Grant Hunter
Head of Contracts & Clauses, BIMCO

Overview
Grant Hunter is Head of Contracts & Clauses at BIMCO, responsible for the development, revision and promotion of BIMCO’s wide range of standard contracts and clauses. He has worked for BIMCO since 1997. Previous careers include five years at sea with the Ben Line and eight years working ashore in the commercial and operations department of P&O Bulk Shipping in London. Grant has a Master’s in Maritime Policy and Law from the London School of Economics.
Main general changes permeating the whole form

- Reviewed in light of past judgements and awards
- Clarifying areas identified in commentaries as being unclear or in need of revision
- Elimination of archaic or overly complex language
- Development of clauses which often raise issues in negotiations or during operations to provide a better starting point for discussions
- More balanced allocation of rights and obligations between Owners and Charterers, particularly regarding K4K-only limited exceptions
## What has changed

- New clauses covering the use of common fuel systems, payment for fuel and liability for engine damage
- Expanded provisions dealing with on and off hire surveys, audits, inspections and assessments, including condition of liquid mud and brine tanks
- New lay-up clause
- Suspension and termination clauses clarified to remove ambiguity
- Notice mechanism governing the exercise of the parties’ right to terminate for cause has been reviewed and clarified.
- Clearer provisions dealing with maintenance days

## What has changed

- Drydocking clauses clarified
- Latest version of Bimco standard Sanctions, Designated Entities and MLC clauses
- Both to Blame collision clause and GA clauses removed
- Annex A brought up to date
“has vast experience in shipbuilding matters”

(Legal 500)

Practice Overview

Chris is dual-qualified as a solicitor in England and Hong Kong. Between 1995 and 2001 he practised in Ince & Co’s Hong Kong office, during which time he was the Secretary of the Hong Kong Maritime Law Association. Chris has strong industry links in Hong Kong, China, and Korea. He is a Fellow of the Chartered Institute of Arbitrators and a member of the LMAA Supporting Members Liaison Committee.

Chris’ practice encompasses shipping and offshore matters. He leads the firm’s shipbuilding team and frequently advises buyers and shipyards in relation to building, conversion and repair contracts, as well as dispute resolution, for conventional vessels and specialist offshore vessels and floating platforms. He worked with BIMCO to develop NEWBUILDCON, a standard form newbuilding contract, and is a regular speaker and chairman of seminars on shipbuilding, conversion and repair.

Chris advises on yacht and superyacht construction contracts including contract drafting and negotiation, and dispute resolution.

Chris has specialist experience in jurisdictional issues, mediation and in major London arbitrations and litigation, particularly for claims arising from shipbuilding, conversion and repair contracts. His experience includes LMAA, ICC and LCIA arbitrations, as well as cases in the Commercial Court, Hong Kong Courts and liaising with lawyers conducting litigation in other jurisdictions.

He also advises on the drafting and negotiation of contracts, as well as dispute resolution, in the renewables sector including offshore wind farm installation contracts, charterparties and contracts for the construction of wind farm installation vessels. He has been involved in Greater Gabbard, Gunfleet Sands, London Array, West of Duddon Sands, Borkum Riffgat, Kentish Flats, Westermost Rough, Gwent Y Mor, amongst others. He has also worked with BIMCO to develop WINDTIME, a standard offshore wind farm personnel transfer and support vessel charterparty.

Chris has also advised in connection with accidents to offshore vessels, fixed and floating platforms. He has acted in a significant number of cases including BP Thunderhorse, Bombay High North and Piper Alpha.

Shipyards, Buyers, Owners, Offshore wind farm contractors and Developers.

What the Directories Say

“Astute” (Legal 500 2015)

“has vast experience in shipbuilding matters” (Legal 500, 2014)

A real asset” (Legal 500 2013)

“understands client needs and always gives first-class advice.” (Legal 500, 2011)
Clause 14: Knock-for-Knock and Excluded Losses:

... Perfection at Last?

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Change No. 1: The Removal of Numerous Exceptions to Knock-for-Knock

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Clause 14: SIX principal changes

- (1) The Removal of Numerous Exceptions to Knock-for-Knock
- (2) Expanded Definitions of who falls within Owner / Charterer Group
- (3) Attempts to deal with The A Turtle Problem and ‘Radical’ Breaches
- (4) Decoupling Excluded Heads of Loss from “Consequential Loss”
- (5) Much Wider Treatment of Specifically Excluded Losses
- (6) Deletion of Clause 14(f) of Supplytime 2005

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The Old 2005 Clause 14(a)(i): OWNERS’ Responsibility

- “Notwithstanding anything else contained in this Charter Party except...”
  - Clause 6(c)(i) Dangerous / Explosive cargo
  - Clause 9(b) Cargo securing and special materials
  - Clause 9(e) Owner / Charterer towing wires &c.
  - Clause 9(f) Contraband / Drugs in Cargo
  - Clause 10(d) NB consequences of ‘bad’ bunkers
  - Clause 11 ISPS Code compliance
  - Clause 12(f)(iv) B/L liabilities if Owner suspends

The Old 2005 Clause 14(a)(i): OWNERS’ Responsibility

- “Notwithstanding anything else contained in this Charter Party except...”
  - Clause 14(d) Limitation of liability at law
  - Clause 15(b) Pollution liability (non-Vessel)
  - Clause 18(c) Salvage of Charterer’s property
  - Clause 26 GA and New Jason
  - Clause 27 Both-to-blame collision clause

CHARTERER: Clauses 11 (ISPS); 15(a) (pollution ex-Vessel); 16 (wreck removal); 26 (GA and New Jason)


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CHARTERER: Clauses 11 (ISPS); Clause 9(e) Owner / Charterer towing wires &c. 15(a) (pollution ex Vessel); 16 (wreck removal); 26 (GA and New Jason)

Change No. 2: Expanded Definitions of who falls within Owner / Charterer Group

- 14(a)(i): “any property of any member of the Owners’ Group”
- 14(a)(ii): the cargo, the tow, the any property of any member of the Charterer’s Group, whether owned or chartered [etc]

The new Definitions in Clause 1, e.g. “Charterers Group”

- 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.

Towage of rig from Brazil to Singapore via Cape Town. The tug (“Mighty Deliverer”) ran out of fuel in the South Atlantic, the towage connection was released and the rig drifted away and was subsequently lost.

The Clause 18 Towcon relied on by tugowner:

("The following shall be for the sole account of the Hirer without any recourse to the Tugowner, ... duty or negligence of the Tugowner, his servants or agents: ... loss or damage of whatsoever nature, howsoever caused or sustained by the Tow. ... loss or damage of whatsoever nature suffered by the Hirer ..."

Teare J. upheld the clause as effective to exclude liability. But obiter, considered the position if the tug owner had deliberately chosen not to perform the towage contract “[which] would be a very radical breach indeed”

Whilst the words of clause 18 are facially capable of applying to such a radical breach I do not consider that clause 18, if it is to be construed in the context of the Towcon as a whole and 30 as a whole, is capable of applying to such a radical breach. For a breach which is radical, that applies however radical the breach. The words, when read in the context of the Towcon as a whole, are also incapable of applying, so long as the tug owners are actually performing the towage connection which they have voluntarily undertaken, to exclude liability for loss or damage in circumstances which so far as the owners are concerned were unforeseen and unexpected. That ensures that the obligations of the tug owners are more than a mere declaration of intent.

Change No. 3: Dealing with The A Turtle Problem and ‘Radical’ Breaches

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The "A Turtle" Problem (2):

Kudos Catering v Manchester Convention

Kudos Catering (UK) Limited v Manchester Central Convention Complex Limited [2013] EWCA Civ 38

- Five year catering and hospitality services contract. MCC terminated. Kudos claimed damages for repudiatory (deliberate) breach of contract including a claim for £1.3 million for lost profits.
- "18.6 The Contractor hereby acknowledges and agrees that the company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure (whether reasonably foreseeable or not) or indirect or consequential loss suffered by the Contractor or any third party in relation to this Agreement."
- Tomlinson LJ: "In my view the Agreement is, if the judge's construction of Clause 18.6 is adopted, effectively devoid of contractual content since there is no sanction for non-performance by the Respondent."
- "In order to construe the provision consistently with business common sense, I would regard the expression "in relation to this Agreement" as meaning in this context "in relation to the performance of this Agreement", and thus as not extending to losses suffered in consequence of a refusal to perform or to be bound by the Agreement. [...] by their language and the context in which they used it they demonstrated that the exclusion related to defective performance of the Agreement, not to a refusal or to a disabling inability to perform it."

BIMCO's Aim

See the BIMCO Explanatory Notes:

- "The knock-for-knock regime has been reinforced by expanding the description of the included causes of loss"
- "The background to these additions is found in Court cases since SUPPLYTIME 2005 such as The A Turtle"
- No further guidance: but ... was it intended to cover every sort of breach, including deliberate renunciation or repudiation?

The 2005 vs the 2017 Approach

- Clause 14(a)(i) and 14(a)(ii) 2005:
  - "shall not be responsible for loss of or damage to [...] arising out of or in any way connected with the performance of this Charter Party [...] even if [...] caused by the act, neglect or default [...] and even if caused wholly or partially by unseaworthiness of any vessel"
- Clause 14(a)(i) and 14(a)(ii) 2017:
  - "shall not be responsible for loss of or damage to [...] 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 [...] caused by the act, neglect, breach of duty (statutory or otherwise) or default [...] and even if caused wholly or partially by the unseaworthiness of any vessel"
Moore-Bick LJ at [33]:

"As a result there was some debate in the course of argument about whether the clause [NB virtually identical to SUPPLYTIME 2017 Clause 14(b)] enabled Transocean to repudiate the contract with impunity for purely commercial reasons before the rig had even been delivered into service."

That question does not arise for decision in the present case but if necessary I would hold that Clause 20 does not contemplate a deliberate repudiation of that kind (see, for example, … The A Turtle …) and there may be other breaches on the part of one or other party to which similar considerations would apply”.

Cf. Clause 16 of the WINDTIME form, as an exception to the whole scheme of the Knock-for-Knock regime and any other mutual exclusion:

"MUTUAL EXCLUSION On the vent that either party fails to perform the Charter Party, or unequivocally indicates its intention not to perform it, in a way which thereby permits the other party to treat the Charter Party as at an end other than under the terms of the Charter party, any such claim that the other party may have shall not be limited or excluded by the terms of this Charter Party.”

How specific do you have to be? Astrazeneca; MarHedge.

Is repudiation / renunciation addressed or just ‘radical’ breaches?

Cf 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”.

Change No. 4: Decoupling Excluded Heads of Loss from “Consequential Loss”

Clause 14(c) of SUPPLYTIME 2005.

Headed: “Consequential damages”

“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”.

Cf 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”.
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… or the ‘Ball-and-Chain’ problem

- Ease Faith Ltd v Leonis
  Marine Management Ltd
  [2006] 1 Lloyd’s Rep 67
  (Andrew Smith J.) - “other”

- Ferryways NV v.
  Associated British Ports
  (The Humber Way) [2008]
  1 Lloyd’s Rep 639 (Teare J.) - “including but not limited to”

The New Supplytime 2017 Clause 14(b):
EXCLUDED LOSSES

“Consequential or Indirect Loss” becomes an entirely separate and stand-alone head of excluded loss, identified specific heads = completely excluded.

- “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 deferment of drilling rights; loss, restriction or forfeiture of licences, concession or field interest; loss of revenue, shut in, loss of production, deferment 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”

Change No. 5: Clause 14(b)’s Much Wider Treatment of Specifically Excluded Losses

- Cf the 2005, modest, list: “loss of use, loss of profits, shut-in or loss of production and cost of insurance”.

- The 2017 SUPPLYTIME list follows the much more expanded LOGIC Conditions model.

- NB the inclusion for the first time of “cost of use” in order to catch apparently marine spread costs (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” (see BIMCO Explanatory Notes).

- “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”

- Cf Transocean Drilling UK v Providence Resources (The Arctic Ill) [2016] EWCA Civ 372 on identical wording covering marine spread costs.
Cf the 2005’s limited ‘cause’ wording: “arising out of or in connection with the performance or non-performance of this Charter party”.

The 2017 SUPPLYTIME list follows a much more expanded form (but NB one not consistent with Clause 14(a) with its attempt at “Anti-A TURTLE” wording).

“arising out of or in connection with the performance or nonperformance of this Charter Party, and each even if such loss is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the indemnified party, and even if such loss is caused wholly or partially by the unseaworthiness of any vessel, and the Owners shall indemnify, protect, defend and hold harmless the Charterers’ Group as defined in Clause 14(a) from such losses suffered by the Owners’ Group and the Charterers shall indemnify, protect, defend and hold harmless the Owners’ Group from such losses suffered by the Charterers’ Group.”

Cf Moore-Bick LJ in The Arctic Ill, obiter, on the similarly worded clause.

Change No. 5: Clause 14(b)’s Much Wider Treatment of Specifically Excluded Losses

Cf SUPPLYTIME 89

“Notwithstanding any other provision of this Charter Party to the contrary, the Charterers shall always be responsible for any losses, damages or liabilities suffered by the Owners’ Group […] by the Charterers or by third parties with respect to the Vessel or other property, personal injury or death, pollution or otherwise […] caused directly or indirectly by the Vessel’s carriage of any hazardous or noxious substances in whatever form as ordered by the Charterers and the Charterers shall […] indemnify the Owners […]”

In terms of escapes etc, does it add anything to pollution under Clause 15?

Why is it an exception to knock-for-knock? Cf other cargo.

BIMCO Explanatory Notes: “but one risk among several others which does not justify special treatment” and gets in the way of a ‘clean’ knock-for-knock.

Change No. 6: Clause 14(f) of SUPPLYTIME 2005 is no more
“Very impressive and focused - he thinks fast on his feet. He is fantastic both on the technical law and also as an advocate. He is easy to work with and charming, and remains calm and collected when under pressure.”

“He is stellar. He has a brain the size of a planet.”

(Chambers UK, 2017)

Practice Overview

Simon is one of the best-known practitioners at the Commercial Bar with a broad commercial advisory and advocacy practice spanning substantial commercial contractual disputes, international trade and commodities, shipping and maritime law in all its aspects, energy and natural resources and insurance and reinsurance and has extensive experience of international arbitration. Simon regularly acts in ground-breaking cases including NYK Bulksip (Atlantic) NV v Cargill International SA (The Global Santosh) [2016] UKSC 20 where Simon was brought in to argue the case in the Supreme Court and represented the successful appellants, Cargill. The decision is a landmark one in relation to a contracting party’s responsibility for the vicarious or delegated performance by a third party of its contractual obligations, both in the common charterparty and international sale of goods contexts and more generally. In Bunge SA v Nidera SA [2015] UKSC 43 Simon successfully represented Bunge in a landmark decision by the Supreme Court on GAFTA Default Clause and sale of goods damages after The Golden Victory on points which had been lost at every stage below.

His practice specialises in high value complex energy and offshore disputes, for example: drilling and exploration projects, both in terms of construction and infrastructure issues and in relation to casualties due to failures of equipment or negligent operation involving the allocation of responsibility in complex factual and technical situations, offshore and onshore construction projects covering virtually every species of oil and gas platform, rig, FPSO, offshore vessel and wind farm. Regularly instructed in matters concerning BIMCO forms, particularly Supplytime, with a number of large arbitrations recently completed or pending, he is the author of the leading text on BIMCO and other marine offshore contracts including Supplytime 2005: “The Law of Tug and Tow and Offshore Contracts” (Informa, 3rd Edn, 2013, 4th Edn to be published in Autumn 2017 covering Supplytime 2017 and other new forms), co-author of “Offshore Contracts and Liabilities” (Informa, 2015: chapter on offshore project mutual indemnities) and co-author of “Offshore Structures- Law and Liability” (Sweet & Maxwell, in preparation: chapters on LOGIC and IADC forms).

Ranked as the “Star Individual” for shipping by Chambers UK in 2015, 2016 and 2017, Simon: ‘impresses with his mastery of the brief... exceptionally gifted, he has the strong confidence of his clients, and is an excellent presenter of complex material...’ and ‘...is one of those super silk guys who has judges eating out of his hands.’ “He has the gift of going straight to the problem.” He was ranked as Shipping Silk of the year 2017 by Chambers and Partners UK and Legal 500 UK Awards and one of the Top Ten Maritime Lawyers 2017 by Lloyd’s List. He has also been cited for many years as a leading Silk in the areas of Commodities, Commercial Litigation and Dispute Resolution, International Arbitration, Energy and Natural Resources, and Insurance and Reinsurance by Chambers UK and/or Legal 500.

He is a Deputy High Court Judge (Commercial Court and Queen’s Bench Division), sits as arbitrator and has performed numerous offshore industry expert determinations.
Part 1, Box 19

Part II, Clause 10:

(a) Upon delivery – The Vessel shall be delivered with no less fuel on board than the quantity stated in Box 19(i).

(b) Upon redelivery – The Vessel shall be redelivered with no less fuel on board than the quantity required by the Vessel to reach, at economical speed, the nearest port where fuel of the specification and grade as stated in Box 19(iv) is available.

Clause 10(c): Fuel

Payment

10(c) Payment for fuel – The payment, crediting and accounting of fuel remaining on board the Vessel at the time of delivery and redelivery of the Vessel shall be either in accordance with Subclause 10(c)(i) or 10(c)(ii) below, as indicated in Box 19(ii).

If Box 19(ii) is left blank, Subclause 10(c)(i) shall apply.

(i) The Charterers shall purchase and pay the Owners for all the fuel on board at the time of delivery at the substantiated price paid by the Owners at the last loading of fuel and the Owners shall purchase and credit the Charterers for all the fuel on board at the time of redelivery at the substantiated price paid by the Charterers at the last loading of fuel. The quantities of fuel shall be those recorded on the Vessel’s delivery and redelivery surveys (see Clause 5 (Surveys, Audits and Inspections);

(ii) The Charterers shall pay the Owners, or the Owners shall credit the Charterers, for the difference in the quantity of fuel on board between the delivery and redelivery of the vessel by reference to the delivery and redelivery surveys (see Clause 5 (Surveys, Audits and Inspections). In the event that the price paid by the Charterers for the quantity of fuel consumed, or credited by the Owners for fuel loaded, is a pre-agreed price, this shall be the price stated in Box 19(iii). Where the price of fuel is not pre-agreed, Box 19(iii) shall be left blank and the price shall be the substantiated price paid for the Vessel’s last loading of fuel.
**Clause 10(d): Fuel Loading**

"d) Loading of fuel – The Charterers shall supply fuel of the specifications and grades as stated in Box 19 (iv). The fuels shall be of a stable and homogenous nature and unless otherwise agreed in writing, shall comply with the latest edition of ISO Standard 8217 as well as with the relevant provisions of MARPOL... During delivery representative samples of all fuels shall be taken at the vessel's fuel manifold. Each of the samples shall be divided into a minimum of four (4) sub-samples, labelled and sealed and signed by the suppliers, Chief Engineer and the Charterers or their agents. One sub-sample shall be retained on board for MARPOL purposes and the remaining samples distributed between the Owners, the Charterers and the suppliers. If any claim should arise in respect of the quality or specification or grades of the fuel supplied, the samples of the fuel retained as aforesaid shall be analysed by a qualified and independent laboratory jointly appointed by the Parties, whose analysis as regards the characteristics of the fuel shall be binding on the Parties concerning the characteristics tested for."

**Clause 10(e-f): Fuel**

"e) Compliance - The Vessel's Chief Engineer, or nominee, may at any time before or during the loading of any fuel, stop the loading if such person reasonably believes that it does not comply with Subclause 10(d) until such time as the Charterers or the fuel supplier have reasonably demonstrated their compliance with Subclause 10(d). The Vessel shall remain on hire during any stoppage of loading under this Clause.

(f) The Owners shall not be held liable for any reduction in the Vessel's speed, performance and/or increased fuel consumption nor for any time lost arising as a result of any fuel not complying with Subclause 10(d) and the Vessel shall remain on hire."
Owners should be alive to need for self-protection:

- C/E fully engaged with sampling/testing during loading.
- C/E alive to right to cease loading.
- Need to document reasonable belief in non-compliance and ensure good faith.
- Ensure samples properly stored/labelled for later speed/performance disputes.

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Clause 10: Fuel
Owners’ Protection

Clauses (a) and (b) are continued:

Clause 5(a): Surveys

(a) Surveys – Upon delivery and redelivery of the Vessel, the Parties shall jointly appoint an independent surveyor for the purposes of determining and recording in writing:

(i) the type and quantity of fuel;
(ii) the quantity of potable water remaining onboard; and
(iii) the cleanliness and condition of the cargo tanks, as at the time of the Vessel's delivery and redelivery respectively.

The Parties shall jointly share the time and expenses of such surveys.

[cont. ...]

Clause 5(a): Audits & Inspections

(b) Audits and inspections – Prior to delivery the Owners shall provide the Charterers with such information and documentation as the Charterers may reasonably require to conduct a vessel audit, survey or inspection, upon reasonable notice.

Provided that audits, assessments, surveys or inspections can be accomplished without hindrance to the working or operation of or delay to the Vessel, and subject to prior consent, which shall not be unreasonably withheld, the Owners shall provide full access to the Vessel prior to delivery for the Charterers or their appointed auditor to carry out vessel audits, assessments, surveys and inspections.

[cont....]
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Gemma Morgan, Quadrant Chambers

Clause 5: Audits & Inspections

The Charterers shall have the right at any time during the Charter Period, subject to reasonable prior notice, to conduct, or have conducted, any audits, assessments, surveys or inspections of the Vessel.

The cost for all such audits, assessments, surveys and inspections shall be for the Charterers’ account.

The Owners and the Crew shall assist the Charterers with the audits, assessments, surveys and inspections.

The results, conclusions and any recommendations arising from such audits, assessments, surveys and inspections shall be presented to the Owners for review and reasonable time to comment prior to inclusion on OVID, CMID or similar systems.”

Clause 33: Lay-up

Comprehensive regime

SUPPLYTIME 2005 Clause 6(d) removed.

Now comprehensive laying-up regime in Clause 33:

“The Charterers shall at any time during the Charter Period have the option to require the Owners to place the Vessel in lay-up in accordance with the following process:

(a) The Charterers shall notify the Owners in writing of their intention to lay-up the Vessel including a date for the commencement of the lay-up and its estimated duration. The Charterers shall nominate a safe port or place where the Vessel shall be laid up.

(b) The Owners shall within seven days, provide the following responses in writing to the Charterers:

(i) the Owners’ approval, which shall not be unreasonably withheld or delayed, of the nominated port or place of lay-up, or, if not approved, provide an alternative port or place;

(ii) the Owners’ description and justification of the nature and extent of the lay-up;

(iii) the Owners’ reasonable estimate of costs to place the Vessel in lay-up and the time required;

(iv) the Owners’ reasonable daily savings during the period the Vessel is in lay-up and the amount of reduced hire during the period of lay-up; and

(v) the Owners’ reasonable estimate of costs to reactivate the Vessel at the end of the period in lay-up and the time required.

[cont. …]
Upon receipt of the information in Subclause 33(b) above, the Charterers shall, within seven (7) days, confirm to the Owners if they require the Vessel to be laid-up. The Owners shall, upon receipt of the confirmation by and orders from the Charterers to lay-up the Vessel, take all actions necessary to effect the laying-up of the Vessel.

The Vessel’s hire rate shall be reduced to the amount specified by the Owners in Subclause 33(b)(iv), from the date the Vessel is in the port or place agreed and commences to effect lay-up. The Charterers shall pay the reasonably incurred costs of laying-up and of reactivating the Vessel.

The Charterers shall give the Owners no less than thirty (30) days prior written notice when they require the Vessel to be reactivated and ready in all respects to accept the Charterers’ voyage instructions. The Vessel’s hire rate shall revert to the Hire specified in Box 20(i) thirty (30) days following receipt by the Owners of the reactivation notice, or once the Vessel is again fully operational and able to comply with the Charterers’ voyage instructions, whichever is the earlier.

Should the Vessel continue to be in lay-up on the date of expiry, or earlier termination of this Charter Party, the Charterers shall pay the Owners:

(i) a lump sum equal to thirty (30) days Charter hire at the reduced charter rate;
(ii) the amount specified in Subclause 33(b)(v);
(iii) a demobilisation fee for the Vessel, equal to the time and costs necessary for the Vessel to transit from its port or place of lay-up to its port or place of redelivery under this Charter Party; and
(iv) any other amounts due to the Owners under this Charter Party.

Any of the Owners’ obligations under this Charter Party that cannot be complied with as a direct result of the Vessel being laid-up shall be suspended, but only for the duration of the period that the Vessel is in lay-up.

During any period the Vessel is in lay-up, the right to earn Maintenance Days under Subclause 13(c) shall be suspended but without effect to any such Maintenance Days already accumulated.
“An outstanding junior with an excellent eye for detail.”

(Legal 500 Asia Pacific 2017)

Practice Overview

Gemma has a broad commercial practice with particular focus on shipping, international trade, commodities, insurance and international arbitration. She appears regularly in the High Court, and has particular experience of jurisdictional disputes and commercial injunctions. Gemma also appears regularly in arbitrations, particularly those held on LMAA and LCIA terms. She provides an efficient and thorough service and combines accurate legal analysis and advice with practical commercial and tactical awareness. She has extensive experience of heavy and technically-complex cases, in particular those in the shipping and energy sectors, and enjoys working well as part of a team.

Gemma is identified by Legal Week as one of its ten Stars at the Bar for 2016 in a profile piece on the most promising young barristers. Gemma received the following praise from clients:

“razor sharp mind, ideally suited to complex commercial disputes”.

“... retains a strong sense of commercial awareness, which, allied with a combination of intellect, enthusiasm, and emotional empathy, marks her out as someone special.”

“Her confident advocacy means she can win the ear of the judge even when pitted against far more senior opponents”

“... excellent at giving a clear tactical steer at the outset and recognising the broader commercial considerations”

Gemma is recommended by Chambers UK and the Legal 500 UK and Asia Pacific editions as a ‘Leading Junior’
The new Supplytime clause 13 – fit for purpose?
Simon Kverndal QC

An Owners’ problem - Charterers’ clout counts for far more than the wording of the clause

A Charterers’ problem – off-hire is an inadequate remedy (NB Box 32/clause 34(d) and yet …)

A problem for both – time lost for:
- Surveys (on hire, but disruptive)
- Post-accident investigations (off-hire, but can be ‘excessive’)

Tonight’s basket

- Equipment
- “Deficiency of crew”
- “Liability for vessel not working”
- Maintenance days
Exception for quarantine and sickness – lines 375-377
- No change, but substantial and very sensible changes to Fever and Epidemics clause, ch.25, which underpins this

Exception for trading to rivers/ports with bars – lines 380-382
- No change but NB this oddity – grounding on a bar = on hire, grounding on a river bank = off-hire. Why?

Exception for Force Majeure - line 385
- Tidied up – old FM clause effectively provided an exception to off-hire and new clause 13 reflects this

Partial off-hire –
- No provision but may well be appropriate (cf crane clauses for geared bulkers) given wide range of services being provided or when both Owners and Charterers are carrying out repairs. Bespoke provisions?

A new (and much better/fairer) dry-docking regime – lines 402-414
- D-d now separated out from maintenance (lines 392-401)
- ST 2005 puts Charterers at serious potential risk – defects have been ironed out.

ST 2005 –
- Owners to give d-d schedule at commencement of C/P (i.e. after C/P concluded) and Charterers agree to assist Owners to stick to it, though Charterers similarly bound
- Owners have unrestricted choice of repair port
- on hire during transit from Area of Op to repair port and back

ST 2017 –
- V/l off-hire from time put at Owners’ disposal till returned to Charterers in that same place
- Owners’ choice of repair port to be reasonable (for both) as to time and cost

“Equipment” – the clause

ST 2005 – lines 545-547
- If as a result of any ... breakdown of machinery, damage to hull or other accidents to the Vessel

ST 2017 - line 366-368
- If as a result of any ... breakdown of machinery, and/or equipment (excluding any equipment installed on the Vessel by the Charterers pursuant to clause 4 (Structural Alterations and Additional Equipment)
“Equipment” – problem solved?

Breakdown of DP equipment etc. is now an off-hire event

BUT

Is Vessel off-hire when primary system is out of operation but Vessel can operate because DP2?

“Deficiency of crew” – line 366

- “Deficiency” = numerical insufficiency (flag state etc.)
- Doesn’t cover:
  - Time lost waiting for relief crew
  - Downtime where there has been failure to comply with special local manning requirements
  - “Default” of crew (NB Master/crew obligations under clause 7 are not very onerous)

“Liability for vessel not working”

ST 2005 – lines 575-580

The Owners’ liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever shall be limited to suspension of hire, except as provided in Clause 71(a)(i)

[See Rainey para. 5.75 and LMLN 585 arb 1/02]

ST 2017 – lines 386-390

The Owners’ liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever including negligence on the part of a member of the Owners’ Group, shall be limited to suspension of hire, except as provided in Clause 71(a)(i), whether or not the Vessel is off-hire.

Point is now clear – but in Owners’ favour, not Charterers’
Notwithstanding clause 13(a) the Charterers shall grant the Owners a maximum of 24 hours on hire, which shall be cumulative, per month or pro rata for part of a month from the commencement of the Charter Period for maintenance and repairs including drydocking (hereinafter referred to as “maintenance allowance”). In the event of less time being taken by the Owners for repairs and drydocking or, alternatively, the Charterers not making the Vessel available for all or part of this time, the Charterers shall, upon expiration of the Charter Party, pay the equivalent of the daily rate of hire then prevailing in addition to hire otherwise due under this Charter Party in respect of all such time not so taken or made available.

Notwithstanding clause 13(a) and 13(c)(ii) the Owners shall be entitled to 24 hours on hire per month or pro rata, which shall be cumulative, from the commencement of the Charter Period for maintenance, survey, repair, and drydocking (Maintenance Days). During any such Maintenance Days, the Charterers’ obligations under Sub-Clause 9(a) (Charterers to Provide) shall be suspended. Using, or not using Maintenance Days shall be the Owners’ decision alone and they shall give the Charterers reasonable notice of their intention to use such days and how many. Hire shall not be payable for accumulated Maintenance Days not used by the Owners. However, hire for any Maintenance Days which, at the Charterers’ request, have not been used shall be payable on redelivery or earlier termination of the Charter Party.

The new MD regime …

(1) Still get a day a month for maintenance, repair, survey and d-d
(2) But no accumulation of hire equivalent of MDs
(3) Owners pay for “Charterers to provide” items/services when using MDs
(4) BUT if Charterers refuse Owners request (on reasonable notice) to use MDs then accumulated hire equivalent is payable

NB – still assumed that vessel would be off-hire when working is prevented when carrying out routine maintenance or repairs or being surveyed. “Why”? Nowhere does it say so. (NB – no wording such as “or any other cause whatsoever preventing the full working of the vessel”).

The new regime – so is the party over?

Say one year TCP +/- one month CHOPT
MDs not used and 9 months accumulate
Owners give notice of repairs (suspecting that there is no way that Charterers can agree because vessel cannot be spared)
Charterers refuse request

Result? –
Why should Owners not recover accumulated hire?
Supplytime 2017: Evolution or Revolution?

The new Clause 13

- Evolution rather than revolution
- Fitter for purpose

THANK YOU
Simon Kverndal QC
Called: 1982  Silk: 2002

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..."A very attractive style of advocacy and pleasant to work with.” “Very thorough, thinks outside the box”...

[Chambers UK UK 2017]

Practice Overview

Simon Kverndal QC specialises in all aspects of maritime litigation and arbitration. As counsel he is particularly well-known for his experience and expertise in maritime commercial arbitrations (particularly LMAA). Consistently ranked by the leading legal directories, with Chambers UK noting that “he is top flight in arbitration matters”. While his work typically involves detailed consideration of the many and varied technical issues which arise in the field of maritime transport, he is further praised for “his ability to identify key issues and hurdles and give clear guidance on how to overcome them.”

He is a regular speaker (on Supplytime) for BIMCO and at the OSV Chartering Contract Management Seminar run every year by KNect 365 (aka Informa). Simon is acting in several Supplytime cases and has been appointed as arbitrator in Supplytime charter cases, two in the last year. Recently, he has been particularly involved in offshore disputes, the hire or sale or construction of rigs, support vessels and supply vessels and hire condition/maintenance disputes.

Simon has been an LOF salvage arbitrator since 2006 and has great experience of issues concerning tug and OSV handling in a salvage context; he is also frequently appointed as arbitrator in Wreckhire, Wreckfix, Towhire and Towcon charter disputes. At the 19th annual Salvage and Wreck Conference in 2016 he was the first recipient of a new individual award for Industry Contribution and Achievement. He is an accredited mediator and has a growing following amongst maritime solicitors as a favourite choice to mediate shipping and shipping related disputes. He has been appointed in over 25 mediations and has a high success rate. He is particularly experienced in multi-party mediations.
Why have an "Early Termination for Cause" provision?

Supplytime is somewhere in between a charterparty and an oil/gas industry contract, such as a rig hire contract.
Why have an "Early Termination for Cause" provision?

The drafting aims to make things explicit, rather than leaving the position to be governed by principles of English law or standard implied terms which are not stated.

- However, the draftsman does not make the provisions be a "code".

Why have an "Early Termination for Cause" provision?

In order to lower the bar for termination and make it clearer

- In comparison with the English common law tests for repudiatory breach and frustration

What there was in Supplytime 2005

1. Procedure involving two notices, with the first notice attempting to do two jobs: to inform and to warn.
2. Breakdown [which was within the two-notice procedure].
3. Repudiatory breach within the two-notice procedure.
The procedure with two notices

In 2017, the first notice is doing only one job: to warn.

The Explanatory Notes, page 2, say:
"The notice mechanism governing exercise of the parties' right to terminate for cause has been reviewed and clarified."

"Termination Events" which have not been altered, and where there may be problems

- Confiscation
- Constructive total loss
- Insolvency event
- Force Majeure

"Termination Event" (subject to the notice procedure) added

- If Owners do not have the required insurances
First notice now only to warn

"written notice of its intention to terminate this Charter Party unless . . ."

First notice now only to warn

There is now no duty to give information of the occurrence of a Termination Event.

No duty on Owners to inform Charterers if insurance has lapsed or is cancelled

The onus is on Charterers to call for insurance certificates, if they are concerned as to whether the Owners have the insurances required.

- Charterers will need to take note of the dates of expiry, in order to call for fresh certificates following renewal of the insurances.
No duty on Owners to inform Charterers if
taxi

What if the insurers cancel mid-term?

• There does not seem to be any provision enabling
  Charterers to require Owners to have their insurers
  undertake to give notice of the cancellation to
  Charterers.

[unless in practice this is covered by being named as "co-insured"
  under clause 17(a)(ii)]

No duty on Owners to inform Charterers if
insurance has lapsed or is cancelled

But would an obligation on Owners to inform Charterers
if Owners’ insurances are no longer in force, work in
practice?

Period of warning now 14 days

From the Owners’ point of view this is a reasonable period in
which to get fresh insurance policies.

However, from the Charterers’ point of view, it is rather long.

• I have not seen any provision entitling Charterers not to
  use the vessel and put her off-hire while she does not
  have the insurances required.
The provision is now not 15 days of preventing/hindering before the first notice is given.
The provision is now that the first notice can be given at once, and then there are 14 days to see if the preventing or hindering ceases.

Period of warning now 14 days

14 days to get the vessel un-requisitioned or un-confiscated
14 days to get the vessel un-lost???

14 days to get a vexatious bankruptcy petition withdrawn.
But also, 14 days for the Administrators to take proceedings to stop one from terminating.
Notice procedure is now tidied up

No "in any case" time limit on when the first notice can be given.

Notice procedure is now tidied up

Not left to be implied that the second notice must be given promptly.

- Second notice latest within three days of expiry of the 14 days' notice.

Notice procedure not completely tidied up

It is left to be implied that the first notice must be given promptly after the occurrence (or after being informed of the occurrence).

- There may be an argument about whether someone can give a first notice if they become informed of a Termination Event a long time after the event began.
Notice procedure not completely tidied up

As I read the wording, the second notice can only be given after the 14 days have expired.

The Explanatory Notes do not agree with me.

Notice procedure not completely tidied up

"the notifying party may terminate this Charter Party with immediate effect".

But in fact:

• Demob will be payable under clause 2(e).
• Charterers will have to bring the vessel (in their time and at their expense) to a contractual redelivery port and redeliver her with clean tanks, under clause 2(d).
• The vessel will have to be reinstated under clause 4.

Off-hire replaces "breakdown"
**Problems with "breakdown"**

Probably was intended to require an internal cause: "breakdown" as opposed to "damage".

But it turns out, as a matter of the caselaw . . .

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**Problems with "breakdown"**

Do days count as "breakdown days" if they are also maintenance days, or if Owners are suspending performance under clause 12(f)?

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**Problems with "breakdown"**

Supplytime 2005 added "and have not initiated reasonable steps within 48 hours to remedy the non-performance".
Off-hire replaces "breakdown"

Clauses allowing Charterers to terminate if the vessel has too many days off-hire are reasonably familiar from charterparties of cargo vessels (in particular, charters of container vessels for use in liner service).

Off-hire replaces "breakdown"

In relation to "internal cause", the Supplytime off-hire clause is restrictive, and further provides that the vessel will not be off-hire if non-performance is caused by breach of contract by Charterers or exposure to abnormal risks.

However, if the vessel is exposed to ordinary risks, and an accident (such as a collision) happens, the vessel will be off-hire.

Off-hire replaces "breakdown"

There is clarity, as there was not with "breakdown days".

- Days of suspended performance are on-hire.
- Maintenance days are on-hire, as the Explanatory Notes point out.

A charterer might wish for a period which included maintenance days used for unplanned repairs.
Issues with the off-hire termination provision

If the vessel goes back on hire when she is in an equivalent position, it may be open to the charterer to manipulate the service required so as to keep the vessel off-hire for longer.

Issues with the off-hire termination provision

If the parties agree a partial off-hire for something which does not create any loss of time, does that go to increase the cumulative total?

• If the icecream machine breaks down and this is agreed as 2% off-hire

Issues with the off-hire termination provision

With off-hire there is no warning notice.

An owner might wish for a notice: if the figure for aggregate off-hire is 20 days, I might wish to be warned that I had clocked up 16 days and should consider putting in a substitute vessel.
Drafting issues with the off-hire termination provision

The Supplytime off-hire clause is a “net loss of time” clause so we are not accumulating days during which an off-hire event is occurring, but the days of the resulting loss of time.

The Explanatory Notes say “if there is an off-hire event . . . that lasts longer than the agreed periods”, which may be misleading.

Drafting issues with the off-hire termination provision

If the vessel is working at 50% efficiency for 20 days, is that:

• 20 days consecutive off-hire?
• 10 days consecutive off-hire?
• not consecutive?

Drafting issues with the off-hire termination provision

If Owners put in a substitute vessel, does she start with a clean sheet, or is the aggregate off-hire accumulated by the original vessel, carried forward to count against the substitute vessel?
Drafting issues with the off-hire termination provision

In the definitions of (i) and (ii) the words "including any extensions which have been declared" have been carried over from Windtime, where they made sense, into Supplytime where they do not make sense.

I think that an interpretation can be given to the words in relation to (ii), but in relation to (i) the words may have to be simply ignored.

Off-hire replaces "breakdown"

It is as if the draftsman saw that "breakdown" had problems, and rather than trying to tackle the problems, decided just to replace "breakdown" with something else.

But then something else may turn out to have its own problems.

"Repudiatory breach"

This is an unexplained term of English law.
"Repudiatory breach"

In 1989 and 2005 this was included under the notice procedure.

Under the notice procedure

If Charterers were required to provide a bank guarantee, this might be a condition of the contract. However, Owners would have been obliged to give three days' notice, giving Charterers an opportunity to remedy the breach before Owners were entitled to terminate.

Under the notice procedure?

However, it takes clear words to give up a common law right . . .
**Termination for repudiatory breach**

If Charterers terminate for Owners’ repudiatory breach

- No demob, under clause 2(e).
- What about bringing the vessel to a contractual port of redelivery, and redelivering with clean tanks?
- Charterers presumably have to take their clause 4 kit off, but do Charterers have to pay Owners for the time involved?

**Termination for repudiatory breach**

In Windtime it seemed that damages for repudiatory breach were taken out of the exclusion clauses, but there is no such provision in Supplytime 2017.

**“Repudiatory breach”**

Rather than respond to the problem by putting in words excluding the common law right to terminate immediately, the draftsman gives up, taking repudiatory breach out of the notice provision.
"Repudiatory breach"

It might have been better to deal separately with breaches capable of remedy and breaches not capable of remedy.

• With a breach not capable of remedy, there might be a right to terminate if, and only if, the breach is repudiatory.
• With a breach which is capable of remedy, there might be a right to terminate only if notice and an opportunity to remedy the breach had been given, and the breach had not been remedied.
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Practice Overview

Robert Gay is a Legal Director with Hill Dickinson LLP. He combines the highest academic expertise in shipping and marine/energy insurance law with practical experience in handling and advising on dry shipping and insurance disputes.

He has taught as a Visiting Lecturer in Law at University College London. He is a Supporting Member of the LMAA, a Liveryman of the Worshipful Company of Arbitrators, and a member of the Education and Events Committee of the London Shipping Law Centre.

His publications include:

» Shelltime 4 and ShellLNGTime, a detailed (115 pages) commentary published by Intertanko in November 2010.
» “Damages in Addition to Demurrage” Lloyd’s Maritime and Commercial Law Quarterly, 2004


> “Unsafe berth obligations, repairs to a berth, and exceptions to laytime” (casenote on The Vine), Lloyd’s Maritime and Commercial Law Quarterly, 2011.

Robert is the enfant terrible of BIMCO’s Supplytime form. His paper “Problems and Pitfalls of Supplytime 89” has been widely cited, including in arbitrations. Following this paper, he was asked by BIMCO to speak at an event when Supplytime 2005 was launched, and then invited to design and organise a course on Supplytime for BIMCO, where the topics on which he speaks include:

» knock-for-knock
» exclusion of consequential damages
» insurance, wreck removal and pollution

His commentary on the provisions in Supplytime 2005 for early termination for cause and war cancellation (and on frustration) was available in hard copy from HD.

Robert suspects that it is not a coincidence that many of the provisions in Supplytime 2005 which he has critiqued have now been changed in the drafting of Supplytime 2017.

He is now writing an introduction and full commentary on Supplytime 2017 which is expected to be published by Sweet and Maxwell in November 2017.

Robert is also an expert on tanker charterparties, especially time charters, but also issues including laytime and demurrage. He is a member of the Documentary Committee of Intertanko, which is responsible for keeping Intertanko’s recommended clauses under review and drafting fresh clauses as required.

Robert’s work in marine and energy insurance has mostly been for the assured. However, he assisted with the drafting of the International Hull Clauses for the London Market, and has advised P&I insurers on policy wordings. He has also given expert evidence on English marine insurance law for the Multi-Member Court of First Instance in Piraeus.
Other areas where Robert has detailed practical experience include -

» FFA's
» Shipbuilding contracts
» MOA's for purchase/sale of ships
» Contracts for the hire of jack-up rigs, drillships, etc.
» Construction contracts, including offshore construction

He has considerable experience with English proceedings dealing with issues as to foreign law or relating to proceedings elsewhere in the world. He has an interest in English law with regard to anti-suit injunctions and the effect of the EU Jurisdiction Regulation and he is particularly interested in the possibility of recovering damages for breach of an arbitration agreement.
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