



## FLOATING STORAGE: HIGH REWARD AND HIGH RISK?

### EXISTING AND NEW FLOATING STORAGE CHARTER ISSUES DISCUSSED

Disputes between oil producing nations on output capacity, coupled with a steep decline in consumer demand for oil as a result of the Covid-19 pandemic, have led to serious oil storage capacity shortages on-shore and plummeting (even negative) oil prices. There is far too much oil and not enough places to store it.

This has in turn generated a surge in demand for tankers under time and voyage charters to act as floating storage both (i) as conversion of existing charters into “floating storage”; and (ii) new business. This has pushed tanker rates up but has also led to a renewed focus on legal/charter issues associated with short and long term storage afloat.

Rory Butler and William Gidman have reviewed a number of existing and new charters over the last few weeks and advised both owning and charterer clients on storage/charter issues. With VLCC hire rates reported at well over US\$100,000 a day (some reports have been as high as US\$200,000-US\$300,000 a day) these charters have potential annual values of US\$40 million plus and so the sums at stake are large.

With higher rates, disputes can escalate quickly. What might previously have been a modest 2-3 days off-hire, demurrage or damages claim may easily be worth a few hundred thousand dollars now. It is therefore wise to focus on agreeing terms that allocate the additional risks associated with floating storage even if there is a commercial need to conclude such deals quickly!

Whilst this article focuses on the position under charterparties, it should be remembered that where the charterers are different from the cargo interests under bills of lading, floating storage really requires three-party discussions.

We have dealt with enquiries under existing and new charters and refer below to some of the issues arising.

### Time charters

- The charterers are generally free to employ the vessel to carry cargo how they see fit within the charter period, which may include orders to proceed to a specific destination or wait to load or discharge cargo, providing always that they trade within the geographical limits and honour any specific charter obligations or exclusions such as safe port/berth obligations, the types of permitted cargo, and sanctions clauses, etc.
- Some tanker time charter forms do expressly permit the charterers to use the vessel as floating storage – e.g. clause 21 of BPTime 3 (which is a short form clause and does not grapple with all the issues highlighted below). However, many charters do not.
- Where there is a specific charter clause permitting floating storage then obviously the charterers have that option – subject to the terms of the clause.
  - Where there is no such clause then there is a potential debate about whether charterers can ask owners to agree to use the vessel as floating storage/whether any such orders would be lawful. This will of course depend on consideration of the specific charter terms and also whether any bill of lading has been issued by the owners (as owners can normally refuse orders that would place them in breach of a bill of lading, which will include a duty to prosecute the voyage with utmost despatch and not to deviate).
  - However, putting specific charter terms to one side, from a practical perspective if charterers ordered a vessel to wait off a nominated discharge port for a relatively short period pending discharge (e.g. because there is no shore ullage) it may be difficult to challenge from an owners' perspective as this is a normal operation of the vessel. On the other hand, ordering the vessel to wait for months at a floating storage location, which is not the nominated discharge port, would arguably not be consistent with charterers' rights under a time charter/the contractual bargain agreed, and owners may be able to argue such orders are not legitimate and can be refused.
- The position under the bill of lading is important and cargo owners need to agree to any floating storage, as do owners' insurers. Therefore the position under a time charter is not necessarily as straightforward as may be first thought. To avoid such debates the parties would be well advised to agree specific terms for use of the vessel as storage and to ensure the consent of cargo owners and owners' insurers is obtained.
  - If charterers do order the vessel to be used as floating storage then their obligations/liabilities will usually extend (even without a storage clause) to:
    - Exercising due diligence to order the vessel to anchor or drift at a safe place – this could be relevant in the event of collisions and/or pollution issues; and

- An implied indemnity in owners' favour for the consequences of complying with charterers' orders.

### Voyage charters

- Voyage charters are generally more problematic. Most charters define the load and discharge port(s) and require the owners to proceed with utmost despatch on the usual and customary route between the ports. This will also be owners' obligation under any bill of lading.
- Unless there is an express provision to allow the vessel to be used as storage, even accepting an order from charterers to stop the vessel might be a breach of the charter's utmost despatch requirement and constitute a breach of the bill of lading obligations/a deviation which may also prejudice an owners' insurance cover. Although hypothetically it may be possible to argue an implied indemnity as against the charterers, it is widely recognised that establishing such an indemnity is considerably harder than under a time charter. Thus owners would likely want to refuse such orders.
- Certain charters do permit the charterers to stop the vessel and issue revised orders. For example, under clause 22 of BPVOY4 charterers are permitted to instruct owners to *"stop and/or divert the Vessel"*. If she is laden then *"all time spent by the Vessel awaiting orders shall count as laytime or ... demurrage"*.
- It is debatable whether charterers could rely solely on such a provision to demand that the owners stop the vessel to effect floating storage. The provision appears to anticipate the vessel being stopped purely to allow the charterers to revise the discharge port orders. Floating storage may not be time spent *"awaiting orders"*.
- Nevertheless, the owners might be happy to accept the demurrage rate if it is higher than the market freight rate. However, disputes could arise if the market conditions flip and owners want to trade the vessel

elsewhere. Further, if it is found that floating storage does not fall within provisions such as clause 22 then arguably the owners are not entitled to demurrage, but to damages for detention instead. Unless defined, the detention rate could be higher or lower than the demurrage rate.

- Even if the charterers continue to pay demurrage and this is accepted by the owners under protest, there may come a point in time when the delay for floating storage amounts to frustration. Guidance on demurrage and frustration can be taken from cases such as *MSC v Cottonex* [2016] EWCA Civ 789 (considering container demurrage). Based on this line of authority, it is arguable that a voyage charter could be considered frustrated where the performance of the contract becomes radically different to what had originally been intended. This will be a question of fact, but it may be relevant to look at the duration of the delay (storage) compared to the time the voyage should have taken.

## Issues

- In relation to both existing time and voyage charters we have already been involved in disputes where owners have refused charterers' orders for the vessel to drift/anchor away (or even sail away) from the discharge port range (de facto storage) and have instead reserved their right to proceed to the nominated discharge port, tender NOR and claim laytime/demurrage or hire as applicable. Following such a standoff the parties have normally agreed commercial terms on a storage option - e.g. agreeing an addendum to the charter to cover extended storage afloat at market rates or a compromise earnings figure where the charter period is extended with specific terms (see below) to deal with storage issues. The cargo owners have also consented/been involved in discussions.
- Difficult issues may arise under existing charters where vessels are at or off the discharge port and the charterers do not (or cannot) order discharge. Owners' remedy

here may be limited to demurrage or hire only, unless it can be said charterers are in breach of specific terms or obligations under the charter (which may allow a claim for damages for the difference between charter and market rates). However, it is worth remembering that demurrage may not be applicable (absent an express provision) unless the vessel is actually within port limits and has tendered NOR.

- From charterers' side, if there is a particular reason why discharge cannot commence (e.g. Covid-19 or lack of shore labour, etc.) close attention should be paid to exceptions or force majeure provisions which may allow total or partial avoidance of payment of demurrage/hire. Obviously, the situation will turn on the particular contract wording, but in the very worst case scenario for owners, they may be stuck at or off a discharge port with market rates rising above the charter rate, and partial or no payment under the current charter because of exceptions under the charter.
- Other issues regarding floating storage concern the following:

## Hull fouling & speed and performance

- Employing the vessel as floating storage at a fixed location for an extended period can lead to hull fouling and ultimately speed and performance issues under a time charter. The English Court found in *The Coral Seas* [2016] EWHC 1506 (Comm) that the implied indemnity would not apply to hull cleaning if the vessel is ordered to stay in a warm water port for an extended period and said express hull fouling clauses were needed. So, absent an express provision, the owners will likely bear hull cleaning and associated speed and performance claims arising from storage (save to the extent it can be said that such orders are not lawful and charterers must pay damages).
- From an owners' perspective it would be prudent to include an express provision that speed and performance warranties will not apply post storage.

- A provision may also be agreed to permit the vessel to steam in the vicinity at regular intervals to minimise hull fouling – who is to bear responsibility for the cost of bunkers consumed?
- Even under a voyage charter, hull fouling could affect whether the vessel can reach any warranted speed.

## Bunkers and supplies

- Under a time charter, charterers are usually responsible for providing bunkers, fresh water and other supplies. Careful planning before the storage (and during, depending on duration) is required to ensure the vessel is well stocked. Not least as a vessel's ability to make fresh water is often restricted when not underway.
- Under a voyage charter, the owners may have planned the bunkering and supplies schedule based on the anticipated voyage duration without acting as floating storage.
- Therefore, if the vessel does anchor for storage then the vessel may need to be permitted to go closer to the shore to bunker, take on fresh water and supplies, and responsibility for the time and bunkers used needs to be allocated, and the storage location needs to be selected, with this in mind.

## Safety of the storage place

- Which party will be responsible for verifying the safety of the place of storage? Clause 21 of BPTIME 3 is silent on this. However, usually, this will be a due diligence requirement on the part of charterers under a time charter, unless the owners have accepted the storage place at the outset of the charter.
- Careful consideration must be given if the storage area is at or off a busy port. Security also needs to be factored in if there is a risk of piracy in the area or it is an additional war risk premium region.
- Owners will want to shift safety and any extra security or insurance risks onto the charterers as well as giving the master

freedom to shift location as they see fit. It is best if all these issues are considered in a bespoke clause.

### Duration and payment

- In the context of a time charter the parties will need to decide if the overall charter duration should be extended.
- The parties would be wise to consider if minimum and maximum periods for the floating storage should be included in the contract as well as notice provisions concerning termination of the floating storage period.
- The parties will also need to decide if the rate of payment (hire for a time charter) will be increased (or decreased) for the storage period. Where the contract is a voyage charter we have seen the demurrage rate used as payment for the floating storage period.

### Insurance

- Is there a deviation? Do the owners' insurance policies – P&I, H&M, K&R, War, etc. - cover vessels acting as floating storage? If not, who is to bear the additional premium costs? Advice needs to be taken from brokers and underwriters.

### Cargo claims

- It is understood petroleum products can deteriorate over time. If clean bills of lading are issued but the cargo deteriorates naturally, owners may need to try to rely on the Hague/Hague-Visby Rules exceptions (e.g. inherent defect), or the implied indemnity, to defeat a cargo claim. It might be sensible to agree a bespoke

clause dealing with quality issues following storage to prescribe liability. Generally speaking we would expect owners to want to shift cargo deterioration or excess ROB risks caused by the extended storage onto the charterers.

- Further, are there any specific cargo instructions that need to be adhered to (e.g. heating), and who pays for the bunkers used to do this?

### Conclusion

The issues arising out of floating storage are not straightforward, and charters cannot be looked at in isolation. Consideration should also be given to bills of lading, sales contracts and insurance provisions.

We would suggest that even where charterers do not necessarily intend to use the vessel for floating storage at the outset of a new charter, it would be prudent in the current market conditions to always build in a floating storage option to every charter to give maximum commercial future flexibility and avoid potential disputes.

If floating storage is envisaged under an existing charter that had not previously contemplated such action, then it is recommended to agree an addendum to expressly deal with these issues.

Rory and William are available to discuss drafting suitable provisions, and also to discuss any disputes that may arise.

In the meantime, a link to a table of drafting tips for time and voyage charters on the HFW website can be found at: <https://www.hfw.com/Floating-Storage-Time-and-voyage-charter-drafting-tips>.

For more detailed discussions, please contact your usual HFW contact, or the authors of this article:



**RORY BUTLER**

Partner, London

T +44 (0)20 7264 8310

E [rory.butler@hfw.com](mailto:rory.butler@hfw.com)



**WILLIAM GIDMAN**

Senior Associate, London

T +44 (0)20 7264 8579

E [william.gidman@hfw.com](mailto:william.gidman@hfw.com)

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