

TIME CHARTER TRIP DURATION -
“ABOUT DAYS, WITHOUT GUARANTEE”

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The law relating to the duration of a time charter and the legitimacy or otherwise of orders given under a time charter to perform the final voyage has been developing relatively quickly during the last few years. These issues are important since ultimately, the Courts have to decide whether it is owners or charterers who have to bear the risk if, through the fault of neither party, their estimate of the charter duration is undermined by circumstances over which they have no control.

The duration of the charter period is important to both owners and charterers;

- (i) It is important to charterers since they cannot properly plan sub-fixtures unless they know that they have the use of the vessel for a specified period.
- (ii) It is important to owners since, firstly, they wish to know what their gross income will be for the charter period and since, secondly, they need to know when the vessel is likely to be redelivered to them in order to plan future employment.

Therefore, any event that subsequently affects the duration of the period may have important repercussions for both parties. For example, charterers may find themselves unable to carry a cargo for which they are committed under a sub-charter whilst owners may find themselves unable to deliver the vessel before the cancelling date specified in her next fixture. Therefore, who should bear the risk of a change of circumstances? In general terms, the English Court has concluded that the risk is to be borne by the charterers since in the absence of any contrary terms, the contract defines the period for which they are entitled to exploit the vessel commercially and the owner is entitled to re-assume control of his vessel on the expiry of that period. In considering the question of allocation of risk in the landmark decision of the *Gregos*¹, Lord Mustill speaking in the House of Lords stated that :-

¹ (1995) 1 LLR 1

If the matter is to be decided according to balance of convenience the owners argument appears to have much the better of it.

However, he also went on to base his conclusion on a construction of the time charter terms and stated that, in principle :-

the risk of delay is primarily on the charterer.

As a result of this risk allocation, the English Courts have formulated the following rules

- (a) If, as a result of the charterers' employment of the vessel, she is redelivered to owners either before or after the agreed redelivery date, the charterers are in breach of contract and owners are entitled to damages for the underlap or overlap period. Since the purpose of damages is to put the owners back in the position in which they would have been in had there been no breach, the result is that :-
 - (i) in relation to any overlap period, the owners are entitled to receive in addition to the charter hire and other sums payable under the charter, any increased hire which may have been available to the vessel on the open market for the overlap period had she been free of the charter (the *Peonia*²).
 - (ii) in relation to any underlap period, it is submitted that owners are entitled to damages equivalent to the hire which they should have received for the underlap period at the charter rate together with sums which charterers were obliged to pay under the charter (e.g. bunkers etc), less any savings made as a result of early redelivery

- (b) If it appears, at the time that an order is given for the vessel to perform her last voyage under the charter, that she will not be able to perform the required employment and be redelivered to owners at the agreed redelivery range and by the

agreed redelivery date, then the order is illegitimate and owners are given the option of either refusing the order and demanding a new legitimate order or of performing the illegitimate voyage without prejudice to their right to claim damages. Alternatively, if the order is legitimate when given, then the owner cannot refuse to comply with it at that stage. Nevertheless, if by "*the time when performance falls due*" it appears that the order, if performed, will result in the redelivery of the vessel at the agreed redelivery range after the agreed charter expiry date (i.e. the voyage has by then become illegitimate) the owner is entitled to refuse to comply with it at that time.

- (c) Should owners opt to refuse to comply with the illegitimate order, and should charterers thereafter either refuse or be unable to give an alternative legitimate order, owners are entitled to treat charterers' conduct as a repudiation, thereby terminating the charterparty subject to owners' rights to claim damages³.

Whatever be the rights or wrongs of the risk allocation determined by the Courts, it is clear that the principles outlined above place serious restrictions on the ability of charterers to commercially exploit vessels under time charters and, therefore, attempts have been made to redress the balance.

a) **Last Voyage Clauses**

In some instances, charterers have felt it expedient to include an express clause intended to enable them to perform a last voyage which appears on the face of it to be illegitimate. However, the Courts have tended to construe such clauses in a manner contrary to charterers' interests unless they are clearly expressed.

For example, in the *Peonia*⁴ the charter period was stated to be :-

"about minimum 10 months maximum 12 months time charter. Exact duration in charterers' option. Charterers have further option to complete last voyage within below mentioned trading limits.

³ *Gregos* (1995) 1 LLR 1

⁴ *Peonia* (1991) 1 LR 100

Similarly, the Court considered in the *Black Falcon*⁵ a clause providing :-

“for about 9 (nine) months, charterers’ option three months, charterers’ option further three months, 15 days more or less on final period. Charterers having option to complete last round voyage under performance prior to delivery at charterparty rate.

In both instances, the Court held that the clause did not permit charterers to give orders for a voyage that could not reasonably be expected to allow redelivery within the basic charter period; the clauses merely protected the charterers against a claim for damages if a legitimate final voyage accidentally overran.

However, in the *World Symphony*⁶ the Court of Appeal considered a charter for “a period of 6 months 15 days more or less in charterers’ option” and which included the following clause :-

“Notwithstanding the provisions of clause 3 hereof, should the vessel be upon a voyage at the expiry of the period of this charter, charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided by the charter.”

The Court held that such a clause did entitle the charterers to send the vessel on a voyage which appeared, on the face of it to be illegitimate. It appears that the words which persuaded the Court of Appeal to come to a different conclusion to that reached in the *Peonia* and the *Black Falcon* were the following

“Notwithstanding the provisions of Clause 3 hereof.

⁵ *Black Falcon* (1991) 1 LLR 77

⁶ *World Symphony* (1992) 2 LLR 115

(b) Implied Tolerance

The Courts have also been prepared to assist in that they appreciate that there must, of necessity, be a degree of flexibility. Therefore, the Courts will generally imply some degree of tolerance where the charter provides for a stated period such as “*three months*” or “*one year*”⁷ or even when there is a range such as “*duration about 4 to 6 months*”⁸. Indeed, such tolerance is allowed even if the parties have not included words such as “about” duration of the period of tolerance depends on what the Court decides is reasonable in the particular circumstance.

(c) Express Tolerance

The difficulty with the implied tolerance approach, however, is that the parties can never be certain exactly how much tolerance the Court will imply in any particular circumstance. Therefore, since, as in most commercial instances, the parties prefer certainty, it is common now for them to introduce an express degree of flexibility such as, for example :-

“Three months 15 days more less charterers’ option (MOLCHOPT).

The Courts will give effect to the margin agreed by the parties but will not allow any further tolerance⁹. It further follows, since the Court is prepared to give effect to the agreement reached between the parties, that it will not allow any margin if the words used by the parties indicate that the period is to be final. Therefore, the use of the words “minimum” or “maximum” (e.g. “70 days maximum”) are taken to indicate finality¹⁰.

(d) “Without Guarantee”

Albeit that an express or implied margin assists in introducing flexibility into the period allowed to the charterer to perform his sub-fixture, the charterer still faces the problem that even if the original estimate of the required period for completion of sub-fixtures was correct,

⁷ *Gray –v- Christie* (1889) 5 TLR 577

⁸ *Democritos* (1976) 2 LLR 149

⁹ *Dione* (1975) 1 LLR 115

¹⁰ *Mareva A S* (1977) 1 LLR 368

a subsequent incident occurring through no fault of his own (for example, bad weather) may mean that the duration of the sub-fixture will, in fact, overrun the period of the time charter resulting in the time charterer incurring liability to the head owner. Accordingly, some charterers have begun to introduce into the time charter the words “without guarantee”

The English Court has considered such words, albeit in a different context, for some years. Such words were used traditionally in relation to a vessel’s carrying capacity. For example, in one case¹¹, the Court of Appeal considered whether owners were in breach of a warranty that the vessel’s carrying capacity was 600 tons deadweight “without guarantee”. The Court of Appeal concluded that, as a result of the inclusion of the words “without guarantee”, there would be a breach of the carrying capacity warranty only if the estimate had not been given by the owners in good faith. Accordingly, when the Court again came to consider the words “without guarantee” in two subsequent cases in relation to the duration of a time charter (both of which, somewhat strangely, involved the vessel *Lendoudis Evangelos II*¹²) it followed the same approach.

The first case involved a time charter trip “*via safe berth(s)/port(s) ... about 40/120 days duration without guarantee*” whereas the second case involved a charter for a time charter trip “*duration about 70/80 days without guarantee*”. The first case was the most remarkable since the vessel presented herself for loading at the loadport but the loading was aborted and the vessel was redelivered about 7 days later at the pilot station at the same port. In the second case, the vessel was redelivered late (i.e. overlap as opposed to underlap) by nearly 24 days in excess of the stipulated 80 days. In both cases, two different judges (Leggatt J in the first case and Longmore J in the second case) followed the approach adopted in the *Japy Freres* case and held that as a result of the inclusion of the words “without guarantee”, there would be no breach of contract on the part of the charterer in redelivering the vessel either earlier or later than the period stated in the charter unless it was shown that their pre-contractual estimate of the charter duration had not been given in good faith. Furthermore, the Court went on in the second case to hold that although there was a finding by an earlier arbitrator that the charterers had no reasonable grounds for making the estimate that they did,

¹¹ *Japy Freres –v- Sutherland* (1921) 26 COM. Cas 227

¹² The first case is unreported but note of it appears in the Lloyd’s Maritime Law Newsletter No 408 dated 24th June 1995 whilst the second case is reported in [1997] 1 LLR 404

this was irrelevant, since the only relevant question was whether or not the original estimate had been given in good faith.

The result of the inclusion of “Without Guarantee”

It will be appreciated that by construing the effect of the words “without guarantee” in the manner in which they have done, the Courts have in those charters which include such words, effectively reversed the balance of risk between owners and charterers determined by the House of Lords in the *Gregos*. The risk in such cases is now effectively on owners rather than on charterers. However, whilst a strong case could be made for redressing the balance of risk in circumstances such as those which occurred in the *Gregos* (i.e. when unexpected events, occurring without fault on the part of either Owners or charterers, undermine an original estimate given in good faith and on reasonable grounds), the approach adopted by the Courts seems to have given the pendulum of risk an unnecessarily strong push in the Owners’ direction.

There appear to be two possible ways to construe a time charter which describes the duration subject to the words “*without guarantee*”:-

- (i) the original estimate of the charter duration need only be given in good faith;
or
- (ii) a distinction is drawn between, firstly, the original estimate of the voyage and, secondly, the effect on that estimate of subsequent events which undermine it. The original estimate is to be made on reasonable grounds whilst the words “*without guarantee*” protect the charterers only when that reasonable estimate is subsequently undermined by unforeseen events.

The Court appears to have adopted the first construction which appears to me to be unfortunate since a test of duration based purely on good faith rather than on reasonableness, or, at least, on a combination of good faith and reasonableness, is difficult to implement in the particularly practical world of chartering. The test of what is or what is not reasonable is an objective one based upon the likely thinking of a reasonable man. However, the question of what is or what is not good faith is a purely subjective one based upon the intention of an

individual. Unless that individual is prepared to volunteer the fact that he was not acting in good faith (which is unlikely) it is notoriously difficult to prove the case against him. Accordingly, whilst a shipowner is normally entitled to damages¹³ if the vessel is redelivered after the redelivery date, the shipowner will not be able to prove the necessary breach of contract on the part of the charterer if the charter includes the words “without guarantee”, unless he can prove that charterers’ original estimate of the charter duration was deliberately incorrect.

Furthermore, whereas the Court has preferred to adopt the first construction (at least, such an issue is taken to the Court of Appeal or higher) the second construction has much to commend it :-

- (a) There are good commercial and practical reasons why an estimate of charterparty duration should be based on reasonable grounds.
- (b) the inability of a party to recover damages unless he can prove bad faith will result in unnecessarily costly and problematical litigation.
- (c) It appears that the original reason why the words “*without guarantee*” were introduced into time charters in relation to duration was to protect charterers against circumstances such as that which occurred in the *Gregos* where unforeseen events had the effect of undermining an estimate which had originally been given on reasonable grounds. The words were, therefore, introduced for a limited purpose.
- (d) The *Lendoudis Evangelos II* line of authority appears to be based on the premise that the Court was merely following binding authority already laid down by the Court of Appeal in *Japy Freres*. However, the question of whether or not the original estimate was based on reasonable grounds does not seem to have been a real issue in the *Japy Freres* case. Accordingly, the latter case would not seem to be authority stipulating that the original estimate need not be given on reasonable grounds.
- (e) Serious difficulties arise in determining the legitimacy or otherwise of the last voyage where the charter duration is stated to be “without guarantee”. The question

¹³ *Peonia* (1991) 1 LR 100

of whether or not a last voyage is legitimate is usually tested against a fixed point in time, namely, the expiry date of the charter. However, where, firstly, that date is given “*without guarantee*” and where, secondly, any challenge to the duration will succeed only if bad faith is proven on the part of the charterer, there is no real or effective fixed point in time against which the legitimacy or otherwise of a suggested voyage can be tested.

“Without guarantee” and the last voyage

For reasons stated above, a shipowner must at some stage fix his vessel for her next employment. Therefore, any unexpected delay to his current fixture may cause him extreme difficulty since the vessel may, as a result, miss her cancellation date under the next fixture. However, there may well be temptation for charterers who have fixed a vessel on a “*without guarantee*” basis, to try to introduce into the fixture at a later date new voyages or cargoes which had not been planned when the fixture was first negotiated. This could be the case, for example, when the charter rate is attractive in comparison with the market rate, or where a new cargo suddenly presents itself during the course of the fixture, the carriage of which would be profitable to the charterers. It may be difficult in such circumstances to prove that the “new” voyage or cargo was not one within the bone fide contemplation of the charterers prior to fixing but was, instead, one which had been subsequently introduced. However, the other terms of the charter may be helpful in casting any light on the question. Therefore, in the first (unreported) case involving the *Lendoudis Evangelos II*, the judge came to the conclusion that it must have been contemplated that the voyage would be for a minimum of 15 days since another provision of the charter provided that the charterers were to give owners not less than 15 days notice of the vessel’s expected date of redelivery and probable redelivery port.

“Without Guarantee” and trip charters

The House of Lords has recognised that the manner in which the parties have described the contemplated voyage is paramount and charterers are not entitled to give orders which are inconsistent with that description¹⁴. Therefore, if the service were to be described as “one

round Atlantic trip, about 3 months without guarantee", it would seem to be clear that when estimating the 3 months, the charterers were contemplating a voyage from the delivery range across the Atlantic and a further voyage back across the Atlantic to the redelivery range. Consequently, any order given to perform a voyage not falling within the agreed "round" would appear to be illegitimate, both on the basis that it took the vessel outside the agreed trading area, and also on the basis that it was evidence of the fact that such a voyage had not been within the bone fide contemplation of the charterers when initially estimating the charter duration.

However, a more difficult question arises when the vessel is not ordered on a new voyage outside the agreed trading range but is ordered to load a further cargo on a voyage within the agreed "round". Again, in order to determine whether or not the order was legitimate, consideration would need to be given to the other terms of the charter, and to questions such as whether the new cargo fell within the range of "intended cargoes".

The situation would also be more difficult if the contemplated employment was described as, for example, "one time charter trip, about 3 months without guarantee". On the face of it, there is very little in such description to give any clues as to the contemplated voyage apart from the fact that there would, presumably, be a delivery range and a redelivery range and some description of the intended cargoes.

"Without Guarantee" and a period charter

An even more difficult question would arise in relation to a very general description such as a charter for "3 months, about 15 days MOLCHOPT, without guarantee", particularly if the charter provided for worldwide trading and a wide choice of permissible cargoes. Clearly, if the charterers have, before or at the beginning of the charter, given voyage instructions which relate to the whole of the 3 month charter then this would give some idea of charterers' intentions generally in relation to the 3 months period. However, it frequently occurs in such circumstances that charterers merely give details of their intentions in general terms, making it clear that, as some sub-fixtures have not yet been completed, such a timetable is extremely tentative. In such circumstances, it would be extremely difficult for a shipowner to bring evidence to show that a last voyage ordered by the charterers was not bona fide and was, therefore, illegitimate.

Owners' dilemma

The dilemma which an owner faces in these circumstances is that if he performs the voyage, then he may lose his next fixture, whereas if he refuses to perform the voyage, and it is subsequently shown that the voyage was legitimate, it is he who is guilty of a repudiation and the charterers have a claim against him for any losses suffered by them as a result of the fact that the vessel did not comply with their instructions and perform the voyage.

Conclusion

To sum up, the inclusion of the words "without guarantee" in relation to the duration of a time charter, is beneficial in introducing the necessary flexibility which is required if an estimate originally given in good faith is undermined by a subsequent and unanticipated event. However, since the manner in which the Court has (at least to date) construed these words is to absolve the charterers from any duty to exercise reasonableness in relation to the initial estimate of the duration, care needs to be taken to ensure that when such an estimate is originally given, the particular employment which will be required of the vessel is explained precisely and agreed.