Contracts of Affreightment - Nomination Terms

The main purpose of a contract of affreightment (COA) is to oblige a carrier to lift a fixed or determinable quantity of cargo of a specified type over a given period of time. Usually, the COA is not limited to one particular vessel, but operates as a series of voyage charters. Freight is payable on the quantity of cargo transported and the carrier bears the risk of delay en route.

Characteristics

Given the long term nature of the contract, a COA is almost always tailor made to meet the specific needs of the parties concerned. These parties are the shipper or buyer of the cargo who is often motivated by requiring certainty for the costs of transportation, and the ship-owner who is concerned with providing assured long term employment and flexibility for his owned or chartered in tonnage. COAs enable the ship-owners to be flexible and allow the vessels to be fitted into a pattern of trade that maximises laden as against ballast distances and allows such arrangement to be concluded at very competitive rates of freight.

As a result, COAs contain very few standardised terms, other than the individual voyage charter terms that govern each chartering once the vessel has been tendered for loading. The least standardised part of the contract will be the shipping programme and nomination provisions, and it is these provisions that are the most abused or contested over the period of a lengthy COA.

Nomination procedure and potential problems

Some individual contracts have very detailed and complicated provisions concerning nomination procedure. However broad or detailed the terms are, care needs to be taken in the terms used.

For example, the expression fairly evenly spread is often used when neither party wishes to be tied down to any particular dates. The downside to this in practice is that the term is imprecise and difficult to enforce or determine from a legal aspect when the defining factor depends on the parties own definitions of the suitable shipment intervals. Timings setting out the quarter or a range of months during which the shipments are to be carried are preferable, wherever practicable.

Nomination clauses will invariably set out the nomination procedure, ranging from who is to initiate the procedure to which party is to have a final say on the vessels required arrival date. More detailed provisions are better in terms of giving certainty to the contract and avoiding any misunderstandings, as long as these are well drafted and consistent with other contractual terms.

The danger is that even details that are seemingly simple and straightforward, such as those requiring the charterer to approve owners nomination within one working day can cause problems, even when the contract has been careful enough to define the working day as a minimum of 8 working hours. Take for instance the circumstance where owners nominate the performing vessel at 17.42 on Monday and charterers fail to approve the vessel on Tuesday, but try to do so on Wednesday morning; it might seem clear that charterers have failed to comply with the nomination procedure agreed.

Under English law, being required to do something within one working day usually excludes the day in which the notice is given. The day that the notice is given is usually excluded from calculation of the period. On this basis, if owners nominated the vessel on Monday evening, the charterers have until close of business on the Tuesday to accept (Zoan v Rouamba (2000)). However, if the notice is given after business hours on the Monday, the usual presumption is that the notice is treated as having been received the following day (Rightside Properties v Gray (1974)). It all depends on whether there is evidence to show that the owners nomination on the Monday was made within or after working hours. Even if the nomination was made after working hours on the Monday, it would seem that the provision that a working day to be a minimum of 8 working hours would be sufficient to show intention by the parties to give the charterers a whole working day to respond, as an exception to the general rule.

Usually the circumstances of a COA are such that timely acceptance of the vessel nominated is essential in order that the parties know where they stand. The COA rarely makes express provision for timely acceptance of nomination to be of the essence of the contract. However, owners advance consideration of such a provision may be beneficial especially where vessels are in high demand and have considerable earning power. A clear breach of a condition by charterers will enable owners to fix the vessel on a different contract quickly and with certainty.

This in turn leads to further questions. If the nomination fails, is the charterer entitled to nominate a further laycan spread? Or is it the case that once a vessel is nominated, the contract becomes one for the charter of the vessel nominated and there is no scope for a further nomination? Does the breach of the condition timely acceptance entitle the owner to treat himself as discharged from the COA?

As with many of the issues that arise under COAs, there is little direct case law and the answers always turn on the particular facts and circumstances of each case. Whilst care is taken in drafting the COA to suit the parties commercial interests, this is one area where the commercial relationship between the parties to the COA is often a good incentive for both sides to find an acceptable commercial solution to any disputes.