

# “Last done” – the perils and pitfalls of charter parties

Dealing with paperwork is a task few of us relish. It is time consuming and rather dull. In shipping as in all businesses, the focus is quite naturally on securing the best possible deal and quickly concluding the agreement.

To speed up the process, it has become increasingly commonplace in our industry for the parties to agree on a “as per last done” basis accompanied by a “recap” containing details specific to that particular fixture. Not surprisingly, few people want to go to the effort of producing a brand new charter party for each and every fixture.

There are new fixtures to be negotiated and so the task of completing the paperwork often falls by the wayside. But however boring it may be to produce a charter party that reflects what the parties have agreed, it is nevertheless an essential task. In 99.99% of cases, the voyage will proceed smoothly and there will be no need to refer to the terms and condition of the

agreement, but if a dispute arises the consequences of not having done the paperwork correctly can be considerable.

Stephen Mackin, Partner at Eversheds LLP in London, neatly sums up the importance of not only making sure that the contract is properly prepared, but that an appropriate form of contract is used: “The key issue in any contract is ensuring that the contract, when it is reduced to writing, reflects what the parties intended it to mean and does so in language that is unambiguous. Standard form contracts are drafted carefully to ensure clarity and minimise the areas for argument and dispute”. But standard forms of contract are generally used as “boilerplate” templates to which parties make amendments and additional clauses.

In Stephen’s view “Amending standard form contracts increases the risk of clauses not fitting together properly and therefore increases the scope for argument and dispute. The practice in the shipping industry is often to finalise contracts through an exchange of recaps. This is fine, but does create the risk of contractual terms being unclear; because of the language used in recaps and because of the multitude of amendments to the standard form wording and additional clauses that are introduced.

A similar issue arises in the use of non-standard form contracts or reprints of contracts from sources such as BIMCO. Using the original form ensures that the parties know the basis for the contractual terms, using a “pirate” version introduces the risk of typographical variations (deliberate or mistaken), which can cause issues if a dispute arises.”

## Do you even have a contract at all?

The basic elements that need to be in place before a contract can be said to have been made are an “offer to contract” and an unconditional and matching acceptance, turning the offer into a binding agreement. All steps must also satisfy relevant communication requirements. If the acceptance does not mirror the offer it will not count as an acceptance but as a counter offer, which in itself is an offer on revised terms requiring unequivocal acceptance by the other party. Furthermore, under English law for an agreement to be enforceable, consideration to support the promise is required, as well as an intention to be legally bound.

Consideration means an act or promise given in exchange for the promise – so



Photo: Lauritzen Bulkers A/S



The Nicoline Bulker. (Photo: Lauritzen Bulkcarriers A/S)

in charter party terms, for example, this means the offer of the services of a ship in exchange for the payment of hire. In commercial agreements, it is presumed that the parties intended to be legally bound unless clear words indicate the opposite<sup>1</sup>.

More specifically, for a charter party to be enforceable there needs to be evidence that there has been a firm agreement on all essential terms. Such essential terms may be terms which, if lacking, would render the entire agreement unworkable or too vague. A recent case, *The Pacific Champ* [2013] EWHC 470 (Comm), illustrates the ambiguity recaps can cause. The Commercial Court held that the last sent recap did not contain or evidence a binding agreement between the parties.

The facts were that the disponent owners had bareboat chartered the vessel *Pacific Champ* on BIMCO's standard bareboat charter party BARECON. The disponent owners' broker then went into negotiations for a possible time charter of the vessel for the carriage of HBI (hot moulded briquettes of direct reduced iron) from Houston via the Orinoco River, and back to the US Gulf. The bareboat charter excluded trading on the Orinoco River.

The negotiations resulted in two recaps. The second and last recap, sent by the char-

terers, stated, *inter alia*, "SUB REVIEW OWNERS HEAD CP BTB". The charterers alleged that there had been a binding contract after the second recap had been sent and that it was for the charterers to lift the subject which referred to a *pro forma* NYPE time charter that had previously been received from the disponent owners.

The Court rejected the charterers' arguments and held that the subject in the recap could only refer to the disponent owners' bareboat charter with the registered owners of the vessel, and that it was for the owners to review this document to ensure that the proposed trade (HBI via the Orinoco River) was permitted, which, as a matter of fact, it did not permit. Thus, the subject could not be satisfied and no legally binding agreement between the parties had been made.

#### What are the terms of your agreement?

The majority of charter party disputes will be about identifying the terms that the parties have agreed upon since by the time the dispute has arisen, part of the contract may already have been performed and, under English law, there is generally a reluctance to come to the conclusion that there is no valid agreement where there has been performance<sup>2</sup>.

A problem that BIMCO's Front Office is fre-

quently confronted with is recaps that refer to a "*pro forma* charter party as per logically amended", and where the parties later disagree about what "logically amended" meant, i.e. what amendments they intended to be made to the underlying charter party.

For example, if there are conflicting terms in the recap and the charter party in the sense that the same issue is dealt with in contradicting ways, making it impossible to comply with both provisions, both sides may have good arguments in respect of which of the terms that should prevail.

We also see that the same *pro forma* charter party is used over and over again for several different fixtures with various amendments done at each fixture but without anyone going through it and checking for inconsistencies. The end result is an unworkable contract full of conflicting clauses that lawyers would happily haggle over.

Another issue is where the recap refers to the underlying charter party "as per last", meaning the charter party which the parties previously agreed on. The problem here is if the "last" charter party was never issued, and if that was the case with several charters back, then it will be very difficult to identify the terms of the agreement.

Unclear references in recaps such as ref-



ferences to “BIMCO’s law and arbitration clause” also causes uncertainty since it will be difficult to tell which version of BIMCO’s standard dispute resolution clauses the parties intended to apply since standard clauses are updated from time to time. It is even more problematic when the clause reference in the recap does not name the standard clause correctly. This can also be the case with references to standard charter parties where there may be conflicts in respect of which edition should apply.

### Risks with fixing on non-genuine BIMCO forms

BIMCO frequently receives reports from members and non-members alike who are offered business on the basis of unauthorised copies of BIMCO standard forms. Sometimes these homemade BIMCO forms are easy to detect by looking at the layout or for obvious spelling mistakes. But sometimes they are more difficult to spot and you would have to cross check every word in order to find out if they were fake or not. The use of a form in the honest belief that it is a genuine BIMCO form is not illegal and you will still be bound by its terms, but it can be a costly mistake.



A lot of work and effort goes into developing BIMCO’s standard contracts and clauses, which are characterised by their thoroughness and drafting craftsmanship. On average, it takes between one and two years’ work by highly experienced and dedicated experts in the relevant trade before a new form or clause see the light of day. The overall objectives guiding the drafters are to create documents that are balanced, legally sound and which provide certainty so that the parties will know, from the outset, what

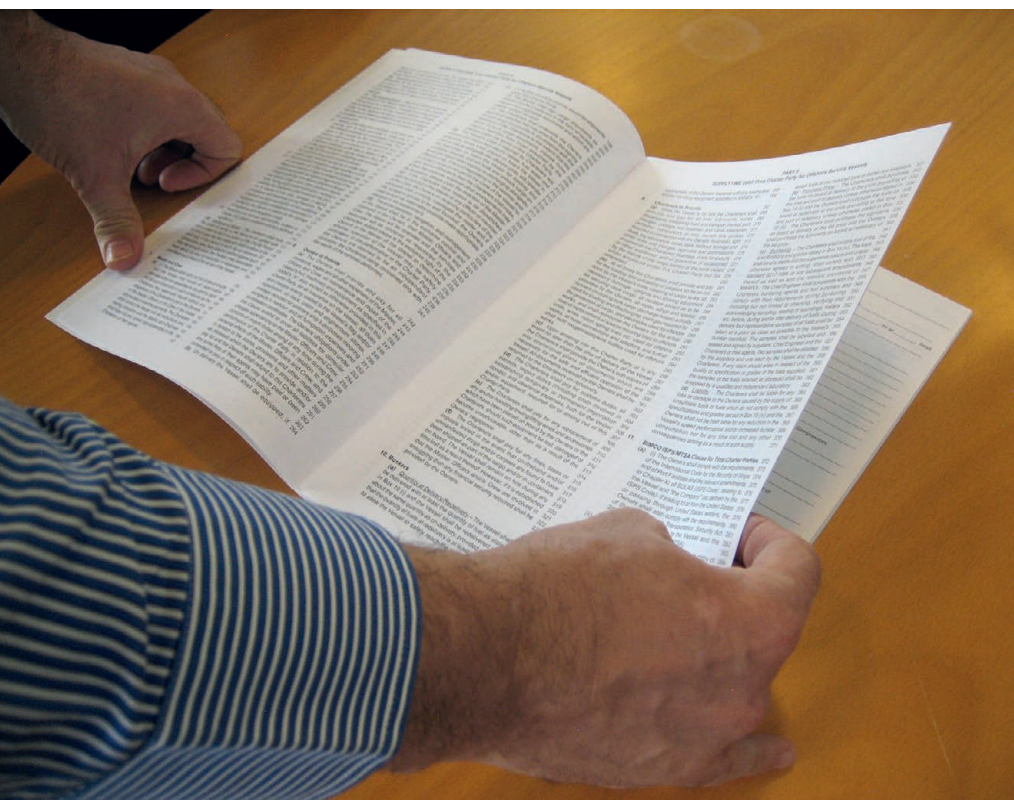
their rights and obligations will be under their contract. All this assists in avoiding disputes between the parties and plays an essential part in managing risks.

The main risk with using non-genuine BIMCO forms is that that you may be bound by bad terms in the sense that changes that favour the other party may have been made without you noticing. Then the balance between the parties is lost and uncertainty is created. The types of differences that may arise are for example slight changes in wording that change the allocation of responsibility e.g. adding the word “not” before “liable”. Thus, the assumption that a homemade BIMCO form contains the same wording as an authorised copy can be an expensive one, not least because in the eyes of the law there is little excuse for not reading the terms of the contract by which you have agreed to be bound.

It was for the purpose of creating contractual certainty that BIMCO’s on-line contract editing system, IDEA•2, was developed. Without a secure environment in which to use BIMCO contracts where all amendments are clearly shown, the industry may have lost faith in our documentary products in an electronic age.

### Solutions

To avoid situations where the other party tries to pull out of the contract in search of a more lucrative deal, or to be lured into an unfavourable contract believing it to be a balanced BIMCO standard form when it is not, the advice will be obvious to all – always use an authentic BIMCO contract and read



it through from top to bottom checking for inconsistencies between printed standard wording and amendments and rider clauses. This will help significantly in reducing the likelihood of disputes arising. A diligent operator will usually undertake this task in-house, but often limited resources mean that it can take a disproportionate amount of time to complete. Some companies are now turning to third-party service providers to do their charter party work for them.

Anders Lienggaard, Vice President, Handy-size, at Lauritzen Bulk in Copenhagen, explains that they decided to change their routines and start to use "CP-Desk" in Dubai for both legal and practical purposes. Before they signed up for CP-Desk's services it could take anything from three months to several years to execute a charter party signed by both parties. Today, the procedure runs much faster and efficiently and they feel confident that they have done their part in minimising the risk of future disputes.

CP-Desk launched their charter party service in 2013 to assist owners, operators, charterers and brokers with drawing up, reviewing and tracking charter parties to final execution. Because the charter party drafting and review process is so labour intensive and time consuming, many contracts remain unsigned, or, if signed, they often contain poorly drafted clauses or mistakes that can open the door to costly litigation. By using a third party to deal with the paperwork, efficiency is increased, risk reduced and time released to concentrate on other core business activities.

CP-Desk uses IDEA•2 to draw up charter parties for its clients. Captain Errol Gonçalves, Managing Director of CP-Desk explains that "We are a completely independent service provider with no ties to owners, charterers or brokers. As we began looking at the issue of charter parties in 2011, we strongly believed that service offerings backed by our commitment to quality, security, confidentiality, and compliance, would greatly benefit owners, operators, charterers and brokers in the drafting, verification and overall reporting of charter parties.

Today, that has proven to be the case; our customers have confidence that we can handle their sensitive information with-

out question. We also believe that in today's environment, charter parties require the personal attention of trained professionals, rather than shipping trainees as is often the case. Thus, we established CP-Desk to give charter parties the expert attention they need and to help owners, operators, charterers and brokers limit their exposure to expensive disputes."

### Conclusion

Contracts work best when parties have a clear understanding of their rights and obligations. Contractual ambiguity is a breeding ground for disputes. Disputes are always costly and hugely time-consuming – they far outweigh the effort to implement the simple measures necessary to make sure contracts are properly drawn up in the first instance.

Printed by BIMCO's idea

# SHIPMAN 2009

STANDARD SHIP MANAGEMENT AGREEMENT

PART I

1. Place and date of Agreement	2. Date of commencement of Agreement (Cis. 2, 12, 21 and 29)
3. Owners (name, place of registered office and law of registry) (Cl. 1) (i) Name: (ii) Place of registered office: (iii) Law of registry:	4. Managers (name, place of registered office and law of registry) (Cl. 1) (i) Name: (ii) Place of registered office: (iii) Law of registry:
5. The Company (with reference to the ISMISPS Codes) (state name and IMO Unique Company Identification number. If the Company is a third party then also state registered office and principal place of business) (Cis. 1 and 9(c)) (i) Name: (ii) IMO Unique Company Identification number: (iii) Place of registered office: (iv) Principal place of business:	6. Technical Management (state "yes" or "no" as agreed) (Cl. 4) 7. Crew Management (state "yes" or "no" as agreed) (Cl. 5(a)) 8. Commercial Management (state "yes" or "no" as agreed) (Cl. 6)
9. Chartering Services period (only to be filled in if "yes" stated in Box 9) (Cl. 6(a))	10. Crew Insurance arrangements (state "yes" or "no" as agreed) (i) Crew Insurances* (Cl. 5(b)); (ii) Insurance for persons proceeding to sea onboard (Cl. 5(b)(ii));
11. Insurance arrangements (state "yes" or "no" as agreed) (Cl. 7)	*only to apply if Crew Management (Cl. 5(a)) agreed (see Box 7) 12. Optional insurances (state optional insurance(s) as agreed, such as piracy, kidnap and ransom, loss of hire and FD & D) (Cl. 10(a)(iv))
13. Interest (state rate of interest to apply after due date to outstanding sums) (Cl. 9(a))	14. Annual management fee (state annual amount) (Cl. 12(a))
15. Manager's nominated account (Cl. 12(a))	16. Daily rate (state rate for days in excess of those agreed in budget) (Cl. 12(c))
18. Minimum contract period (state number of months) (Cl. 21(a))	17. Lay-up period / number of months (Cl. 12(d))
20. Severance Costs (state maximum amount) (Cl. 22(h)(ii))	19. Management fee on termination (state number of months to apply) (Cl. 22(g))
22. Notices (state full style contact details for serving notice and communication to the Owners) (Cl. 24)	21. Dispute Resolution (state alternative Cl. 23(a), 23(b) or 23(c); if Cl. 23(c) place of arbitration must be stated) (Cl. 23)
	23. Notices (state full style contact details for serving notice and communication to the Managers) (Cl. 24)

It is mutually agreed between the party stated in Box 3 and the party stated in Box 4 that this Agreement consisting of PART I and PART II as well as Annexes "A" (Details of Vessel or Vessels), "B" (Details of Crew), "C" (Budget), "D" (Associated Vessels) and "E" (Fee Schedule) attached hereto, shall be performed subject to the conditions contained herein. In the event of a conflict of conditions, the provisions of PART I and Annexes "A", "B", "C", "D" and "E" shall prevail over those of PART II to the extent of such conflict but no further.

Signature(s) (Owners) \_\_\_\_\_ Signature(s) (Managers) \_\_\_\_\_

Explanatory Notes for SHIPMAN 2009 are available from BIMCO at [www.bimco.org](http://www.bimco.org)

Copyright published by BIMCO

This document is a computer generated SHIPMAN 2009 form printed by authority of BIMCO. Any insertion or deletion to the form must be clearly visible. In the event of any modification made to the pre-printed text of this document which is not clearly visible, the text of the original BIMCO approved document shall apply. BIMCO assumes no responsibility for any loss, damage or expense as a result of discrepancies between the original BIMCO approved document and this computer generated document.

Continued

A diligent owner or operator should always make sure that a charter party is issued, that it is authentic and checked for inconsistencies and other pitfalls. It may be dull work but it is also absolutely vital in reducing the risk of disputes arising. So in the end it is time very well spent. (AWE) ■

### Notes

<sup>1</sup> There are numerous cases on contract formation, see for example *Harvey v Facey* [1893] AC 552, *Gibson v Manchester City Council* [1979] 1 WLR 294, *Currie v Misa* [1875] LR 10 Ex 153 and *Baird Textile Holdings Ltd. v Marks & Spencer plc* [2001] EWCA Civ 274.

<sup>2</sup> *Trollope & Colls Ltd. v Atomic Power Construction Ltd.* [1963] 1 WLR 333.