

Holland+Knight

CONTRACT OF AFFREIGHTMENT

Istanbul, April 22, 2008

William J. Honan

Contract of Affreightment Defined

A contract between a vessel owner/operator and a charterer in which the vessel owner/operator agrees to provide tonnage, usually unnamed, and the charterer agrees to provide cargoes, usually bulk cargoes, from a specified place or places to another place or places during an expressly stated period of time.

Benefits - Charterer

1. Secure tonnage availability from a known and, perhaps, trusted source
2. Quantify the transportation expense
3. Save time and effort

Benefits – Owner

1. Secure employment for a portion of your fleet
2. Quantify expected revenue
3. Provides flexibility for the fleet and the owner
4. Create back-haul opportunities
5. Saves time/effort

Owner's Due Diligence

- Charterer's reputation including creditworthiness
- Charterer's experience in trade
- Control of named cargoes

Charterer's Due Diligence

- Owner's reputation
- Owner's experience in trade
- Control of appropriate vessels

GENCOA Clause 10

The Owners shall nominate vessels only of the description stated in Box 13 suitable for the intended trade.

b. If you are the charterer, you want to be specific so that you get what you expect.

(i) Specify size, type and maximum age.

(ii) Consider specifying names of vessels (you want or don't want).

GENCOA Clause 1

. . . the Owners undertake to carry the cargoes as described in Box 5.

a. Quantities

(i) If you are the Owner, consider a "requirements" provision, with a minimum/maximum range.

(ii) If you are the Charterer, if there is a quantity range keep it as wide as possible.

GENCOA Clause 16

This Contract is concluded on the basis of the bunker price stated in Box 18(a) for oil of the type and grade stated in Box 18(b). If the bunker price per metric ton at the port or place stated in Box 18(c) on the first day of loading is higher than the figure stated in Box 18(d)(i) or lower than the figure stated in Box 18(d)(ii), any amount in excess of such increase or decrease shall be payable to Owners or Charterers as the case may be.

The agreed bunker consumption for each voyage is as stated in Box 18(e).

Escalation Issues

a. If you are the Owner, insert an escalation provision that covers fuel and a variable component especially in long term COA's

b. If you are the Charterer, be precise in defining the measuring escalation so that the escalation does not become a profit center. For example, avoid, if possible, measuring escalation against indices that don't (and cannot) measure Owner's actual increases.

GENCOA Section 6

Unless otherwise specified in Box 12 the Charterers' programme of shipments shall be fairly evenly spread over the period of the Contract.

“Fairly Evenly Spread”

a. If you are the Owner, consider being specific as to what you cannot or are not prepared to do: "fairly evenly spread but in no event will be Owner be expected to provide vessels for three months in a row."

b. If you are the Charterer, consider what are your needs or the needs of your customer. Do not use "fairly evenly spread" if those words do not reflect your needs.

Cover Remedy

If Carrier is unable to load Cargo pursuant to the schedule described in paragraph 3(C) above, Charterer may arrange for transportation services with another carrier. Unless excused by the Force Majeure Clause, Section 11 of this Agreement, Carrier is to reimburse Charterer for its costs in arranging for such transportation services which is greater than the costs that Charterer would have incurred under this Agreement and the tonnage so transported shall count in calculating Charterer's obligation to supply the minimum quantities under this Agreement.

Interruption of Performance

Neither the Owners nor the Charterers shall, except as otherwise provided in the attached charter party, be responsible for any loss, damage, delay or failure in performance hereunder arising or resulting from act of God, act of war, act of terrorism, seizure under legal process; quarantine restrictions; strikes; boycotts; lockouts; riots, civil commotions and arrest or restraint of princes, rulers or people. Quantities not carried as a result cannot be demanded to be shipped.

Broaden the Contingencies

a. If you are the Owner, insert contingencies that would cause you otherwise to breach your commitment to provide a vessel such as "vessel breakdown."

b. If you are the Charterer, insert events that will cause you to be unable to provide the cargo such as "failure of third-party contractors to supply the cargo."

Force Majeure Clause Add-On

b) The failure, as a result of an event as set forth in paragraph (a) above, of Charterer's supplier(s) of cargo available for delivery to it pursuant to this Agreement, or pursuant to a commitment between the supplier and Charterer, shall constitute an event of Force Majeure assertible by Charterer against the Carrier.

Any Good Force Majeure Clause Has These

- 1) prompt notice of its occurrence,
- 2) best reasonable efforts to minimize its effects,
- 3) periodic updates of efforts to eliminate or minimize its effects with the estimated end data, and
- 4) prompt notice of it's the end of the *force majeure*.

From Owner's Perspective

If the Charterer fails, for reasons other than Force Majeure, to provide the Minimum Annual Quantity for the year in question, the Charterer shall pay a deadfreight charge equal to the freight specified in the Freight Clause multiplied by a number equal to the difference between the Minimum Annual Quantity and the actual number of tons provided during that same annual period.

From the Charterer's Perspective

If the Charterer fails, for reasons other than Force Majeure, to provide the Minimum Annual Quantity for the year in question, the Charterer shall be liable for an amount equal to Owner's actual losses after deducting amounts that Owner earned in mitigating its damages and amounts that the Owner saved in not carrying the Minimum Annual Quantity.

S.M.A. Rules – Section 30

The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including but not limited to, specific performance.

Arbitrators' Ruling

. . . , the Panel unanimously directs that within 90 days from the date of this award, JWR and Owner are to agree appropriate laycan dates for loading the remaining COA quantity. If no such schedule is agreed, upon the application of either party, the Panel will convene a hearing for the purpose of imposing such a schedule. Pursuant to a mutually agreed or Panel imposed schedule, Owner is to provide JWR with the firm nomination of a suitable vessel to lift and carry the balance of coking coal from JWR's designated berth in Mobile to Erdemir's designated berth at Ereğli at a freight rate of \$ 10.50 per metric ton;

Arbitrators' Ruling (continued)

. . . . In the unlikely event Owner refused or otherwise fails to timely provide a suitable vessel, JWR shall be free to it self arrange such transport and recover from Owner all reasonable costs so incurred in excess of the COA \$ 10.50 per metric ton freight rate and \$ 10,000 per day demurrage rate plus related other charges and interest.

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