

BPTIME3

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BPTIME 3 Time Charterparty

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The great majority of the tanker charter parties developed over the years have been designed by the oil majors largely for their own benefit. Two years ago, BP Shipping baulked at this tradition and took the unprecedented step of approaching BIMCO with a request for assistance in developing a new tanker time charter party, to be code named BPTIME 3.

BP's ambition was to produce a charter that would be accepted as a new standard form by the tanker industry, not limited in its use to charters concluded with BP.

To achieve this aim, BP recognised that the endorsement of the form by BIMCO, renowned for its expertise in the development and promotion of standard shipping forms, would be an essential part of the process.

BP's reasons for involving BIMCO in the development of BPTIME 3 were twofold: first of all, BIMCO's considerable expertise in the drafting of standard documentation would greatly assist in the production of a charter party technically and legally superior to forms presently used by the tanker sector; secondly, BP realised the importance of ensuring that BPTIME 3 reflected commercial realities and took into account the interests of both parties to the contract. This could only be achieved by the active participation of the shipping industry.

As BIMCO represents shipowners worldwide, its stamp of approval on BPTIME 3 would positively influence the promotion of the form. BIMCO approved documents are generally considered to be well balanced with the terms and conditions fairly struck between the parties. Recognition of this balance and of the standard wording adopted by BIMCO makes it easier for parties to conclude their fixtures on BIMCO forms without the need for hard negotiations and major amendments.

It took a little over a year for BIMCO and BP to develop BPTIME 3. Both parties agreed from the outset that an innovative approach in a number of areas was needed if the new charter were ever to appeal to the tanker industry at large.

As a result, the new form represents a significant departure from similar forms used in the tanker industry. Firstly, it adopts a less complex formula than seen in many tanker charter parties in respect of the number of clauses and secondly, some clauses which have, up until now, been considered as standard in tanker charters, have been dropped altogether.

Although, as is natural in any negotiated form, BPTIME 3 reflects compromises in some areas, it is nevertheless a thoroughly simplified charter setting out the responsibilities of the contractual parties in a clear and balanced way, which the commercial parties can safely rely upon as a basis for negotiation. It is certainly BIMCO and BP's hope that there will be some "return on investment" for the considerable efforts which have been put into this new Charter and that the industry will see this document as a step in the right direction and take the opportunity to make use of it.

The purpose of this paper is to highlight some of the key clauses in the new BPTIME 3 Charter and provide a little background information in respect of the thinking behind some of these clauses.

Preamble

From Lines 9 to 12 of the Preamble it will be seen that the BPTIME 3 Charter shall be performed subject to the provisions of the Charter comprising of the Preamble, Part I, Part II, the OCIMF Vessel Particulars Questionnaire and the BPTIME 3 Questionnaire. Companies other than BP may wish to make use of their own questionnaires and should therefore amend the Preamble accordingly.

Clause 1 - Delivery and Charter Period

Sub-clause 1.2 contains the basic obligations of the shipowner to deliver the vessel in a seaworthy condition, in every respect fitted for cargo service. The requirement to deliver the vessel in a seaworthy condition is an absolute one and it will be seen that care has been

taken in Clause 35 (Exceptions), by specific reference to Clause 1, not to modify the owners' absolute obligation to deliver the vessel in a seaworthy condition by the incorporation, for the purpose of the Charter, the U.K. Carriage of Goods by Sea Act 1971. (See also the comments made in respect of Clause 35 (Exceptions)).

As in any other time charter party, the owners must deliver the vessel in conformity with the description provided, failing which they will be in breach. However, the description of the vessel is not set out in the actual charter party, but in the BPTIME 3 Questionnaire, which may be subject to amendment over time. As a consequence, the fact that the vessel should in all respects live up to the description contained in the Questionnaire could appear to be a rather dangerous undertaking. As a safeguard, it was agreed to insert the word "material" in to the phrase "...and in all respects meeting the description of the Vessel set out in the Questionnaire" to make it clear that minor variances in the description should not constitute a breach entitling the charterers to cancel the charter.

Clause 2 - Cancellation

Traditional cancellation clauses found in many currently used voyage and time charter parties have been construed to mean that the charterers may await the vessel's arrival at the loading/delivery port before they exercise their option of cancellation - even if it is perfectly evident well ahead of time that the vessel will not be able to keep her cancellation date. In the dry cargo trade there has been a growing practice over the years of including as part of the cancellation provisions a so-called "interpellation" clause. This provision is designed to relieve the owners of the obligation to proceed on a long voyage towards the loading or delivery port, not knowing whether the charterers will exercise their option to cancel the charter should the vessel fail to arrive by the cancellation date.

BIMCO has invariably insisted upon the inclusion of interpellation clauses during negotiations with charterers' organisations and, although it is rare to see interpellation provisions in tanker time charter parties, BP was receptive to the idea.

However, as a quid pro quo for BP agreeing to include interpellation provisions in BPTIME 3, they insisted that the cancellation provisions should give the charterers the right to cancel before the cancellation date if it became obvious that there was no way that the vessel could be delivered by the cancellation date. Under English law there is no anticipatory right for the charterers to cancel even if it is quite obvious that the vessel is not going to make her cancellation date. This was made quite clear in the Court of Appeal decision in the *Mihalis Angelos* [1970] 2 *Lloyd's Law Rep.* 43 which decided that the charterers, in the case of a voyage charter, had no right to cancel before the agreed cancellation date.

BIMCO agreed that the charterers should enjoy a reciprocal right to cancel if it appears to them that the vessel is not going to be delivered before the cancellation date and the owners are unable or unwilling to refute this.

Therefore, the owners' right to interpellate as to whether the charterers intend to exercise their option to cancel and the resulting effect thereof, is provided in sub-clause 2.2 (in conjunction with sub-clause 2.4 first and second paragraph), while the charterers' right to interpellate and the resulting consequences are provided in sub-clause 2.3, 2.4 first paragraph and sub-clause 2.5. Although Clause 2 may appear slightly convoluted, it is felt to take a balanced approach to protecting the interests both of the owners and the charterers in respect of the delivery of the vessel under a time charter.

Clause 3 - Redelivery

It happens quite often that there are disputes between the parties whether the vessel has been redelivered in accordance with the contractual terms of the charter, not least when the market hire rate has been fluctuating while the vessel has been on charter. Since re-delivery beyond the agreed charter period is considered a breach of contract, it is essential for the contractual parties to complete Part I to establish the precise charter period.

The provisions of Clause 3 are not materially different from those found in a number of other tanker time charter parties developed by oil majors. However, it is worth mentioning that the provisions relating to final voyage were the subject of discussion since the charterers' order for the last voyage is often a problematic area. An unforeseen overrun prior to the commencement of the last voyage may result in the charterers not being able to complete the last voyage within the agreed charter period. The problem is not an easy one to resolve since whereas the owners have a vested interest in timely re-delivery of the vessel, the charterers may be in breach of their contractual obligations towards their sub-charterers if the owners refuse to perform the order for the last voyage.

BIMCO felt that consideration should be given to the House of Lords' decision in the *Gregos* [1995] 1 *Lloyd's Rep.* 121. In the *Gregos* case the House of Lords dealt with the issue of whether a final voyage order was legitimate or not. It was made clear that if, at the time the voyage order was given, it appeared that the order was a legitimate one but circumstances changed so as to make the order no longer valid by the time the order was to be performed, the owners would be released from their immediate obligation to perform that voyage. If the charterers nevertheless insisted upon the order being performed, the owners would be entitled to refuse the order and require either a new order to be given permitting timely re-delivery of the vessel or to perform the order without prejudice to their right to claim damages for breach of charter.

On their part, BP felt that the provisions in BPTIME 3 in respect of final voyage orders reflected common commercial practice in the tanker trade and should remain unchanged. In BP's view, adopting the "final voyage" provisions of BIMCO's recent GENTIME General Time Charter Party (which clearly reflect the decision in the *Gregos*) might significantly disadvantage the charterers and unduly complicate the marketing of BPTIME 3 as an industry standard form.

BIMCO conceded that it was rare in the tanker trade for charterers to abuse their right to order the vessel on a voyage which may not allow timely re-delivery, thus reducing their exposure to higher market rates at the owners' expense. It was also felt that the notice provisions in sub-clause 4.1 would enable the parties to give advance notice of what was going on, which would also help to reduce the likelihood of such a problem occurring.

Clause 8 - Hire

The hire provisions in BPTIME 3 are not materially different from those found in other tanker time charter parties except, perhaps, for sub-clause 8.4. This sub-clause contains specific provisions, similar to those found in many dry cargo time charter parties, to the effect that the owners can suspend the performance of the charter or alternatively withdraw the vessel from the service of the charterers in the event of late payment of hire. The clause is carefully worded to ensure that if the owners give notice of their decision to suspend services under the charter after five banking days after the lapse of the payment date, they cannot subsequently cancel the charter without giving further written notice to the charterers. This, at least, would be the position under English law. Consequently, sub-clause 8.4 provides that notwithstanding the suspension of performance of the charter, the owners may withdraw the vessel provided they give a further 24 hours notice. As a protective measure, lines 194-197 require the charterers to indemnify the owners in respect of any liabilities incurred by owners under the bill of lading or other contract of carriage as a result of suspension or withdrawal from their obligations under the Charter.

Clause 9 - Owners' Obligations

This Clause contains a number of owners' obligations, some of which are more important than others. Owners should look carefully at sub-clause 9.2 which contains very important provisions affecting their right to structure the operation and management of the vessel in the most appropriate way.

Sub-clause 9.2 was the subject of considerable debate both within the working group and BIMCO's Documentary Committee. The view was held by BIMCO that the owners should enjoy some freedom to structure their business during the performance of the charter without first having to seek the charterers' approval in matters affecting the operation and management of the vessel. It was argued that the sub-clause stifled this basic commercial freedom to the extent that the potential repercussions of the owners failing to seek the charterers' prior approval could ultimately lead to the charterers terminating the charter.

While recognising that, in certain areas, it is important for the charterers to be able to exert their influence on the owners' decision making process relating to the running of the vessel, such influence must be exercised within reason.

It is commonplace for charter parties to provide that the owners cannot change ownership without the charterers prior consent. Twenty years ago the structure of ship ownership was such that the vessel's owners would generally be expected to have full management responsibilities. Today this is no longer the case and it has become common practice for owners to sub-contract the management of their vessels to third parties, who will usually act as an agent for and on behalf of the owner in undertaking management functions. Therefore, the practice and implications of "third party management" have become a very important issue.

To alleviate the concerns that some shipowners might have of being unduly restricted in their

ability to re-structure their businesses, it was agreed that if the charterers deny their consent to a particular change, then the owners can require them to propose an alternative which is acceptable to the charterers.

It was agreed to keep hull insurance separate from the other items listed in sub-clause 9.2 to allow a reasonable change in the insurance amount. This is dealt with in sub-clause 9.3 which provides that the amount of insurance can be changed, but only with the charterers' prior consent which, in keeping with sub-clause 9.2, is not to be unreasonably withheld.

Clause 15 - Charterers' Obligations

This Clause contains the reciprocal provisions of Clause 9, levying upon the charterers a number of obligations, some of which are more important than others.

Provisions which often tend to be a source of disputes are those relating to the description of the fuels and who is liable in the event the fuels cause damage to the vessel's engines and auxiliaries. A few comments will therefore be made in respect of sub-clause 15.2.1 providing that the charterers shall provide and pay for all fuels of a quality suitable for burning in the vessel's engines and auxiliaries etc.

Again, the provisions relating to bunkers were the subject of considerable discussion in the working group and it was quite clear that BIMCO and BP represented two different schools of thought regarding how to address the matter.

BIMCO was of the view that a good bunker clause needs to provide clarity and that this can only be achieved through rather detailed provisions setting out the specification of the fuels, the suitability of the fuels for the vessel's engines and auxiliaries and the apportionment of risk if the fuels do not meet the specifications or are unsuitable for the vessel's engines or auxiliaries.

BP's view differed to the extent that they felt that specific provisions do not assist in solving the many borderline cases in respect of unsuitable fuels that cause damage to the vessel's engines or auxiliaries. They considered that it was better to leave it to the Courts to decide the matter on the basis of the law of bailment, i.e., the charterers deposit their possession (the bunkers) into the care of the owners via their possession (the vessel) with the bunkers being for the charterers' exclusive use. Thus, if the charterers' bunkers are unsuitable or cause damage to the vessel's engines or auxiliaries, the charterers, as bailors, will be liable to the owners, as bailees.

Sub-clause 15.2.1 nevertheless provides that all fuels ordered by charterers are to be of a quality suitable for burning in the vessel's engines. This presumes that in the event the fuels meet the specification required by the owners, but nevertheless cause damage to the vessel's engine because of undetected impurities or unacceptable additives, then the responsibility will rest with the charterers.

Clause 18 - Performance of the Vessel - Speed and Performance

One of the most distinguishing features of BPTIME 3 is its Speed and Performance Clause. The tanker sector has traditionally taken a highly detailed, text-book approach to this important clause, with the outcome of recent judgements being used to augment existing provisions. The basic concept has been to attempt to describe the underlying principles and spell out precisely how speed and performance should be determined in any given event. The success of this type of detailed clause depends on establishing an exhaustive list of possible events and combination events likely to affect speed and performance. There is little evidence to suggest that taking a highly detailed and exhaustive approach actually leads to fewer disputes as actual events rarely match precisely those described in the clause.

With this in mind, Clause 18 of BPTIME 3 has been drafted concisely, regulating the basic principles without detailing the techniques for calculating speed and performance. The Speed and Performance Clause is composed of two parts: the first is a simple acknowledgement by the owners of the charterers' general instruction for the vessel to proceed at the service speed stated in the Questionnaire. The second part is the actual performance provision whereby the owners warrant that the vessel is and shall continue to be capable of maintaining any of the speeds and corresponding consumptions stated in the Questionnaire. The warranty applies in weather conditions only up to and including Beaufort Force 5.

In the event that the vessel fails to maintain the warranted capability, the charterers are compensated by an adjustment of hire for any loss of time or consumption of additional bunkers. It is important to note that the charterers' compensation is based upon a loss of capability and not on the vessel's average performance over a period of time.

Clause 35 - Exceptions

This Clause provides for background liability regime as between the owners and the time charterers by reference to the UK Carriage of Goods by sea Act of 1971. However, whereas BIMCO and BP agreed that the Hague-Visby Rules should provide the platform for the division of cargo liability between the owners and the time charterers, they had slightly different ideas of how they should be addressed in BPTIME 3.

It is a generally known fact that the Hague and Hague-Visby Rules are bill of lading rules and therefore not specially designed for time charter parties. In fact, their mere incorporation into time charter parties may have effects not intended by the commercial parties.

BIMCO took the view that rather than applying the Hague-Visby Rules by reference to the UK Carriage of Goods by Sea Act, the provisions setting out the responsibilities for cargo damage should be spelt out in the charter more or less in the same way as in BIMCO's recent "Gentime" General Time Charter Party, thus leaving no doubt as to the parties rights and obligations. This would appear to be a more user friendly, albeit long-winded approach, as it would clearly show the cargo liabilities that the respective parties undertook when entering into the charter.

BIMCO receives quite a number of queries from members asking what sort of liabilities they undertake as an owner, respectively as a time charterer, when entering into the "NYPE 46", simply because they are not familiar with what the Hague or Hague-Visby Rules provide. BP, however, preferred to lift over the "Exceptions Clause" from the "BPVoy 4" Charter which they felt constituted a less complicated formula and which, with some simple modifications, could be tailored to address the division of liability between the owners and the charterers in a proper way.

Whereas, as already mentioned, BIMCO and BP were in agreement that the Hague-Visby Rules would be a good platform for setting out the basic responsibilities of the owners and the time charterers, they were also readily aware that applying the Hague-Visby Rules throughout the charter could take away the plain meaning of the charter and unintentionally provide the owners with "back door" defences to their liabilities.

Therefore, the provisions of the Exceptions Clause have been worded so as not to affect the owners basic obligations under Clauses 1, 9, 10, 11, 18 and 19.

There were two matters of particular concern to BP in this respect, i.e., 1) the incorporation of the Hague-Visby Rules should not affect the nature of Clause 1 according to which the Owners would have an absolute obligation to deliver a vessel in a seaworthy condition, and 2) the Hague-Visby Rules effect on the off-hire provisions - in particular, the exemption from liability for the act, neglect or default of the master in the navigation or management of the vessel (Aquacharm [1980] 2 Lloyd's Rep. 237).

Sub-clauses 35.2 and 35.3 deal with indemnity claims and time bar provisions respectively. They deserve only a few comments. However, it may be worthwhile to emphasize that provisions have been included in 35.2 to the effect that the party against whom an indemnity claim is made shall be able to rely upon the same defences and limits as the claimant had in respect of the principal claim. Therefore, if a cargo claim has been made against the owners but which is to be borne by the time charterers under the charter party and the owners neglect or omit to make use of the defences or limitations they would otherwise be entitled to in the cargo owners action against them, the owners shall not be in a position to pass on the excess liabilities to the time charterers.

At the same time the party that is going to make an indemnity claim against the other will always be given sufficient time to do so whether or not the time bar for the principal claim is one year according to the Hague or Hague-Visby Rules or more, for claims referred to under sub-clause 35.3.2.

Law

BPTIME 3 contains a law clause providing the commercial parties with the option to have their disputes dealt with by High Court or arbitration. This is quite unique for a BP form as BP has had a long standing practice of referring disputes under their charter parties to the High Court, which they consider to be more disciplined in the handling of disputes.

However, BP acknowledged that arbitration did provide a useful means of dealing with smaller disputes and that it would benefit BPTIME 3, as an industry wide document, if an arbitration clause was included - not in place of the existing High Court provisions which

would be in conflict with BP policy - but as an option.

Clause 36 in BPTIME 3 therefore provides the parties with the option to refer disputes to the High Court in London or, by mutual agreement, to arbitration. This may not necessarily be seen as a very important clause from a material point of view, as commercial parties would be always be free to opt for arbitration if they so chose. However, in BIMCO's view an express arbitration provision is an important selling point in presenting BPTIME 3 as a document that can easily be used by parties other than BP.

Excluded Provisions

Whenever a new charter party is issued, the first question which often springs to mind is "how is this form compared to other recognised forms in the industry - is it materially different or is it just a repackaged version of an existing form"?

In order to answer the question, the reader initially looks at the provisions of the charter party as a whole. However, as far as BPTIME 3 is concerned, it is equally important to determine what is absent from the charter party. The most notable item from the list of provisions that usually form part of tanker charter parties is a provision dealing with delivery of cargoes without presentation of the bill of lading.

Whereas BIMCO recognises that it is common practice in the tanker trade to include provisions requiring the owners to deliver cargoes without the bill of lading against a Letter of Indemnity (LOI), it is not prepared to officially sanction such a practice. It was felt that since not all charterers are of BP's financial standing, it should be left to the owners themselves to decide on a case-by-case basis whether they are prepared to accept the commercial risk of delivery against an LOI without the bill of lading by satisfying themselves of the financial standing of the party offering the indemnity.

Other provisions which one may come across in the tanker trade are provisions where the owners undertake to indemnify the charterers for any claims paid to or deductions in freight made by sub-charterers for liquid cargo retained on board the vessel upon completion of discharging. Cargo Retention Clauses are a contentious issue in the industry, in particular in the context of voyage charter parties, and BIMCO was concerned to have a reference to cargo being retained on board not being at least "reachable and pumpable" by the vessel's cargo pumps.

Finally, it will be seen that there are no provisions relating to pumping. BP preferred to deal with the issue of pumping in the BPTIME 3 Questionnaire incorporating a list of questions relating to the vessel's pumping capabilities.

An issue which has become highly topical following the *Erika* is that of vetting. It is an issue which has caused a great deal of problems in the industry and the joint BIMCO/BP Working Group involved in the development of BPTIME 3 saw it as a challenge to get the vetting clause right where other charter parties had failed.

The Working Group laboured long and hard on the vetting clause which was to be designed not only to form part of the BPTIME 3 Charter but also as a free-standing clause to be recommended for insertion into any form of tanker charter party.

The result was a well drafted and nicely balanced vetting clause setting out the owners' responsibility in respect of obtaining and maintaining vetting approvals as agreed in the Charter; the distribution of costs in respect of obtaining and maintaining vetting approvals; and the charterers' remedies in the event the vessel loses the majority of the vetting approvals during the charter period.

Unfortunately, due to the increasing focus on safety standards in the wake of the *Erika* some of the oil majors, including BP, felt compelled to advise the industry that they would no longer be able to provide period approvals, but that they would from now on inspect vessels on a per voyage basis. This general change of policy among the oil majors precluded the incorporation of the newly devised vetting clause into the BPTIME 3 Charter.

Conclusion

It has been said many times that there is no such thing as a perfect charter - and certainly BPTIME 3 does not pretend to be the perfect charter. It is a charter which has been negotiated and developed between two main players in the shipping industry, one being the world's second largest oil company and the other being the world's largest shipowners' organisation. As a result, the charter naturally presents a compromise in certain areas.

However, it is beyond any doubt that much effort has gone into the drafting of BPTIME 3 to produce a clearly worded and well balanced charter party which both sides of the industry can safely rely upon as a basis for their negotiations.

Whether it is an improved version of the existing tanker charter parties in the industry is, of course, ultimately for the market to decide. In any circumstances, it has been encouraging to see two such large organisations sitting together trying to develop jointly a time charter party for the benefit of the entire tanker industry.

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