THE SHIPPING LAW REVIEW

TENTH EDITION

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PREFACE

The aim of the tenth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry, including international trade sanctions, ocean logistics, offshore, piracy, shipbuilding, ports and terminals, marine insurance, environmental and regulatory issues, decommissioning and ship finance.

We have invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

Each of these jurisdictional chapters gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered, as are the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims.

In addition, the authors address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included. The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are also examined. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction in the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development estimating that the operation of merchant ships contributes about US$380 billion in freight rates to the global economy, amounting to about 5 per cent of global trade overall. The significance of maritime logistics in facilitating trade and development has become increasingly apparent in the past year. Heightened and unstable freight rates, port closures, congestion and evolving shipping requirements as a result of covid-19 and the Ukraine conflict have all had far reaching effects beyond the shipping sector itself. As the international shipping industry is responsible for the carriage of over 80 per cent of world trade, with over 50,000 merchant ships trading internationally, the elevated shipping expenses and challenges to global logistics we have experienced this year have exacerbated inflation and supply chain disruptions, adding to the ongoing global crisis and hampering the maritime industry's covid-19 recovery. We have seen

global maritime trade, which plunged by approximately 4 per cent in 2020, recover at an estimated rate of 3.2 per cent. In 2021, shipments reached 11 billion tonnes, a value slightly below pre-pandemic levels.

The disruption caused by the pandemic and the war in Ukraine have brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself, and the contributions to this book continue to reflect that.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2023

Chapter 4

OFFSHORE

Paul Dean, Allie Loweth and Nicholas Kazaz[1]

I INTRODUCTION

The development of the offshore oil industry in the 20th century gave rise to the need for specialised contracts for the hire of vessels in this technical (often highly technical) sector of shipping. Beginning with SUPPLYTIME in the mid 1970s, there are now numerous very specific charter parties for use within the industry. These include HEAVYCON 2007, a voyage charter party for the heavy-lift trade that contains a 'knock-for-knock' regime for semi-submersible vessels carrying cargo, such as jack-up rigs on deck, WINDTIME, a time charter party for high-speed personnel craft used in the offshore wind sector, and BARGEHIRE, a time charter party for the hire of non-self-propelled barges. BIMCO continues to update and introduce new forms for use by the offshore industry, including revisions in 2021 of TOWCON, TOWHIRE and BARGEHIRE, and the introduction of ASVTIME, a time charter party for accommodation support vessels.

These contracts, and the many others used in offshore shipping, have had to develop significantly over time to keep abreast of the advancing technologies and changing issues facing the industry. This has resulted in an increasingly complicated contractual matrix surrounding the exploitation of offshore natural resources. In this chapter, we provide a short overview of some of the most frequently used contracts in the field of offshore shipping, and make some general comments about their characteristics and nature.

II SUPPLYTIME

In the wake of the growth in offshore activities in the 1970s, and oil exploration in particular, there was a significant increase in demand for offshore service vessels. Originally these service contracts were based on standard time charter party forms or in-house forms produced by tug owners. Increasingly, the industry felt that it needed a specialist contract, and so the Baltic and International Maritime Council (BIMCO) was approached to draw up a suitable solution. This led to the creation of the SUPPLYTIME form in 1975 (SUPPLYTIME 75). Its purpose was to regulate the relationship between owners and charterers when chartering tugs and offshore service and supply vessels on a time charter basis. Similarly to the widely used NYPE and BALTIME forms, the owners were paid a daily rate in exchange for use of the vessels.

1 Paul Dean is a partner and Allie Loweth and Nicholas Kazaz are senior associates at HFW. The information in this chapter was accurate as at May 2021.

As the industry continued to specialise, a number of revisions were made to SUPPLYTIME in the form of SUPPLYTIME 89. In particular, the aim of the revised version was to strike a more equal balance between owners and charterers and to avoid the use of extensive rider clauses, which had become common with SUPPLYTIME 75. One of the key features introduced by SUPPLYTIME 89 was the knock-for-knock regime between owners and charterers (discussed further in Section II.i), which had been a feature of the 1985 versions of TOWCON and TOWHIRE (see Section III).

SUPPLYTIME 89 became the industry standard form contract for offshore activities. In 2005, a further review was undertaken (largely because of criticism of the early termination mechanism in Clause 26, which was the source of much litigation) and led to the creation of SUPPLYTIME 2005. Following the 10th anniversary of the 2005 form, BIMCO reviewed the contract and a new version came into force in 2017.

Given that the revised 2017 form appears broadly similar to its 2005 predecessor, we highlight and discuss some of the key changes contained in SUPPLYTIME 2017.

i Clause 14 of SUPPLYTIME 2017: liabilities and indemnities (knock-for-knock)

SUPPLYTIME 2005 reinforced the principle that the apportionment of liability should be on knock-for-knock terms, whereby the owners and charterers each assume liability for loss of or damage to their own property and that of their contractors and subcontractors, as well as for injury to their own personnel and that of their contractors and subcontractors, regardless of which party caused the loss, damage or injury. However, the 2005 form contains numerous owner-friendly exceptions whereby the knock-for-knock regime does not apply (e.g., if damage is caused by undisclosed dangerous or explosive cargo, or liability is incurred as a result of the owners' suspension of the vessel's service).

The 2017 form serves to level the playing field by removing the majority of these exceptions. The three remaining exceptions (down from 16) relate to:

a owners' and charterers' towing wire;
b limitation of liability at law; and
c salvage of charterers' property.

The reduction in the number of the available carve-outs has extended the scope of the knock-for-knock regime. This is a trend that has been supported by the amended definitions of 'charterers' group' and 'owners' group', which now include reference to 'clients (of any tier)' (for charterers' group) and 'affiliates' (being those legal entities under the corporate control of owners, charterers or charterers' clients or co-venturers). The expanded definitions address previous uncertainty as to whether these defined terms include other participants in a project further along the contractual chain. However, the amended definitions are still not without their problems and there may still be scope for claims from some parties to fall outside the knock-for-knock regime. Accordingly, thought should be given to appropriate amendments to the 2017 form to ensure that an effective knock-for-knock regime will apply.

In addition to expanding the scope of the knock-for-knock regime, SUPPLYTIME 2017 incorporates amendments to the included losses that fall within the regime. Clause 14(a) now includes reference to 'non-performance' so that parties are protected for losses arising from a total failure to perform the charter party. These amendments ensure that 'radical breaches' of

the charter party, such as deliberate non-performance, fall within the scope of the knock-for-knock regime.[2] The SUPPLYTIME 2017 form is now consistent with other recent forms in the offshore shipping sector, such as WINDTIME.

The knock-for-knock regime continues to be supported by reciprocal indemnities. In addition, charterers assume liability for the property and personnel of their co-venturers and of their clients (of any tier). This is necessary as charterers often hire a vessel as part of a wider project to which the chartered vessel is providing services.

ii Clause 14(b)(ii): consequential damages

Clause 14(b)(ii) of SUPPLYTIME 2017 excludes liability for any consequential loss. Under the 2005 form, this term was widely understood to incorporate an exclusion for loss of use, loss of production, loss of profits and similar losses. The problem was that, under English law, the word 'consequential' has a very specific meaning, restricted to losses that do not flow naturally from the breach. In addition, English courts have traditionally construed exclusion clauses restrictively pursuant to the *contra proferentem* rule.[3]

In *Ferryways NV v. Associated British Ports*[4] (and a number of earlier decisions), it was held that exclusions of 'indirect or consequential' losses were effective only for excluding losses that did not flow naturally from the breach in question. However, exclusion clauses in commercial contexts between sophisticated parties are increasingly being given their ordinary meaning rather than the traditional narrow interpretation. Thus, in the more recent *Star Polaris* case,[5] the court held that 'consequential losses' had the wider meaning of financial losses, as the words are typically used by commercial parties. Therefore, there was uncertainty as to whether losses of production and losses of profits that follow naturally from a breach of contract would be excluded under the 2005 form.

SUPPLYTIME 2017 addresses this uncertainty by including a separate head of excluded loss under Clause 14(b)(i), which expressly identifies excluded losses as including loss of use, loss of profits, loss of product and loss of business, inter alia. By including these specific heads of losses, the 2017 form removes uncertainty and aligns itself with the wording of TOWCON 2008, TOWHIRE 2008 and WINDTIME.

iii Clause 10: fuel

SUPPLYTIME 2017 contains updated provisions concerning the payment for fuel that more closely reflect current industry practice. The previous regime provided that charterers would purchase the fuel on board at the time of delivery and owners would purchase the fuel on board at redelivery (at the price prevailing at the relevant port).

The 2017 form allows for a more flexible regime that details two payment alternatives:

a the parties can pay for fuel in a manner consistent with the 2005 form, but the price to be paid must be supported by evidence obtained at the most recent bunkering operation; or

2 *A Turtle Offshore SA v. Superior Trading Inc (The 'A Turtle')* (2009) 1 Lloyd's Rep 177.

3 The rule requires (broadly) that the clause is to be construed against the party who proposed the relevant clause.

4 [2008] 1 Lloyd's Rep 639.

5 *Star Polaris LLC v. HHIC-PHIL Inc* [2016] EWHC 2941 (Comm).

b the difference in quantity of fuel on board between delivery and redelivery is paid at a pre-agreed rate or a rate substantiated by evidence from the vessel's most recent loading of fuel.

The vessel's chief engineer can stop the loading of fuel should the owner reasonably believe that the charterer is loading fuel that does not comply with the specifications and grades agreed with the owner. Importantly, the vessel remains on hire during any stoppage of loading under Clause 10.

iv Clause 34: termination

The termination provisions in SUPPLYTIME 2017 have been clarified to avoid disputes regarding what constitutes an event of termination. Requisition, confiscation, loss of vessel and *force majeure* are now stated to be events of termination. Conversely, bankruptcy and owners' failure to acquire insurance only provide the innocent party with a right of termination.

The right of termination, after a stipulated period, in the event of vessel breakdown has been removed in the 2017 form. Breakdown is now referred to solely within the off-hire regime and is accompanied by a termination right linked to prolonged off-hire for a single continuous period or cumulative separate periods.

v Clause: maintenance and dry-docking

Under SUPPLYTIME 2017, owners will no longer be compensated for unused maintenance allowance unless such an allowance has remained unused at the charterers' request. Uncertainty still remains as to whether the owner can use maintenance as a defence against off-hire.

The 2017 form removes the owner-friendly provision that stipulated that the vessel remains on-hire during transit to and from the dry-dock facility. The vessel will now be off-hire once it is placed at the owners' disposal, a position that is more consistent with industry standards.

III TOWCON

Towage has been a maritime activity for centuries. The first recorded tug on the River Thames is said to be the *Lady Dundas* in 1832. A further example of early towing can be found in William Turner's painting of *The Temeraire* being towed to a breaker's yard in 1839. Since those formative years, towage has developed to assist with the arrival and departure of ships at ports, with offshore activities, and with salvage operations. Until relatively recently, however, there was a plethora of different towage contracts in use, such as the UK Standard Conditions for Towage and many other forms drafted by the tug owners themselves.

The International Salvage Union, which includes many of the major international towage and salvage contractors, approached BIMCO in the 1980s to produce a standard form international towage contract. The aim was to redress the perceived imbalance arising from the use of tug owners' agreements for ocean towage, which often contained exceptions favouring the tug. There was also inconsistent use of the American Conditions, which used a simple risk allocation between tug and tow, with each party bearing the risks incidental to their vessel, which was then laid off through insurance.

Accordingly, a subcommittee of the documentary committee of BIMCO debated with the International Salvage Union and the European Tugowners Association and produced two standard form contracts for international ocean towage services. The aim of the group was to

produce a more balanced contract based on the American Conditions that did not unfairly favour the tug. The result was the publication of the TOWCON and TOWHIRE forms in 1985, introducing the knock-for-knock liability regime.

The TOWCON form is a contract for the service of a tug for a particular voyage. It is a voyage charter designed for towage between specified locations and, accordingly, the remuneration is on a lump sum basis. In return for this lump sum (which may be payable in several instalments), the tug will bear the majority of the risks in respect of time and delay.

As already discussed, under a typical knock-for-knock regime, parties agree that the loss lies where it falls, irrespective of fault and without recourse to other parties (i.e., 'your people, your property, your problem'). Its purpose is to strike a balance between the tug owner and the hirer. It also offers contracting parties certainty, reducing insurance costs and avoiding the time, expense and difficulties in attributing fault and causation. In essence, each party is responsible for and agrees to indemnify the other contracting parties against injury to, or death of, its own personnel, loss of or damage to its property, and any other specified losses (such as consequential loss or environmental liability).

In 2008, the 1985 version of the TOWCON form was amended to clarify the period to which the regime applies (i.e., from arrival of the tug at the place of departure until disconnection at the place of destination) and to exclude liability for direct or indirect financial loss, except for breaches of permits, tow-worthiness of the tow, seaworthiness of the tug and termination by the hirer or tug owner.

Recent interpretations of the term 'consequential loss' in exclusion clauses have cast doubt on the scope of such clauses (see discussion at Section II.ii). As with SUPPLYTIME 2017 and WINDTIME, TOWCON 2008 avoids this potential pitfall by setting out separate exclusions for loss of profit and similar losses (Clause 25(c)(i)) and 'any consequential loss or damage whatsoever' (Clause 25(c)(ii)).

One further interesting point in the context of Clause 25 is the operation of the knock-for-knock regime in circumstances where a tug and a tow part and the tow are subsequently successfully salved. An argument could be made that in the wording of Clause 25, liability for the salvage operation will not be covered by the knock-for-knock regime and the tug owners may be liable. Such an eventuality assumes that the situation has arisen as a result of a breach of contract by the tug owners. If a successful claim is made, then this will be subject to applicable limitation provisions in the usual way.

The 2008 version of the TOWCON form has been revised with the release of TOWCON 2021. Changes include a reordering of the sequence of clauses and, for the first time in TOWCON, a SUPPLYTIME-style 'group' definition has been introduced. This definition is used in the liability and indemnity provisions. Similar to SUPPLYTIME 2017 (discussed above), the 'group' definitions in TOWCON 2021 are still not without problems. Accordingly, thought should always be given to appropriate amendments to the 'group' definitions to ensure that the liability and indemnity regime applies as intended.

As regards the liability and indemnity regime, TOWCON 2021 has adopted broadly the same consequential loss (described as 'excluded losses') clause at Clause 22(c) as Clause 14(b) of SUPPLYTIME 2017 (described above). Although parties may still wish to make minor amendments to the language for the tug and tow context, broadly this is a beneficial change.

Although the consequential loss clause has been updated by reference to the like provision in SUPPLYTIME 2017, the remainder of the liability and indemnity provisions in TOWCON 2021 have not. This is surprising, given that the inclusion of the SUPPLYTIME 2017 language in Clause 22(c) of TOWCON 2021 (which achieves, inter

alia, the 'regardless-of-cause' effect), contrasts somewhat starkly with the absence of such language elsewhere raising questions as to the intended scope of those other knock-for-knock provisions.

Unlike TOWCON 2008, salvage is now expressly referenced in the knock-for-knock regime.

IV TOWHIRE

While TOWCON is a contract for a specific voyage, TOWHIRE is used for the hire of towage services for a certain period. The TOWHIRE 2008 and TOWHIRE 2021 forms follow the same format as TOWCON 2008 and TOWCON 2021, save that the basis of remuneration is a daily rate of hire rather than a lump sum payment. There are no demurrage provisions, as the daily rate continues to be payable while the vessel is in service.

V PROJECTCON

This charter party form is specially designed for the transport of large project cargoes, often loaded either by a roll-on, roll-off method or using a semi-submersible barge. The form is generally used to cover a single venture involving the use of a barge and tug to transport special or project cargo (such as project components and other complex cargoes that cannot be containerised). It was produced in an attempt to avoid the difficulties of amending and adapting existing offshore shipping contracts, which are not suitable for this specialised service.

VI HEAVYCON 2007

There are many similarities between the PROJECTCON and HEAVYCON forms, but their primary uses differ. HEAVYCON has been adapted for use in the heavy-lift sector. The HEAVYCON form is used almost exclusively for the carriage of deck cargoes on semi-submersible vessels with a single cargo. Again, as with most prominent contracts in the offshore sector, the HEAVYCON form contains a knock-for-knock risk allocation provision that is specific for its intended use.

VII HEAVYLIFTVOY

HEAVYLIFTVOY is drafted for the carriage of multiple heavy-lift shipments carrying cargoes both above and below deck. Unlike the other contracts discussed here, liability is not allocated on a knock-for-knock basis but according to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) and the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules). BIMCO advised in its explanatory notes to HEAVYLIFTVOY that the form is drafted to be sufficiently flexible to cover 'various loading and discharging methods, single or multiple loading and discharging ports, on or under deck stowage'.

VIII DISMANTLECON

On 23 September 2019, BIMCO published its first standard form decommissioning contract. DISMANTLECON has been drafted as a flexible agreement for significant or multiple stages of decommissioning work offshore, as well as more defined removal operations. The agreement makes provision for price and time adjustment on an ongoing basis as it is often difficult to determine the scope of work at the outset. Coupled with this, it uses adjudication as a form of fast-track interim dispute resolution mechanism with the intention of avoiding delay and reducing costs. It adopts a knock-for-knock liability regime similar to the other agreements in the BIMCO suite of offshore documents. For further details in relation to this contract, see the Decommissioning chapter.

IX LOGIC

The most recent addition to the LOGIC suite of contracts, which has been a long-standing feature of the offshore industry, is the LOGIC decommissioning standard form contract. This has been drafted for use in the dismantling, removal and transport to shore of offshore facilities and infrastructure. For further details in relation to this contract, see the Decommissioning chapter.

X RECENT DEVELOPMENTS

Boskalis Offshore Marine Contracting BV v. Atlantic Marine and Aviation LLP (the 'Atlantic Tonjer')

The High Court of England and Wales handed down its first decision in relation to a SUPPLYTIME 2017 time charter party in *Atlantic Tonjer*,[6] an appeal of an arbitration decision, concerning the interpretation of the payments clause thereof, Clause 12(e), and whether the charterers were permitted to withhold payment of an invoice disputed after the due date. The decision emphasises the need to comply strictly with the time limits under Clause 12(e).

Pursuant to a SUPPLYTIME 2017 time charter party, the charterers chartered the multi-purpose support vessel *Atlantic Tonjer* from the owners, Atlantic Marine. Under the charter party, invoices were to be issued 14 days in arrears and payment of hire was to be made 21 days after that. The payment clause, Clause 12(e), was in unamended form and provides as follows:

> *Payments – Payments of hire, fuel invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice . . . in full without discount or set-off to the account stated in Box 23… If payment is not received by the Owners within five (5) Banking Days following the due date the Owners are entitled to charge interest . . .*

6 *Boskalis Offshore Marine Contracting BV v. Atlantic Marine and Aviation LLP (the 'Atlantic Tonjer')* [2019] EWHC 1213 (Comm).

> *If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners promptly, but in no event no later than the due date, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed amount.*

Between 16 June 2018 and 13 July 2018, the owners issued invoices for hire, meals, accommodation and other services in the amounts of €1,475,029.26 and £42,683.04. As at the date of the hearing, those invoices remained unpaid.

Interpreting Clause 12(e) of SUPPLYTIME 2017, the High Court stated that the language 'is clear and unambiguous', concluding that a reasonable person would understand the wording to require 'prompt payment or prompt identification of any issue preventing payment' within the context of the time limits agreed by the parties. The clause is not analogous to a time bar, limitation of liability or exclusion of liability warranting further enquiry and (on occasion) permitting the implication of terms. Properly construed, the clause required the charterers to dispute the invoice within 21 days of receipt. Boskalis' failure to dispute the invoice within that time precluded their defences to the invoice but did not prevent a counterclaim in respect of financial loss resulting from that payment nor did it prevent a claim by way of their rights of audit under Clause 12(g).

XI CONCLUSION

There are a number of situation-specific offshore charter parties, each with its own unique set of situation-specific provisions. As the industry continues to develop, these contracts will likewise evolve to suit the needs of the contracting parties. This is a growing body of law and users of these contracts should ensure that they are aware of changes to the legal environment around the chartering of offshore support vessels and assets.