



## **Supplytime 2005 vs 2017: Knocking clause 14 into shape**

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### **Overview of changes**

- Supplytime 2017 generally received as improvement on already well-drafted BIMCO form.
- Key changes are to “knock-for-knock” regime in clause 14. Discussed in more detail below.
- Some modernising efforts: e.g. “bunkers” now “fuel” and options for payment for fuel on delivery and redelivery brought into line with modern practice.
- Clarifying provisions about non-payment, especially suspension of services (although still query about whether notice has to be given before suspending).



## Overview of changes (cont.)

- Termination for non-payment:
  - Not providing that withdrawal carries with it entitlement to damages for repudiatory breach.
  - Once payment received, right to terminate lost.
- Maintenance days still accumulate, but can't be "cashed in" for hire unless not used at Charterers' request.
- Clarifications about drydocking: when OSV off, and back on, hire and also Owners' choice of location.



## Overview of changes (cont.)

- Provisions for "warm" lay up of OSV, dealing with consequent reductions in hire and issues about redelivery.
- Termination of CP for cause:
  - Earlier triggers to allow termination on insolvency.
  - Breakdown is no longer a freestanding "termination event", but off-hire in excess of agreed period will give right of termination.
  - Any "force majeure" event still permits termination (even if only hindering performance).



## Overview of changes (cont.)

- Standard BIMCO clauses updated.
- Some standard clauses added: Anti-Corruption, MLC 2006 (crewing/ labour), Sanctions, Designated Entities...
- Both-to-Blame and General Average clause removed because usually not relevant.
- Many (perhaps most) OSV Owners and Charterers already making these adjustments in their usual chartering terms, but helpful that tidied up.



## Philosophy of “knock-for-knock” regime

- Going to look more closely at changes to clause 14: “knock-for-knock” clause.
- Logic of “knock-for-knock” allocation of risk is that each party insures own property and ensures that this insurance meets claims without recourse against the other party.
- Looking to avoid disputes between project participants.



## Philosophy of knock-for-knock



- Two ingredients to the basic scheme – belt and braces:

- **Exempt** Owners and Charterers from liability for loss of or damage to property, and personal injury or death, suffered by the other party's group.
- **Indemnify** each party against the other from any third party claims arising out of or in connection with such damage or injury.

- Problem areas:

- Whose property caught by rule?
- Any exceptions to rule?



## Whose property?

- Expanded definition of Owners' and Charterers' group.
- **2005 form:** "Charterers Group shall mean: the Charterers, and their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and Employees of any of the foregoing"
- **Now:** "Charterers' Group" means any of the following:
  - (i) Charterers and Charterers' clients (of any tier); and
  - (ii) co-venturers of any of the foregoing; and
  - (iii) Affiliates of any of the foregoing; and
  - (iv) contractors and sub-contractors (of any tier); and
  - (v) Employees of any of the foregoing;but always related to the work or project on which the Vessel is employed.



## Express exceptions

- In Supplytime 2005: “Notwithstanding anything else contained in this Charter Party excepting Clauses 6(c)(iii), 9(b), 9(e), 9(f), 10(d), 11, 12(f)(iv), 14 (d), 15 (b), 18(c), 26 and 27, the Charterers shall not be responsible...”
- So a large number of scenarios had separate liability regimes – e.g.:
  - dangerous cargo (clause 6(c)(iii))
  - cargo securing and special materials (clause 9(b))
  - liability for drugs shipped with cargo (clause 9(f))
  - bad bunkers (clause 10(d)).
- Multiple regimes not problematic unless this generates uncertainty.



## Express exceptions (cont.)

- Only few exceptions to “knock-for-knock” regime survive into Supplytime 2017, e.g.:
  - damage to anchor handling/ towing wires (clause 9(e))
  - salvage of Charterers’ property (clause 18(c)).
- Also clause 14(c) right to limit liability under “any applicable law, statute or convention” is preserved.
- But much purer form of “knock-for-knock”.



## Express exceptions (cont.)



- Good example of direction of travel concerns carriage of hazardous or noxious substances.
- In Supplytime 2005, clause 14(f) created separate scheme for injury, damage or liability: Charterers responsible for any losses, damages, or liabilities.
- In Supplytime 2017, clause 14(f) has been deleted.



## Implied exceptions?

- The A Turtle [2009] 1 Lloyd's Rep 177:
  - Unseaworthy and ill-prepared tug ran out of fuel half way across the Pacific Ocean.
  - Had to disconnect tow (a semi-sub rig) while waiting to be refueled.
  - Tow floated off and was only found when it beached on coast of Tristan da Cunha (determined to be a CTL).
  - Claim for loss of tow, which had ended up being uninsured.



## Implied exceptions?

### ■ The A Turtle:

- Tow owners argued that must be some limit to breaches falling within knock-for-knock in the Towcon form... e.g. what if tug had just abandoned tow in order to do something more lucrative?



- Teare J held that scheme applied to all breaches, provided tug owners were **actually performing** their obligations (albeit not to the required standard) [116].
- Tug owners were performing...just about.



## Implied exceptions?

- Suggested that same approach would be taken to construing clause 14 of Supplytime 2005
- But Teare J's "performing" test:
  - Said by some distinguished commentators to be unsatisfactory and difficult to apply.
  - Logic for distinguishing on this basis obscure (taken from The Cap Palos [1921] P 458, which concerned very different words).



## Implied exceptions?

- Problem is that you need some limit. Hence:
  - Kudos Catering (UK) Limited v Manchester Central Convention Complex Limited [2013] EWCA Civ 38, Tomlinson LJ said widely-drawn exclusion of liability applied to “*defective performance ... not a refusal or to a disabling inability to perform...*” [27]; and
  - The GSF Arctic III [2016] EWCA Civ 372, Moore-Bick LJ referred to The A Turtle as way of avoiding construction of clause enabling “*Transocean to repudiate the contract with impunity for purely commercial reasons before the rig had even been delivered into service*” [33].



## Different approach in Supplytime 2017

- Clause 14(a)(i) and 14(a)(ii) excludes loss:

“arising out of or in any way connected with the performance or non-performance of this Charter Party whatsoever and in any circumstances, even if such loss, damage, or personal injury or death is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Charterers’ Group, and even if such loss, damage, or personal injury or death is caused wholly or partially by the unseaworthiness of any vessel”
- Can see that change is aimed squarely at Teare J’s “*performing*” test.





## Any implied limit there?

- Note the words “*whatsoever and in any circumstances*”:



- Could Owners just dump Charterers' equipment overboard if it no longer suited them to perform?
- Could Charterers deliberately smash up the Vessel if they felt so inclined?
- Feels unrealistic to suggest deliberate damage would be subject of exclusion/ indemnity.



## Better to have express limit?

- Problem is not that Owner or Charterer might be protected after deliberately causing damage, but rather that the need to have some limit leads to disputes ... as in *The A Turtle*.



- Answer is to draw a clear line so that knock-for-knock achieves real aim of avoiding arguments.
- E.g. in *Windtime* mutual exception from knock-for-knock: if “...*either party fails to perform..., or unequivocally indicates its intention not to perform it, in a way which permits the other party to treat the Charter Party as at an end...*”



## Consequential loss

- Longstanding problem in English law, because definition of “consequential loss” is out of kilter with market expectation.
- Said to mean limb 2 of Hadley v Baxendale test for remoteness: i.e. not catching any losses which may fairly and reasonably be considered to arise “*naturally*” - according to the usual course of things - from the breach.
- Cases suggest this definition catches almost nothing: see Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd’s Rep. 55; British Sugar plc v NEI Power Projects (1997) 87 BLR 42.



## Consequential loss (cont.)

- Supplytime 89: “Neither party shall be liable to the other for ... any consequential damages ... including but not limited to loss of use, loss of profits, shut-in or loss of production and cost of insurance”
- Effect was only to catch “loss of use, loss of profits, shut-in or loss of production and cost of insurance” if those losses also qualified as “consequential damage”.
- See, e.g., Ferryways NV v. Associated British Ports [2008] 1 Lloyd’s Rep 639.



## Consequential loss (cont.)

- Supplytime 2005: “‘Consequential damages’ shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party”.
- Concern remained whether effective to exclude all loss of use, loss of profit, etc.
- BIMCO concerned to get it right this time...



## Consequential loss (cont.)

“Notwithstanding anything else contained in this Charter Party neither party shall be liable to the other for:

- (i) loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of any tier or by third parties), loss of profits or anticipated profits; loss of product; loss of business; business interruption; loss of or deferral of drilling rights; loss, restriction or forfeiture of licences, concession or field interest; loss of revenue, shut in, loss of production, deferral of production, increased cost of working; cost of insurance; or any other similar losses whether direct or indirect; and
- (ii) any consequential or indirect loss whatsoever”



## Consequential loss (cont.)

- Not just excluding “consequential loss”. Excluding first what the market thinks of as consequential loss.
- Also a longer list of excluded types of loss:
  - Not just “loss of use, loss of profits, shut-in or loss of production and cost of insurance”.
  - Now including “loss of business; business interruption; loss of or deferral of drilling rights; loss, restriction or forfeiture of licences, concession or field interest; loss of revenue... deferral of production, increased cost of working”.
  - NB also “the cost of use of property, equipment, materials and services”. Important to exclude “spread costs”.



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