

THE CHARTERER

The Charterers P&I Club Newsletter

JANUARY 2006

TIME CHARTERERS LIABILITY FOR BUNKER PROBLEMS

Time charterers are facing an increase in claims from shipowners alleging damage to the main engine caused by poor quality or off spec bunkers. The larger of such claims can run into millions of dollars. There is no reason in the current market why that increase in claims should not continue and this article looks at certain aspects of the exposure of time charterers to those claims.

Provided the time charterer's liability to the shipowner is back to back with that of the bunker seller, then the ultimate liability of the time charterer should, in normal circumstances, be relatively small (subject to the bunker seller remaining solvent!). However, the vast majority of bunker purchases are from bunker traders rather than large physical suppliers. Further, all operate with very restrictive contractual conditions. Currently, the chance of a time charterer recovering in full from a bunker trader any liability he may have to the shipowner is slim, which leaves the charterer with substantial financial exposure.

There are two essential elements to the problem. The first is to try and limit so far as possible, the time charterer's liability to the shipowner under the charter and the second is to try and increase the chances of obtaining a full indemnity from the seller under the bunker supply contract.

The Time Charter

The NYPE form requires the charterers to "provide and pay for" all the fuel while the vessel is on hire. They take over and pay for all fuel on board on delivery into the charter and owners take over and pay for all fuel on board on redelivery. As a practical matter therefore, the charterers can only be liable for damage caused by bunkers that they supply.

The problem often lies with the additional clauses in the charter which specify the fuel grade required. Clauses such as "Chrts guarantee to supply vsl with bunkers of minimum standards of RME25 for IFO 180 cst" are not favourable to the charterers. But the problem is more than just one of guarantee. If the charter is subject to English law then the fact that the bunkers may comply

with the basic specifications is not enough. Under the Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994, the bunkers must be "fit for their purpose".

This does not mean that the bunkers must comply only with the basic specifications and no more. While the basic tests for bunker quality are reasonably comprehensive they do not test for every possible bunker characteristic. It is impractical for marine fuel specifications to place specific limits on all possible contaminants that might be found in bunker fuel, (even the General Requirements clause in section 4 of the ISO 8217 specifications states that fuels should not include any added substance or added chemical that "jeopardises the safety of ships or adversely affects the performance of the machinery; or is harmful to personnel; or contributes overall to additional air pollution").

What does "fitness for purpose mean"? Recent press articles concerning an arbitration case, have said that in that dispute, the fuel had very poor ignition qualities which the arbitrators were satisfied, damaged the engine of the vessel. There was nothing particularly unusual about the engine. The arbitrators held that the bunkers were not fit for

their purpose and had in fact damaged the engine so that the charterers were liable even though the bunkers were otherwise within the contractual specifications. That result on the facts was not surprising nor did it somehow change the law. However, where there are particular idiosyncrasies of the engine then the owner cannot recover from the charterer for damage to the engine resulting from those idiosyncrasies unless he has made the charterers aware of them before the supply. Evidence establishing that it was the particular idiosyncrasies of the engine that resulted in the damage may, of course, be far from easy to obtain.

So the implied term of fitness for purpose is not necessarily excluded just because the bunkers on the face of it comply with the required technical standards unless the damage in fact results from the particular idiosyncrasies of the engine known only to the owners.



JOHN BLACKER

continued on page 2

continued from page 1

Under English law it might be possible to successfully exclude the obligation of fitness for purpose but there are few shipowners who would be prepared to agree to that during the contractual negotiations.

Having said that, both owners and charterers are trying to achieve the same thing i.e. the supply of good quality fuel to the ship that does not damage the engine and at the most economical price. Can they agree on the identity of the physical supplier? Can they agree that the owners should in fact purchase the bunkers from an agreed source with the charterers paying for them? Either of these would help to reduce the risk and exposure of the charterers.

Equally, one of the main problems faced by charterers is that all bunker traders have a time limit for claims in their trading conditions. The following clause is an example of an extremely restrictive clause in current use:

“Notice of any claim of whatsoever nature arising, made by the buyer against the seller shall be given in writing fully documented with all supporting documents to the seller at their address and be received by them within 7 days from the date on which the delivery was completed. ... Unless the buyer gives notice of any claim pursuant to this clause, within the time limit, all claims by the buyer of whatsoever nature shall be automatically extinguished and absolutely time barred and waived against the seller. ...”

It is rare that bunker test results are even obtained within 7 days of delivery, let alone that the bunkers have started to be used, those on board have found a problem with them and the owners have notified the charterers of a potential claim, within that time limit. While in some jurisdictions such a clause could be challenged as being unreasonable or unfair, it might well be upheld particularly where the seller has chosen his law and jurisdiction with care. (Incidentally, the particular conditions from which the above clause is taken comprise 4 closely typed pages with some 22 very detailed clauses, the vast majority of which are designed to protect the seller from all and any liability!).

Can a charterer successfully incorporate such a clause or indeed any of the seller's terms and conditions into the time charter in relation to bunker claims so that he can rely on some or all of the seller's conditions in defence to a claim brought by the shipowner? That is unlikely but anything that can be done during negotiations to reduce or limit the charterer's exposure or to match that exposure to the right of claim against the bunker seller can only be of benefit to the charterer. After all, even ensuring that the law and jurisdiction clause in the charter match that in the bunker sales contract is of considerable help.

In relation to the taking of bunker samples (and it is the analysis of those samples on which bunker claims are primarily based), charters rarely state how samples are to be taken or retained. Yet sales contracts sometimes state that “local methods” will be used and that such samples will be conclusive and binding between the parties. Disputes can and do arise where “local methods” are said to relate to samples taken at the barge manifold on delivery from the bunker barge or even to the bunker barge from the shore tank, which simply do not match a chief engineer's sample properly taken by the continuous drip method at the ship's manifold throughout delivery. Is there any reason why a shipowner should not agree that all bunker sampling should be taken jointly with representatives of the bunker suppliers and that the method of sampling shall be the international method as recommended, for example, in Marpol Annex VI at the ship's manifold (even though Annex VI is primarily dealing with sulphur reduction)? Is it possible also to specify how long such samples should be retained on board the vessel and be available for joint analysis between owners and charterers?

If the charterer's potential liability under the charter to the shipowner cannot be materially reduced during negotiation, then the terms of the bunker sale contract are all the more important.

The Bunker Sale Contract

Why is it that charterers permit owners six years in which to bring a claim for damage to the main engine caused by the bunkers under an English law charter where there is no express time limit clause; and yet agree with bunker sellers that any quality claim will be time barred after 7, 14 or a maximum of 21 days after the bunkers were delivered? Why is it that London arbitration and English law can be agreed in the charter and a wholly different law and even a floating jurisdiction clause in the seller's option can be accepted without question in the purchase contract?

It is rare to see any term in a bunker purchase contract that has been genuinely negotiated and which varies the seller's general terms and conditions apart from the price. There are even cases where the sellers attempt to incorporate both their own terms and conditions as well as those of the physical supplier. While there may be argument about whether the general terms have been successfully incorporated into the contract by the seller or as to the exact meaning of a specific exclusion clause, in the vast majority of cases, the time charterers have a substantial risk of not being able to pass on to the sellers, any liability they may have to the shipowners. Is this really because commercially, no bunker seller is ever open to negotiation in relation to matters other than the price?

continued on page 3

continued from page 2

Probably the most relied on clause by sellers is that which attempts to exclude all claims unless notice is given within a very short period of time after delivery of the bunkers to the ship. Is there any reason why that clause cannot be negotiated in charterer's favour to provide that any claim is not excluded or barred until an agreed period after the charterers have themselves received written notification of a claim from the shipowner? If not, can the seller be persuaded at the very least to agree that the time limit for claims should be substantially in excess of the current limits – say up to one year from the date of delivery?

Is it possible to negotiate with the seller that the sale contract should be subject to the same law and jurisdiction as that applying in the charter particularly where the charterers have some buying power? It would also be of considerable assistance to charterers if they could incorporate a clause simply saying that the sellers warrant that the bunkers supplied are fit for their purpose.

In relation to bunker sampling, sellers almost invariably state in their trading conditions that the sample taken by

their representative whether jointly with the Chief Engineer or not, is final and binding on both parties and yet even the method of sampling is not specified or if it is, it is to their benefit. Is it possible to agree that samples will be taken during delivery in accordance with the recommendations of Marpol Annex VI jointly with representatives from the ship and that the sellers will retain such samples for a minimum of say six months, or longer if given notice to do so by the buyers?

With claim numbers and values increasing, anything that can be negotiated to reduce time charterers' exposure to liability for bunker claims must be an improvement over the current position. In terms of simple risk management, it would be worthwhile for charterers to have a closer look at that exposure and to do everything they can to draw their charter obligations in respect of the supply of bunkers closer to their rights of recovery from the bunker sellers.

John Blacker
Ross & Co solicitors
London
October 2005
www.finnross.com

100 CORRESPONDENTS MEET THE CLUB



A truly international gathering.
L/R Capt. John McLintock (Brazil), Sarah Wright-Lawson (France)
and Wilson Nyangala (Kenya)

When The Charterers Club was formed in 1986 it appointed representatives in approximately 100 ports around the world but due to subsequent expansion of business and the ever increasing need for quality service the number of listed correspondents has risen to over 400. The Club has always held its network of correspondents in high regard, fully appreciating the value of their special expertise in understanding and solving local problems.

The Club believes that personal relationships develop trust and understanding which translates into greater efficiency when dealing with difficult problems. It is, however, difficult to nurture relations with companies and people who, by their very nature, are spread all over the world. While the Club makes every effort to visit correspondents when in their locality, and some correspondents are regular visitors to London, there are some who have never met any of the club's personnel.



Claudio Tagliavia (left) and Christopher Else
in discussion.

It was therefore fortunate that a large number of the club's correspondents were attending a conference in London in September presenting a heaven sent opportunity for many correspondents to visit the club. An invitation was extended to all the Club's listed correspondents who were in town to visit the company's office in Leadenhall Street on 21st September 2005.

The format of the day was informal, with the office open to receive guests from 10 a.m. until close of business. Some correspondents dropped by for a quick cup of tea or coffee and a chat, while others took the opportunity to stay for lunch.

Following lunch, Christopher Else, Managing Director of Michael Else and Company Limited welcomed the guests and spoke of the importance of the part played by correspondents in providing service to the Club's clients and helping to handle claims efficiently.

DON'T GET CAUGHT ON A TECHNICALITY

Following our review of a number of time charter parties used by Assureds, there appears to be a growing trend to omit anti-technicality clauses from the NYPE '46 and Baltime forms.

The right to withdraw a vessel from a charterer's service for non-payment of hire is a draconian remedy available to owners, especially in circumstances, for example, where hire is paid on time but is short because of the unexpected deduction of bank charges and where, under English law, there is no equitable relief from forfeiture available despite the severity of the consequences to a charterer. The purpose of the anti-technicality clause is to provide a degree of excess latitude to the charterer to remedy any failure to pay hire by the due date by requiring the owner to give notice of default and to allow the charterer a certain specified or grace period (expressed in either days or hours) within which to remedy the default before the right to withdraw arises.

Whether the trend to omit anti-technicality clauses comes from the legacy of the recent high freight market or other commercial factors, charterers should always seek to have an anti-technicality clause included in the charter party terms. For guidance, the essence of an anti-technicality clause is as follows:–

'... where there is any failure to make punctual and regular payment due to oversight or negligence or error or omission of Charterers, Charterers employees or agents or bankers, Owners shall notify Charterers in writing where upon Charterers will have 3 (three) banking days to rectify the failure and where so rectified the payment shall stand as punctual and regular payment ...'

See also Clause 11(b) NYPE 1993.

Given the availability and common usage of anti-technicality clauses, if such a clause has not been incorporated, the Courts will not intervene to imply a degree of latitude, however small, where there has been a failure to negotiate such a clause.

Even when an anti-technicality clause has been incorporated we have seen a worrying trend favouring the inclusion of a liberty, in favour of owners, to temporarily withdraw or withhold performance of owner's charter party obligations in the following or similar terms:–

'... while the hire is outstanding the owners shall without prejudice to the right to withdraw be entitled to withhold performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof in respect of which the charterers hereby indemnify the owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the charterers account ...'

Under English law there is no right to temporarily withdraw a ship from a charterer's service nor to withhold performance of a charter party beyond what has been contractually agreed in the charter party, such as, for example an owner's right to exercise a lien over cargo. As such and especially given the wide ranging benefits which such a clause confers on owners, the inclusion of this type of provision should be resisted.

The choice is yours

We are pleased to inform you can now receive your copy of The Charterer by e-mail. Simply contact charterers@else.co.uk with your request and state whether you still require a hard copy as well as the electronic version.

THE CHARTERER NEWSLETTER

If you wish to contribute to the next edition of The Charterer then please contact the Managers at:
Michael Else & Company, 65 Leadenhall Street, London EC3A 2AD
Tel +44 20 7702 3928 Fax +44 20 7702 3993
e-mail charterers@else.co.uk
www.else.co.uk