DELIVERY AND REDELIVERY NOTICES

SIMPLE, RIGHT?

Most charterparties will require the owners on delivery, and the charterers on redelivery, to provide notices of the intended date of delivery/redelivery. The commercial purpose of such notices is clear – to give the parties time to plan ahead when the actual start and end dates of a charter are not fixed.

However, the legal implications of such notices have been uncertain for a long time and a recent spate of cases (both reported and unreported) in the last few years have brought these issues back into the limelight.

Specifically, in this article William, Rory and Florian will examine the following:

- What exactly is a "firm" notice?
- How do firm redelivery notices interact with final voyage clauses?
- Is the failure to give the requisite notices a breach of charter and, if so, how do you calculate damages? Is the *Great Creation* [2015] LR 315 applicable?

The answers to these questions are surprisingly unclear when the giving and receiving of such notices is an act that occurs in virtually every single concluded charterparty. When claims do arise, they can be of significant value – particularly in sectors where hire rates have spiked – we have seen significant rate volatility across the container, LNG and tanker sectors across the last few years.

What exactly is a "firm" notice?

The Zenovia [2009] LR 139 judgment is often quoted when redelivery notice issues arise. The case held that an approximate redelivery notice was **not** a promise that a vessel would be redelivered on the day stated, or that it would encounter no delay in the remaining employment under the charter after giving such notice (and effectively that it could be cancelled). All that is required is that notices have to be given honestly, in good faith and on reasonable grounds (based on the information available at the time the notice is given, which is subject to change). An approximate notice is therefore of limited commercial utility to the recipient. It would perhaps be unwise for an owner to make binding commercial or operational decisions on the basis of such an approximate notice. *The Great Creation* suggest the giving of redelivery notices simply prevents the charterers from being in contractual breach of their obligation to give notice.

However, the case **did not** consider "firm" notices and the effect of these has been a grey area ever since. The use of different words – "approximate" and "firm" suggests that there must be a difference between the two types of notice, leading some commentors to posit that a "firm" notice must be irrevocable/binding (i.e. it cannot be changed). There are a number of difficulties with that contention:

- If that is the case, then why do charterparties often require the giving of (for example) 5/4/3/2/1 days' firm notices? If the 5 days' notice was binding/irrevocable (i.e. it could never be changed) then there is no need for 4, 3, 2 and 1 days' notice. The requirement to send multiple firm notices would seem to be an industry acknowledgement of – as put by the arbitrators in *The Zenovia* - the *"varied and haphazard"* nature of shipping such that charterers cannot be expected to guarantee redelivery on a certain date.
- The owners on delivery, and the charterers on redelivery, would then be undertaking to deliver/ redeliver the vessel on that precise day (in 5 days' time) and thus assuming all risk for the vessel being delayed, even if the reason was outside of their control (bad weather, slow discharge, engine breakdown, etc.). That would be an odd risk for the parties to adopt, particularly if the owners/ charterers contractually have a longer period of time to deliver/ redeliver the vessel. For example, the owners may still have another 10 days in the available delivery laycan, or the charterers may have a 2 months' redelivery window but may have tendered their first "firm" notice for redelivery at the start of that window.
- Delivery/redelivery *before* (as well as *after*) the stated date would also be a breach.
- The writers have seen one unreported arbitration award in which it was advanced by owners that a "firm" notice was either a contractual election, a variation of the charter, a waiver/ estoppel or a freestanding new contractual obligation. The tribunal determined that a firm notice, when given, was an irrevocable contractual election and therefore binding. It is suggested this is an incorrect analysis and that none of these legal principles can apply to a "firm" notice, for the reasons below. Briefly:
  - **Irrevocable contractual election** – what would be the point of (i) cancellation clauses on delivery; (ii) a redelivery range; and (iii) the requirement to send multiple firm notices, if the owners/charterers were bound to deliver/redelivery on one particular day by virtue of the very first firm notice they sent? There is also arguably no choice (election) to be made, such that the giving of a contractual notice could not be an election of one of those choices.
  - **Variation** – the parties are not agreeing to "change" the original bargain by giving a firm notice, they are doing something required under the express contractual terms.
  - **Waiver/estoppel** – is a party really giving up all of its contractual rights to deliver/ redeliver on a date other than the date specified?
  - **Freestanding new contract** – this doesn't survive the usual offer, acceptance, consideration test.

It is, however, recognised as a counter argument that there must be some difference between firm and approximate notices.

Whilst judicial clarity will be welcomed, the writers suggest that a firm notice is one that needs to be given honestly, that there are no circumstances known at the time to suggest that the vessel cannot be delivered/redelivered on the date stated, and certainly that (in the case of redelivery) no other employment orders will be given or deliberate actions taken by the charterers that would frustrate redelivery in accordance with that notice (i.e. it is binding in the sense it cannot be cancelled in the same way as an approximate notice). Further, it should be acknowledged that there is no margin applied for a firm notice, but there is an acceptance that there still might be events outside of the parties' control that delay the vessel. That is in distinction to an approximate notice, which is less accurate and must be judged by its "approximate" nature and which by necessity must have a margin of accuracy implied (e.g. in *The Great Creation* two days on a twenty days' approximate notice or 10%) and which can be cancelled.

“The presence of such a clause in a charter would suggest that if charterers redeliver a vessel “late”, after the date stated in the charterers’ firm notice(s) then the owners would be compensated in agreed liquidated damages – additional contractual hire until the date of actual redelivery.”

However, if the tribunal in the unreported case was right and a firm notice is an irrevocable election that cannot be changed, then both owners and charterers should exercise extreme caution when giving firm notices of delivery and redelivery. In an ideal world it would be prudent to have only a single firm notice that is given one day before delivery/redelivery with all other notices being approximate. Alternatively, express wording could make clear in the charter that firm notices can be changed, certainly due to circumstances outside a party’s control, and are therefore not an irrevocable election.

From the recipient’s viewpoint commercial decisions (e.g. an owner deciding on the next fixture after redelivery) should not normally be made basis receipt of approximate notices and even where a firm notice is received a window of flexibility should always be included in the next contract (e.g. the delivery laycan).

Firm notices and Last voyage orders

These are clauses that extend the contractual charter period (under a time charter) in the event a legitimate final voyage (i.e. one that was (legitimately) expected to be completed within the maximum charter duration) is delayed. The clause compensates the owners through the payment of additional hire for each day of the overrun.

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However, a recent unreported arbitration found that charterers are not entitled to the benefit of a last voyage clause after they have given a firm notice of redelivery. Accordingly, a notice clause (that merely states charterers are to give 5/4/3/2/1 days’ firm notice) cuts across and renders redundant the last voyage clause as soon as a firm notice is given, such that the owners’ losses must be calculated as normal unliquidated damages (rather than liquidated at the hire rate). Without express wording to that effect in a charter, that appears to be a surprising finding applying normal rules of contractual construction, but it is another point on which judicial determination will be welcome.

In the meantime, it would be recommended to have only a one-day firm notice and/or to make clear that a last voyage clause takes precedence over any firm redelivery notices clause.

Failure to give requisite notices and calculating damages

If a charterparty requires the giving of delivery and redelivery notices, then the failure to give any such notices, or compliant notices, may be a contractual breach of charter. The question is how should damages be calculated? There are two schools of thought/arguments.

The writers have seen arguments that *The Great Creation* decision means a failure to give the requisite number of redelivery notices (approximate or firm) entitles the owners to simply claim for damages for the period of notice that was not given at the charter rate, regardless of any actual loss. I.e. if the charterers fail to give the contractually required 20 days’ notice of redelivery and just give the vessel back immediately, the owners would be entitled to an additional 20 days’ hire.

Whilst at first blush that might appear an easy-to-use formula, it is suggested that you cannot make wider conclusions from what was a fact specific case (noting the award of hire in that case for the missing notice period actually operated as a cap on the owners’ damages claim – thus query if it can be justifiably used to quantify a claim as opposed to limit it). Further, such approach has the clear potential to violate the overriding compensatory principal of damages under English

law. What happens if owners were never going to be able to charter their vessel immediately even if the correct redelivery notices had been given and the charterers were contractually entitled to redeliver the vessel on the date they did (that is to say it was not an "early redelivery")? Surely awarding the owners 20 days' additional hire would be giving them a windfall? A claimant must normally prove the breach caused a specific loss.

It is suggested the better approach is to apply the usual measure of damages, i.e. factually consider what the owners **would have done** had the correct redelivery notices been given so they are placed in the same position as if the contract had been properly performed. If factually the owners would not (or could not) have done anything differently then no damages would be due. Noting, as above, that you would normally be unlikely to fix out a follow-on charter against an approximate notice. Conversely, the damages award could be larger for owners than following The *Great Creation* outcome – perhaps they could have fixed a future charter at a higher daily rate or even sold the vessel at a higher price had they been given the requisite redelivery notices. However, this must be a question of fact in each case and it is suggested any general broad formula trying to use *The Great Creation* ruling to quantify claims in relation to redelivery notices is wrong and that, if anything, the point to take from this case is *The Great Creation* "cap" may operate to limit an owners' damages claim (if the owners can **first** establish they have suffered a loss).

Again, judicial clarity may be needed but, in any event, the best advice for charterers is clear: do not take redelivery notices lightly; make sure the redelivery regime is followed precisely and always tender the notices required. Especially in the case of approximate notices - they have limited effect as stated above and accordingly provided they are given in good faith (basis the information available at the time they are given), the charterers should not be in breach. Extra care is needed with firm notices for the reasons set out above. The same lessons of course apply to owners giving delivery notices at the start of a charter, who would be equally advised to carefully consider the nuances of the notices they are giving and receiving.

For more information, please contact the authors of this briefing:

WILLIAM GIDMAN
Partner, London
T +44 (0)20 7264 8579
E william.gidman@hfw.com

RORY BUTLER
Partner, London
T +44 (0)20 7264 8310
E rory.butler@hfw.com

FLORIAN SCHACKER
Senior Associate, Dubai
T +971 4 560 6630
E florian.schacker@hfw.com

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