Fixing or unfixing a charter party — a shipbroker's view

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I. INTRODUCTION

You have heard from Stuart Hetherington the legal applications of what I would prefer to call "those two little words", that are used by brokers when we are negotiating between shipowner and charterer for a contract for the carriage of goods by sea.

A shipbroker, as you are aware, is the channel which brings together, in a series of negotiations, the two parties who hopefully will confirm into a successful fixture, evidenced by a charter party.

There is nothing new or secretive in shipbroking, which like shipowning, has its roots based on precedent which stretches from before the times of the Pharaohs. Therefore, apart from the odd problem or dispute which might occur due to the recent advances in technology where both vessels or cargoes are concerned, most disputes have occurred before, albeit in a slightly different guise.

So when a broker is approached by his principal, be it owner or charterer, to find a ship for a cargo or a cargo for a ship, he will use his extensive network of connections both here in Australia and overseas to supply the wants of his client.

Having circulated his contacts the broker will arrange for a firm offer to be passed between the clients in order to commence negotiations.

From a commercial point of view, in day to day dry cargo chartering, negotiations with the object of concluding a charter party between the two principals are very roughly divided into two basic sections. As Stuart Hetherington has given an excellent description of the differ-

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ences from his legal background I shall just comment briefly on the commercial practice.

II. THE MAIN TERMS

The main terms of a voyage charter speak for themselves, in that the parties agree to the details of the vessel, quantity and description of cargoes, loading and discharging ports and loading and discharging terms, laydays and cancelling, freight rate, freight payment, demurrage and despatch and charter party form. Put that basic way such terms should be very simple and easy to accept by both parties.

So having happily achieved this goal, the broker will forward to both principals a telex, or facsimile message, giving a recap of the fixture so far. From a commercial practice our learned judges are correct when they say that this is not a fixture (although I must admit to some surprise not everyone agrees, as at a recent gathering of brokers I overheard a junior broker announce to the world that he considered he had concluded a fixture, even though it was obvious to me that sub-details had not been approved by both parties).

Here I must interject and point out to our legal colleagues present, that shipping, like the law has retained many of the old traditions that have grown up with the profession over the centuries, and which are practised and used for particular reasons. In broking many of our customs and practices are in use today for clarity, economy and sound commercial sense, built up over many years' use.

So when in that future time you find yourself sitting on the bench in your ermine robes and wig, please spare a thought for us laypersons who are trying to follow the custom of our craft, which was laid down by our predecessors, and please do not disregard the fact that certain clauses or statements are included in charter parties for commercial rather that legal reasons. For, like Ian Timmins in his letter to *Fairplay*, some decisions given from the bench have caused deep concern in that, whilst as brokers we appreciate the legal judgment must be totally impartial, no weight appears to have been given to commercial factors that are placed before the court.

III. AGREEMENT ON OUTSTANDING MATTERS[1]

Many lawyers with whom I have discussed the problem of "those two little words", state that in effect the broker is announcing that the main terms being agreed, all further terms are "subject to contract". I

[1] Usually referred to as "subject details".

feel that this could not be the intention of the parties, or their brokers, at that time in the negotiations.

From a practical chartering view the parties in agreeing to the main terms, as enumerated earlier, are agreeing to the fact that one individual will carry and care for another individual's cargo from one port to another for a fee.

That is the basis of the contract and having agreed to the first stage then both parties are in a position to conclude their main business. The charterers can finalise the sale or purchase of the cargo and all its requirements, whilst the shipowner can adjust his schedules, replenish his vessel and issue orders for the next trip. Certain trades really do require that breathing space to finalise their operations and need to have tonnage firm fixed with subjects at their disposal, thereby making subject details only a formality.

Whilst there is no definite gap between main terms and details, as we have already said, it is usual for the broker to send a recap of fixture to both parties. At one time it was the custom to send a fixing letter to both principals, but technology and the decline in the efficiency of the postal services have made such a document obsolete. Brokers now rely on a fixing telex or fascimile.

In addition a pro forma charter party is produced for joint consideration and acceptance by the two principals. The transmission problems of years ago when pro forma charter parties were sent word for word by telex have now been overcome by the introduction of the facsimile machine. This is where the "i's" are dotted and the "t's" are crossed, and where the broker is required to have a creditable knowledge of maritime law. In case of later dispute the law itself must be seen to be totally impartial and will not take into account the personality of the individual, which is one of the skills of the broker at this important time during the negotiations and when drawing up the charter party.

Both the law and the shipbroker hope from the outset that the parties to the contract are persons of integrity and able to comply fully with the requirements of the terms, conditions and exceptions of the charter party. However, it is my experience that one should change the word "integrity" to read "training" or "professionalism" because it is very obvious when discussing with various principals their background, that the better the training the more professional the approach they have to their business. Little or no training quickly reveals a very imprecise attitude towards the various terms placed before them. In general they will accept anything provided the rate is right, and are prepared to run for cover should a dispute arise later.

It really is alarming to see how many charterers' representatives are appointed to their positions with no previous training or any idea

regarding their function in the charter market. These clients find very early in their career that the magic words "subject details" are the salvation of all their problems and that such a clause could be readily activated if extraneous conditions or events, outside of the negotiations with the shipowner, were not successful.

Unfortunately whilst such principals might convince some brokers of the validity of their actions I have noticed with some concern and alarm that very experienced shipowners now appear to be taking the easy way out of a conflict by accepting the most ludicrous attempts by some charterers to invoke a "get out clause". The answer from the owners, when questioned why they appear to condone such unethical conduct, is a shrug of the shoulders and a comment that, if this is that individual's normal behaviour, they feel that, whilst they might have expended money and time during negotiations, such unsatisfactory working methods only highlight circumstances that confirm that it is prudent to let the fixture drop with that individual and save the extra heavy expenses of litigation later. A point, I suggest, the legal fraternity should note.

I was extremely fortunate at the outset of my career in that my mentor in the early 50s took the time and trouble not only to teach me my craft but also to recognise the various traits and characteristics of the clients that I would be representing in the future. I well remember this admonition to me one day, after his usual quick visit to the wine bar whilst returning from the Baltic Exchange: "My son, when you can persuade a shipowner to fix a cargo he hates, from a port he doesn't like, to a discharge port he doesn't know, at a rate which is below last done, then my son you can call yourself a broker". Some 38 years later that is a goal I have yet to achieve, although I have been near it on a couple of occasions. It is always the rate that lets me down.

Mention was made by our learned judges about standard charter parties, such as the "Gencon charter party". Originally all charter parties were drawn up by hand. When I started in broking the first thing I was handed was a copy of *Teach Yourself Copper Plate Handwriting* as all our charter parties, including the copies, were completed by hand in pen and ink (we were past the quill stage). At the early part of this century a few owners and charterers decided that it would be beneficial if they drafted some standard charter party form. This policy expanded over the years, enhanced by both world wars and the development of groups of owners and charterers combining in certain trades or associations and standardising their documentation to comply with the special needs of their trades.

Such charter parties are not the answer to the sub details problem because in many cases the parties are offered optional clauses from which they may select a clause, or part of a clause, to cover their

requirements. Consequently, having the opportunity to select the options tends to confound the object of the standard charter party.

To overcome the subject details problem I always endeavour to encourage my special, regular clients to build up their charter party terms to a level that is freely acceptable to the market without alteration. Thereafter, all that is required is a statement within the main terms "otherwise XYZ Company's usual charter party".

It is not my intention to indicate to you that the Subject Details sections of negotiations are easy. In many cases they are not. Again, the more professional the charterer the quicker the result, whilst other charterers appear to delight in changing their minds and their clauses as often as, we hope, they change their socks. One particular individual after ten days solid work only requiring the master's approval of stowage, and having agreed that we were fixed with recap telex transmitted, slept on it and next morning decided to change everything to liner terms load and discharge.

Or others, agreeing that they were fixed subject to the receivers' agreeing to the vessel, asked the owner for an extension to obtain this approval — only to sight a distressed ship at a lower rate overnight which they fixed, being quite oblivious as to how their actions could be accepted. It is these principals who worry me as it would appear that, should the owners in both cases attempt to hold the charterers to the concluded fixture, they face the prospect that the courts may support such behaviour on the part of charterers.