in the time charter are of considerable importance to them. Indeed unless the clauses in the time charter are satisfactory, the Banks are reluctant to finance the project at all. I remember discussing with the legal representatives of a well known finance Bank, the original draft terms of an ExxonMobiltime 2000 as amended by our clients, and the Bank's lawyers telling me that this particular document was unfinanceable. The reason for this, as is clear, is that the Banks, wearing their Owners' hat, thought that there were not enough safeguards for the Owner. Nevertheless, the project was financed!

As I have already mentioned, the majority of the long term charterparties were entered into to back up a long term sale contract (although that is now beginning to change) and newbuildings are ordered to fulfil that charterparty, which means that the two contracts must proceed in tandem. The other contract that must proceed in tandem is the shipbuilding contract. The Builder does not have a direct interest in the relationship between Owner, Charterer and Bank. The Builder wishes to have the best available contract, with the least onerous terms,

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so that he faces little risk when building and delivering the vessel. However, as these vessels are to be put on long term charter to support a sale contract, it is always the case that the shipbuilding contract is very closely scrutinised both by Owners and Charterers and the building contract has to be in all material terms back to back with the charterparty.

What this means is that the Charterer, who is usually the Seller under the sale contract, has much more interest than would ordinarily be the case in the capabilities of the vessel and the date when it is delivered. The importance of Qatar in the LNG world is such that they are able to exercise considerable influence over the form of shipbuilding contract, even though they are the long term Charterer, as well as also exercising influence over the terms of the long term charterparty. Some of the provisions that are to be found in the more recent shipbuilding contracts are quite onerous on the Builders and are the result of pressure from long term Charterers.

I must also not forget the Banks. They will also have an interest in making sure that the technical shipbuilding contract matches the charterparty terms. The Banks will be lending very considerable sums perhaps to the Owners, perhaps to the Charterers, perhaps to the Sellers, and will want to make sure that the vessel that is going to carry this very valuable cargo is built entirely in accordance with the highest shipbuilding standards.

### *Form of Time Charter*

I am going to discuss what to look for, pitfalls and concerns, long term or short term, legal risks and benefits. I thought the easiest way to do this would be to go through a fairly typical ExxonMobiltime charter, which has been used for a long term LNG project, and talk about the various clauses that I think are of particular interest. As a lawyer, I will be concentrating more on the clauses that give rise to legal issues, rather than what I might call commercial clauses which though of very great importance to both parties, are more purely 'commercial' in form. For example, what I can call generally 'speed and consumption clauses' do give rise to disputes, indeed frequently do, but I do not regard them as being particularly interesting from a legal point of view. They are vital for the Owners and Charterers, particularly in the long term LNG charter, and as you all know, are usually extremely complicated. The last charter that I negotiated, I told the clients that I was not interested in the speed and performance clauses, they could draft them themselves since I didn't think that it was for a lawyer to have any input into them. Interestingly, I am now involved in a dispute on one of these terms!

### **ExxonMobiltime 2000**

I would like to make one general comment. I am going to deal with some clauses in a little detail, but overall the most important matters are, so far as the Owners are concerned:

- what obligations are there on them to maintain the vessel;
- what are the provisions of the payment of hire;
- what is the regime for deductions from hire;
- what trading range is the vessel to be ordered to;
- what are the speed, consumption and pumping requirements, and what provision is to be made for requisition, force majeure and war risks.

So far as the Charterer is concerned they have, effectively, the same concerns; LNG sale contracts are very tightly worded and LNG vessels operate on a very tight schedule. Missing one convoy through the Suez Canal could be very serious. Accordingly, the Charterer will want to make sure that the vessel can at all times comply with her charterparty description in relation to speed, consumption, pumping boil-off etc. and that the vessel will be operated at the highest standards and is fully maintained throughout the period of the charter.

I also ought to mention the Banks. The Banks' interest, clearly, is to make sure that their security is safe. They therefore have concerns as to whether or not both the Owner and the Charterer can terminate the charterparty, what is the regime for payment of, and deductions from, hire what cure and step in rights they might have and, ordinarily, they will insist on an assignment for the payment of hire.

Moving on, therefore, to clauses of interest in the charter: As most of you will know, ExxonMobiltime 2000 is not very favourable to Owners. It is a Charterer friendly document, not surprising, as it was drafted by Exxon after they stopped being shipowners and became Charterers.

The clause numbers are based, not on the Standard ExxonMobiltime, but on an amended version with which I am familiar.

## **Clause 1 - The vessel to be chartered**

This clause contains a number of provisions which are of considerable importance.

### ***Construction of the Vessel***

The clause deals with the construction of the vessel and the point to look for here is the control that the Charterer has over the construction of the vessel. The Charterer can be given complete control over the specification of the vessel and a veto over any changes to that specification. The Charterer can insist, and normally does, that they have their own supervision team there at the yard checking that the Owner and the Builder are doing their job. This is where it is vital to make sure that the building contract and the charterparty specifications are identical. There will also be a provision, ordinarily, allowing the Charterer to enforce changes to the specification if the Charterer wishes to do so. This will be for the Charterers' account, but, if there is such a provision, it has to be mirrored in the building contract. The Owner will also be under an obligation, ordinarily, not to waive any of their rights under the building contract, not to agree any alteration in the delivery date and so on. Ordinarily, also, the Charterer is entitled to exercise a right to take over the building contract in certain circumstances, such as where the Owner is proposing or has a right to cancel the contract.

### ***Vessel Registry***

One small point is that the question of the vessel's registry is often dealt with here. This is of importance to Owners, Charterers and the Banks. An LNG vessel is an expensive piece of kit. The current vessels are costing well in excess of US\$200,000,000. Accordingly, it is almost always provided that the vessel will be registered in what is regarded as a 'safe' registry. It is not usual for such vessels to be flagged in Panama or Liberia, and there will ordinarily be restrictions on the change of the port of register. This can also have an impact, so far as the Banks are concerned, in relation to tax, they wish to make sure that the vessel is registered in the country where additional taxes will not be imposed on Owners.

### ***Name of Vessel***

Just as by way of light relief, I thought I ought to mention that there is also a provision for the name of the vessel. In the charters which I have been involved, the Charterer has the right to name the vessel. At a negotiation that I attended, this was at one stage a deal breaker with the Owners with whom we were negotiating, who insisted that their principal (Mr Moller) had always nominated the name of the vessel. Ultimately, I am glad to say, the matter was resolved.

## **Clause 2 - Charter term**

This is obviously important and will have been agreed in advance. We are talking here of 20, 25 or indeed perhaps 30 year terms. If that is the case then it is clearly important to discuss whether there are to be off-hire extensions which can be added on to the charter period or not. Sometimes these are agreed, sometimes not.

### ***Termination***

Also in this clause, you will find provisions for termination for the default of either the Owner or the Charterer. These are very important. There will be the usual provisions for insolvency, but where the Charterer is in the ascendant, you will also find clauses giving the Charterer the right to terminate the charter if the Owner is in breach of certain of the clauses in the charter. These are obviously argued over fiercely, but it is interesting that such provisions are found at all. Traditionally, Banks used to like to insist that the termination rights of the Charterer were very limited

Now that is not the case. I have seen provisions where the Charterer can terminate the contract, not only if the Owner goes into some form of Bankruptcy, but also if the registry is changed; the vessel ceases to be classed with the vessel's classification society (another important point); the vessel is arrested and not released within a

certain period or the Owner fails to maintain certain of the ordinary insurances. When we are talking about a 30 year charter, these clauses are clearly vital. When you come on to termination by the Owner, again ordinarily you will find a provision in relation to Bankruptcy of the Charterer. We will come on to termination of non payment of hire when I talk about hire payment.

### **Clause 3 - Charter hire**

#### ***Rate of hire***

Of the most interest to Owner, Charterer and the Banks, is the rate of hire. This is what I would call a commercial issue so I will not spend any time on it. Originally, these types of charter were on a cost pass through basis, but more commonly nowadays, there is a Capital Element (Opex) that is linked to one of the relevant Consumer Price Indices. There has been concern that in some of the recent charter deals with the rate of hire is unrealistically low, and time will tell if this is correct. When I was in Tokyo last month, there was considerable concern, and one big Owner said they were no longer willing to do LNG business as Owners.

However, there are several important points to look at in this clause.

#### ***Deductions from hire***

It used to be the case that the Banks, again, keen that hire should always be paid in full without deduction insisted on what was known as a 'hell or high water' provision. That is no longer the case. There are detailed off-hire provisions to which I will come on to a little later. However, in this clause it is now quite frequent to see provisions allowing the Charterers to make quite substantial deductions from hire. These deductions can include normal deductions such as disbursements, overpayments of hire, including past off-hire, vessel operating expenses during off-hire and even the value of off-hire periods anticipated to occur during the month when hire is to be paid. This affects Owners, Charterers and Banks. Charterers like to be able to make deductions if they can. Owners want to make sure they get their hire near enough in full and the Banks have an identical interest to that of the Owners. Indeed they are normally the assignees of the hire. The clause therefore needs to be tightly drafted to make clear exactly what deductions may be made. As a charterparty lawyer, dealing with 'wrongful deductions' from hire used to be a daily occurrence. The importance of this is that if a wrongful deduction is made from hire, the Owner may be able to withdraw the vessel from the service of the Charterer, although in the context of a long term charter of this nature, that is perhaps not very likely.

#### ***Right of withdrawal***

Also in this clause, you will normally find the right of the Owners to withdraw. You are all familiar with this. If the Charterer does not pay on the due date, whenever that may be, the Owner ordinarily has a contractual right to withdraw the vessel. Usually there will be a grace period which in long term charters where the Owners and the Charterers are, on the surface at least, good friends, the grace period will be quite long. The period can be 3 working days, or 5 working days, and can be as long as 30 days. This is a standard clause in charters, it does provide a contractual mechanism for bringing the contract to an end.

### **Clause 4 - Owner Warranties**

#### ***Vessel condition***

This is a fairly standard clause in the sense that the Owner will be warranting that at the time of the entry into the charter, the vessel is built in accordance with the building contract, thus making the building contract important, and that she has all the classification, registry requirements, particulars, capabilities etc. As we are talking about long term contracts with very expensive vessels, it is almost always the case that there is a very detailed schedule attached to the charter which will provide for all the capabilities of the vessel. The one I looked at recently had 7 detailed pages.

English law held, years ago, that where there was a warranty as to condition, then, depending on the language, it might well be that the warranty only applied at the date of the commencement of the charter. Accordingly, it is always the case, in my experience, that the warranty is now made to be a continuing warranty throughout the

period of the charter. This is of considerable importance to the Owner since he is having to warrant matters such as pumping, speed, fuel consumption, boil-off etc. throughout a 25 or 30 year period. This is quite an undertaking. Ordinarily the provision will be tempered by what is known as the 'exercise of due diligence'. In other words it is not completely absolute and this does give the Owner a little leeway.

### *Management*

Also in this clause is a provision in relation to management. This may not seem important, but I think you all know that the Manager of the vessel is of very great importance. Quite often the Charterer will insist that the vessel is managed by a certain Manager, indeed certain Managers are pre-approved for this purpose. The clause, therefore, will provide that the Manager may not be changed except with the consent of the Charterer. I have seen a provision in the charter that gives the Charterer the right to terminate the charter if the Owner is in breach of this clause. I will not go into other details of the technical warranties, but they are all fairly obvious such as cargo capacity; pumping warranties; draught; speed; fuel consumption and boil-off.

### *Cargo manifolds*

I do want to mention, however, a clause that relates to cargo manifolds. The reason for this is that there is usually a warranty from the Owner that the vessel's manifolds should be suitable for loading and discharging cargoes at all terminals to which the vessel may be ordered. This could cause considerable difficulties. There can be serious arguments between Owners and Charterers about this clause. After all if there is worldwide trading in the charter, and the Charterer can order the vessel wherever the Charterer likes and then it is found that the vessels cargo manifolds do not match, so to speak, this could be a serious matter for the Owners. Ordinarily, therefore, there is an agreed list of terminals set out in the charter and sometimes the warranty is limited in time, such as 'at the time of delivery', but an important point to watch.

### *Crew*

Also a small point, which may not seem important, is the question of the crew. As you all know, the shipping of LNG has grown exponentially. One problem with this is that there are not enough senior officers who have previous experience with LNG. It is common for Charterers to insist on a provision that the senior officers, Master, Chief Officer, Chief Engineer etc. will each have not less than 6 months sailing experience in the past 5 years on board an LNG tanker. When you are now talking about 50 or 60 new vessels being built, there are just not enough people around. Again, this is important and it is actually something I have had experience of as a difficulty when drafting these contracts. Owners have said that they just cannot comply with such a provision. I do know that there are now training colleges opening up specifically to train officers in working on LNG tankers, which will help. Again, when I was in Tokyo, I was told that salaries for senior officers had risen sharply. Warwick Pointon may be able to comment on this.

### *Compliance*

Another clause that is tucked in here is the question of compliance. The clause will provide that at all times during the charter, the vessel must be in compliance with all international conventions, laws, regulations and requirements, not only of the vessel's registry (which is fairly easy), but also of all the ports and places which the vessel may go and also all the regulations and requirements of any terminal where the vessel may load and discharge. Now this could be a very expensive business. Let us say that things change in the next 10 or 15 years, which they well might, and this necessitates very expensive modifications. Who is going to pay for these? May be it won't even be possible for a vessel built now to comply with regulations brought in in 15 years time? Remember double skinned tankers! Ordinarily this is dealt with by agreement between Owners and Charterers as to who actually pays for this, perhaps the Owner might pay for the first 5 years and the Charterer for the next 20 or something like that, or there will be provisions in relation to the total cost. You also have to include in any such clause whether the vessel remains on or off-hire. Again, this is of somewhat fundamental importance to all the parties.

The recent case in the English Court of Appeal of the '*ELLI*' and the '*FRIXOS*' [2008] EWCA Civ 584, makes this point. In that case the question was whether the vessels complied with the relevant Marpol provisions as to double hulls. The Owners contended that they were not obliged to modify the vessels - an expensive undertaking. Charterers argued that under the Shelltime 4 charter there was a continuing obligation to keep the

vessels *'in every way fit to carry'* the cargoes stipulated in the charter. There was also a continuing warranty of compliance with Marpol. The Commercial Court and the Court of Appeal found for the Charterers against the Owners.

This should be contrasted with another recent decision, the 'Rightship' case. This is very close to home, as Rightship is an Australian regime. Almost all coal and iron-ore to be shipped out of Australia needs 'Rightship' approval. In the case, *Seagate Shipping v Glencore International* [2008] EWCA 1904 (Comm), the Commercial Court (reversing the Arbitrators) held that 'Rightship' was not a governmental requirement, it was a privately organised vetting service. Accordingly the Owners, who did not have Rightship approval, were not in breach of the charter provision requiring the vessel to have all documents necessary for worldwide trading.

## **Clause 5 – Delivery**

This is really quite a short point. Delivery is very important, obviously both to Owners and Charterers, and this is where everything has to dovetail, again, with the building contract. You will normally have provisions whereby the Charterer can actually ask for a delay in delivery, but that the Owner cannot. There will be usual provisions in relation to liquidated damages and cancellation, and again the cancellation provisions in the charter must be back to back with the cancellation provisions in the building contract.

## **Clause 6 - Trading Limits**

### *Trading range*

This is a point rather similar to the point in relation to compliance. The trading range has to be carefully discussed and agreed. Will there be a list of *'primary terminals'* to which the vessel can be ordered or will there be worldwide trading? What happens if, 15 years down the line, the Owners are unable to go to some of these terminals due to another change in regulations? Quite apart from being caught by the 'compliance' provisions, Owners may be in breach of this clause also. I mentioned double skinned tankers already. I am old enough to remember the change in regulations where some ports required that all tankers calling there must be double skinned. Some of our more creative Charterer clients, those who had an onerous charter but also had a warranty of worldwide trading, immediately ordered their vessels to such a port and when the Owner could not comply, terminated the charter. An important point, therefore, to consider.

### *Loading Places*

A common source of argument is in relation to damage caused at the loading or discharging port. These claims can be very substantial. I was involved in a case where a hole in the shell plating 1 metre long by 50 centimetres wide led to a claim for US\$52,000,000! Thus it is important to set out here whether the Charterer is to have an absolute obligation to send the vessel to a safe port or place or whether the Charterer only has to exercise due diligence.

## **Clause 8 - Owner performance warranties**

I have already briefly mentioned these, they are of vital importance to the Owner and the Charterer, but not of vital importance to a lawyer.

The important point that I would raise, however, here is in relation to initial warranties. I have already referred to a detailed schedule which will set out what the vessel should be able to do. Commonly, if the vessel does not comply with any of these warranties on delivery, then the Charterer may have a right to cancel the charter. This depends on what is agreed and as to whether or not there is a 'maximum deficiency' or something like that. Again, vital to make sure that the same provisions are in the building contract so that if there is a problem, the Owner will be able to deal with this as against the shipyard. I have seen provisions, interestingly, where the Charterer still has a right to terminate the charter after the vessel has been delivered in the event that some of these warranties are not being met. This could be of serious concern to the Owners and to their Banks.

## **Clause 9 - Performance Reviews**

These performance review clauses are normally extremely complicated and lengthy and again not of particular interest to a lawyer except when a dispute breaks out. Clearly it is very important that they are put together properly and I do remember a wonderful time arguing about what was a 'voyage segment' for the purposes of the speed warranty.

## **Clause 10 - Lien provisions**

These are of interest to the Banks, as well as to Owners and Charterers. There may be a provision preventing the Owner having a lien on any cargoes, freights, sub-freights etc. and a provision saying that the Charterer will not allow a lien against the vessel. The Owner will also not be allowed to affect any other mortgage other than those agreed at the time of the charter.

## **Clause 11 - Off-hire**

I said I would mention off-hire a little later on. The importance of the off-hire clause is that again it has to be tightly drafted. It will provide that a whole series of incidents may lead to the vessel being off-hire which entitles the Charterer to make a deduction from hire. One of the leading cases, if not the leading case on deductions from hire, is the '*NANFRI*' [1979] 1 Lloyd's Rep 201, a case in which my firm was involved and which went to our House of Lords, and which we subsequently lost! In any event, speaking as a Charterer, you want the most detailed and longest list of possible deductions that you can find, speaking for the Owner, you want exactly the reverse. The important thing is that the clause should be tightly drafted, as I have said, and clear. Quite often there is a grace period, in that the first 3 hours, for example, does not count as off-hire just to deal with very small incidents. Where the Owner and the Charterer are well known, as is often the case in LNG, these provisions usually allow the Owners considerable leeway. You can have provisions here, which I have seen, which also provide for a permanent reduction in hire in the event that the vessel fails to meet her performance criteria.

Also one thing to look for is whether or not the Owner only has to exercise due diligence or whether this is a strict obligation. Obviously from the Charterers point of view, and this is more common, the obligation is strict.

## **Clause 12 - Drydocking and repairs**

Modern LNG carriers only require to be drydocked every 5 years and it is customary to have a clause setting out in quite some detail when the vessel may be drydocked and, in some circumstances, even where. Some developing nations quite like the idea of vessels being drydocked in their own country! It is common for the Charterer to retain the right to approve the relevant yard. As already mentioned, the LNG supply contracts are very tight and accordingly the Charterer will normally require at least 12 months notice of any scheduled drydocking. There is then a debate as to whether or not the vessel remains on hire during her drydocking or off-hire. You might think it would be more ordinary for the vessel to be off-hire, since she is not in the service of the Charterer, but I have seen a number of charters where it has been agreed that the vessel will remain on hire. It is obviously reflected in the overall hire, but do not assume, therefore, that the vessel is necessarily off-hire.

## **Clause 13 - Owners' responsibility**

This is a fairly standard clause, the Owner will provide the vessel, the crew etc. etc. One thing to note is that there is ordinarily a requirement to provide the necessary insurances, a point I will mention later. There will also be obligations in relation to COFR, again something that is now much more important.

There will be the usual provisions in relation to the Owners observing the orders of the Charterer, the Master prosecuting all voyages with due dispatch etc. etc.

## **Clause 15 - Charterer provides**

Again, fairly standard, Owner provides and pays for fuel, including natural boil off, port charges, etc. etc.

### ***Fuel***

One important point which is often found here is in relation to the standard of fuel. Again, we have had many happy months arguing about damage to vessels caused by sub-standard fuel. All of you know that the fuel provided to vessels can often be of the lowest possible standard. It is important, therefore, to have a detailed fuel standard clause under which the fuel specification is set out as fully as possible. I think it sensible to have provision for one of the well known fuel testing services, such as that provided by DNV, to be used. It is absolutely vital to make sure that there is a provision for samples to be both taken and retained. Not only should they be taken, they should be divided between Owner and Charterer. There are of course ways in which samples can be doctored, but at least there should be a clause such as this.

### ***Tugs and Pilots***

There is also a provision in relation to tugs and pilots. Pilots are normally the servant of the Owner, and this is important. In charters such as this, it is common to make sure that both tugs and pilots remain agents for the Owner, even though chosen by Charterer. This may seem a little unfair on the Owner, but is important. Many unsafe port cases arise from an act of the pilot and therefore this clause has to be clear. Quite often there is a detailed clause setting out that the Charterer cannot be responsible, in any circumstances.

### ***Port Services Agreement***

Perhaps another thing to mention here is the question of the Port Services Agreement. LNG terminals frequently ask Owners to sign a very draconian document making the Owner responsible for absolutely everything. This causes considerable alarm among the Owners P&I Clubs, but is becoming increasingly common. No doubt the Owner would love to pass this responsibility on to the Charterer, but this is not ordinarily possible.

## **Clause 16 - Post-delivery vessel modifications**

I have already talked about the question of alterations having to be made to the vessel. You often see a clause which deals specifically with modifications, not just those necessitated by the trading range, but also those that the Charterers may wish to make. The clause is usually specific and deals with the question of cost and hire, the Charterer obviously paying both hire during any time lost and for the cost of any modifications. The interesting thing is whether or not the Owner has to agree to such modification. After all he may want to continue to trade the vessel after the end of the charter period. Ordinarily, therefore, there is a provision that the Owner either has the right to refuse, or is obliged to agree, depending on who is the stronger party. In a charter in which I was drafting, the provision was that the Owner would have to agree so long as the request by the Charterer was 'reasonable'.

## **Clause 20 - Bills of Lading**

Bills of Lading used to be very important documents and indeed the transfer of title is still important. However, in the LNG trade, I suspect Bills of Lading are rarely ever actually signed! In any event, you will have a provision in the charter in relation to Bills of Lading which is important and one of the most important matters is whether the carriage of the cargo is to be subject to the Hague Rules, the Hague Visby Rules or the Hamburg Rules. This is important from the point of view of the Owners' P&I Club, who will require that the cargo is carried on terms no less favourable to cargo interests than the Hague Visby Rules. There will be the other usual clauses: Both to Blame, New Jason clause, General Average etc., and perhaps the only other matter to mention is the question of the indemnity.



## ***Indemnity***

In the tanker trade, it is commonplace for the Charterer to have the right to direct the Owner to deliver the cargo without production of the Bill of Lading or to different port or place. Indeed, the charters usually have a printed provision to this effect. This always interests me, since as a P&I Club lawyer, if you do deliver the cargo in that way, then you are automatically breaching the terms of your P&I contract and you will lose your P&I cover in the result of any claim. Nevertheless, such is commerce.

I have a particular interest, however, in the form of indemnity. This is ordinarily set out in the charter and usually it is merely signed by the Charterer. Obviously, therefore, you have to be certain that the Charterer himself is worth the money. In a case I was involved with some years ago, (which some of you know well as it was tried in Sydney) which was not a tanker matter, there was the more usual dry-cargo provision that the indemnity should be countersigned by a Bank. Our clients delivered a cargo without production of the Bill of Lading, the cargo was stolen and our clients claimed on the letter of indemnity against the Bank, as our Charterers were men of straw. The Bank refused to pay on the grounds that the signature of the manager of the trade credit department was, on internal rules, not adequate to bind the Bank. Rather a surprising argument, you might think, by a major commercial Bank. Ultimately, in the High Court of Australia, our clients prevailed against the Bank. Important, therefore, to make sure that the form of the indemnity that you receive is in fact correctly executed.

Also, bearing in mind another case I have just been involved in, check there is no time limit. Sometimes the charter will provide that any letter of indemnity becomes void after a certain period. That period will be shorter than any time limit in the charter.

## **Clause 21 - War Risks**

I mentioned earlier that I thought War Risks were important and this is because, like it or not, a great deal of LNG comes out of the Gulf, and the Gulf is an area that historically has war risk difficulties and can become an Additional Premium or Excluded Area overnight. It is important, therefore, that the war risk clause is properly drawn and it is made clear who is responsible for payment of the insurance, normally, indeed almost always, the Charterer. However, what about if the Charterer orders a vessel to, say, Ras Laffan, just after the Iranians have launched some missiles at Qatar and the Master, quite reasonably, or the Owners, refuses to go? The clauses that I have been involved with usually say that if it is possible to obtain war risk insurance from a leading international insurer or under a relevant government programme, then the Owner is obliged to go, although the Charterer is obliged to pay the insurance. There will ordinarily be provisions in relation to crew war bonus etc. which will also be payable by Charterer.

## **Clause 22 - Force Majeure**

Force Majeure is a concept that many people talk about, but sometimes fail to understand. It is not a defined concept under English law and does not arise as a matter of law. It only applies if there is a reference in the contract. The concept is often argued strongly between Owners and Charterers and indeed the Banks. This is where the Banks are very concerned, since if a Force Majeure event arises, then what happens to the charter hire? The Force Majeure clauses in these types of contract can be quite specific and refer to problems at particular production facilities; and they can contain provisions allowing the Owners or the Charterers to terminate. Ordinarily, termination can only take place after a considerable period of time has elapsed. In charters that I have dealt with, there are also provisions that the vessel will remain on hire, during a Force Majeure event, if she is at the effective disposition of the Charterer. This could be a very significant drain upon Charterers' resources.

## **Clause 26 – Insurance**

It is clearly important to Owners, Charterers and the Banks, that proper insurance is maintained on the vessel. As I have already said, these vessels are extremely expensive. So far as P&I insurance is concerned, it is normally the case that the P&I Club must be a member of the International Group and there is often a schedule setting out the terms that must be obtained. Hull and machinery insurance and war risk insurance must also be taken out, and, again, there are sometimes approved insurers that must be used.

An important point to note, however, is that quite often there is a provision that if the Owners fail to maintain these insurances, and fail to cure their default, then the Charterers may have a right to terminate the charter.

### **Clause 27 - Guarantee and transfer conditions**

Vessels are often owned by nominee companies and indeed the Charterers are sometimes subsidiaries or affiliates of large organisations. Accordingly, it is common to ask for a Parent Company Guarantee to be given in respect of both the Owner and the Charterer. This can cause great argument, along the lines of '*we (very big company) do not give Parent Company Guarantees*'. Usually, they do!

### **Clause 28 - Sub-let, Assignment and Novation**

The Charterer may wish to assign or novate the charter to another company in the Charterers' group and ordinarily there will be provisions to deal with this. This is often a concern for the Banks. They and the Owner need protection, however, so it is ordinarily also provided that Assignment or Novation may only be to specific companies with specific credit ratings.

### ***Quiet Enjoyment***

There may also be provisions where the Owner may have the right to assign some rights to the Banks as security for the financing. The Charterer may be required to agree not to exercise any of his termination rights without giving the Banks the right to step in and cure any default. There will normally be a 'Quiet Enjoyment Undertaking' to deal with this.

### **Clause 39 - Lender's rights**

I have already mentioned the question of the Owner assigning their rights to their lender. I have also dealt with situations where the Charterer has Banks involved. There can be provisions, therefore, that the Owner has to provide details of their corporate structure etc. to the Charterers' Banks. There can also be provisions that the Owner will need to agree that the Charterer may assign their rights to the Banks as security for their obligations and that the Banks shall be entitled to step in to the charter and cure any defaults of the Charterer under the charter.

### **Clause 42 – Interpretation**

This is a clause where it is common to park other small points which should go in to a long term charter. Some of them are of some importance.

### ***Entire Agreement***

Ordinarily there is an Entire Agreement clause just to deal with the question of argument as to whether or not negotiations prior to the charter should be taken into account. This clause says that they should not.

### ***Third Parties***

It is also common to insert a provision that the Contracts (Rights of Third Parties) Act shall not apply so that no third party can claim to be a party to the contract.

### ***Consequential Loss***

It is also sometimes provided that neither Owner nor Charterer shall be liable for any consequential or indirect or punitive damages, or indeed any loss of profit. This is of considerable importance when you bear in mind that the question of punitive damages available in the United States and indeed the very substantial claims for loss of profit that might arise.

## **Dispute resolution**

I have not got a lot of time to talk about dispute resolution, so I shall only be making a few points. I am assuming, for the purposes of this talk, that the charter is going to be governed by English law.

### ***Court or Arbitration?***

Most printed tanker time charters contain an option of either arbitration or High Court. Which should you go for?

In my view, it depends what you want. Arbitration is private and Arbitration Awards are more easily enforced abroad under the New York Convention. However, arbitrations can be cumbersome, the quality of the Arbitrators can be variable and it can be expensive. I don't just mean lawyers' costs, which are always expensive, but the cost of the Tribunal themselves! We recently had a 4 day hearing before 3 ordinary LMAA Arbitrators with some interlocutory matters and the total cost of the Tribunal, including the cost of the Award, was £76,000. If you use one of the established international bodies such as the ICC, the costs are much higher.

You also need to decide whether you require a right of appeal. In arbitration in England, there is a limited right to ask for leave to appeal, but under the current Arbitration Act 1996, that right is relatively limited, you need to show that the Award is 'probably wrong' and/or is a matter of general public importance.

So far as the High Court is concerned, the proceedings will be quicker and cheaper, at least at the moment, as the Judges are still free, although that is a matter under some discussion. The hearings are public, and it is not always possible to enforce a Judgment abroad quite so easily as an Award. On the other hand, at the moment, the calibre of the Commercial Court is high and you may feel that you are more likely to get a correct decision. Another point to bear in mind is that the Court deadlines are much more closely adhered to and the Judges enforce them. Arbitrators are particularly bad at enforcing deadlines and, as a result, it can take a very long time to force your opponent to serve, for example, Points of Defence.

It all depends, therefore, what you want out of your Tribunal and, to some extent, whether you are a Claimant or a Defendant. If you are a Claimant with what you think is a good case then you are, in my view, better off in Court.

In either case the question of mediation is likely to arise. In the Commercial Court nowadays, the Judges will almost automatically refer cases to mediation to see if the matter can be resolved by agreement. Mediation is becoming popular and in certain circumstances is very useful.

So far as LNG charters are concerned, in the type of charter I have been discussing, between a well known shipowner and a very well known LNG exporter/charterer, it is perhaps unlikely that there will be substantial disputes. However, I do not necessarily think that this will always be the case. It will certainly not be the case in short term contracts where there are spot fixtures. It is important, therefore, to make sure that you know whether you want to have arbitration or High Court jurisdiction and draft your clause accordingly.

Make sure that you know what your arbitration clause will provide. In other words do not merely say 'arbitration London', which means you have to agree a sole Arbitrator, but take one of the standard clauses, such as the LMAA clause, which provides for each party to appoint an Arbitrator and for the two so chosen to appoint a third.