NYPE 2015: Wholesale Reform or an Invitation to Cherry-Pick?

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The New York Produce Exchange (NYPE) form is said to be the most widely used dry-cargo time charterparty form in the world. Twenty-two years after its last revision, in 2015 it was extensively revised. Such is the bizarre nature of the industry, however, that the form in current widespread use is not its immediate predecessor, a form well suited to the needs of modern commerce, but NYPE 1946, which is not (except by being heavily amended). So the new form is really intended to replace not a two-, but a seven-decade old form; it is only natural to speculate whether it will succeed, when both 1981 and 1993 revisions largely failed. But, even if NYPE 2015 fails in its entirety, there are interesting new clauses which might be used, even if the form as a whole is not. The new form in practice therefore presents alternatives: wholesale reform or an invitation to cherry-pick.

The New York Produce Exchange charter is, according to its explanatory notes, "the most widely used standard time charter party in the dry cargo sector of the industry".[1] Obviously, then, a major redraft is a landmark event, but it is dispiriting to reflect that the three years' work may go largely unappreciated. In recent years, there have been two other significant NYPE revisions, in 1981 and 1993,[2] but the explanatory notes to the 2015 revision go on to state that "[the] 1946 edition is arguably still the most commonly used version of the NYPE charter, although many of its twenty-eight clauses are commonly amended or replaced with numerous rider clauses".[3] Neither of the later revisions has proved attractive to the industry, which prefers to soldier on with a 70-year-old form, riddled with patchwork amendments.

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The following well known abbreviations are used:
BIMCO: Baltic and International Maritime Council;
NYPE: New York Produce Exchange.

1. Both the NYPE 2015 form and the accompanying NYPE 2015 Explanatory Notes can be found linked from BIMCO's site: *www.bimco.org/Chartering/Clauses_and_Documents/Documents/Time_Charter_Parties/NYPE_2015.aspx*.

2. NYPE 1993 is also linked from BIMCOs site: *www.bimco.org/en/Chartering/Clauses_and_Documents/Documents/Time_Charter_Parties/NYPE93.aspx*. NYPE 1981 (also referred to as Asbatime) can be found at *www.fleetle.com/a/d/pdf/asbatime_nype_81.pdf*, and NYPE 1946 at *www.fleetle.com/a/d/pdf/nype_46_portrait.pdf*.

3. NYPE 2015 Explanatory Notes, 3.

Not surprisingly, then, a search of i-law will quickly reveal that the law reports continue to be well populated with disputes on the amended 1946 form.[4] Conversely, a search for NYPE 1993, or NYPE 93, throws up no more than a handful of matches in the last five years or so. However, it does include two cases that are relevant to the discussion in this paper, notably *Spar Shipping* v *Grand China Logistics Holding (Group) Co Ltd*,[5] where Popplewell J classified late payment of hire as breach of an innominate term, and *The Paiwan Wisdom*,[6] on the application of CONWARTIME 2004 to routeing, in the face of fears about piracy. Both these cases were disputes on NYPE 1993, so the form clearly attracts some use, but there are hardly any other cases in recent years.[7]

If this admittedly unscientific survey fuels pessimism as to the likely acceptance of a new NYPE standard form (a more likely explanation, I suggest, than that the better drafting of the 1993 form has led to fewer reported disputes), nonetheless shipping practice has moved on somewhat since 1993, let alone 1946, and there can surely be little doubt "that the industry would benefit from a modern and comprehensive dry cargo charter party that reflects contemporary commercial practice and legal developments that have taken place in the past twenty years".[8] But will the industry appreciate this? Might it instead be tempted to pick the best parts, and leave the rest?

Amendments and the rider syndrome

It would scarcely be possible to use NYPE 1946 unamended today, but amending standard forms on a fixture-to-fixture basis, or adding one-off (rider) clauses (the rider syndrome) can be a fertile source of legal dispute.[9] For NYPE 2015 to counter the practice is a worthy aim, but it is a general form for dry cargoes, and one size is unlikely to fit all. The solution adopted for 2015 is extensive use of options; and, to prevent these themselves becoming a source of dispute, provision for default positions, where no choice is made.[10] The new revisions also resolve a number of disputes that have arisen in the courts in recent years.[11] But one wonders whether even those responsible for it really intend the new form to be used unamended. Even the commonest amendments to the 1946 off-hire clause are

4. As late as December 2015, for example, in *Five Ocean Corp* v *Cingler Ship Pte Ltd* [2015] SGHC 311 an amended 1946 form was used for a trip-time charterparty (which is now provided for by the 2015, but was not by the 1946, revision). Also relatively recent, and touched on in this paper, are *Kuwait Rocks Co* v *Amn Bulkcarriers Inc (The Astra)* [2013] EWHC 865 (Comm); [2013] 2 Lloyd's Rep 69 and *Cosco Bulk Carrier Co Ltd* v *Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm); [2011] 1 Lloyd's Rep 187. Both involved heavily amended 1946 forms; see respectively *infra*, fnn 76 and 45.

5. [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep 407; *infra*, fn.76.

6. *Taokas Navigation SA* v *Komrowski Bulk Shipping KG (GmbH & Co) (The Paiwan Wisdom)* [2012] EWHC 1888 (Comm); [2012] 2 Lloyd's Rep 416; infra, fn.41.

7. See *Dalwood Marine Co* v *Nordana Line A/S (The Elbrus)* [2009] EWHC 3394 (Comm); [2010] 2 Lloyd's Rep 315 and *Onego Shipping & Chartering BV* v *JSC Arcadia Shipping (The Socol 3)* [2010] EWHC 777 (Comm); [2010] 2 Lloyd's Rep 221; and that is about it, in the last five years or so.

8. NYPE 2015 Explanatory Notes, 3.

9. See further *infra*, fn.87.

10. Eg, cl.1(d) (NAABSA); cl.9 (Bunkers); cl.38 (Slow Steaming); cl.54 (Law and Arbitration); *infra*, fnn 38, 50, 68, and text thereto.

11. Eg, cl.11(c) (Withdrawal), allowing the owners "damages, if they withdraw the Vessel, for the loss of the remainder of the Charter Party", resolving (in favour of Flaux J's approach in The Astra, *supra*, fn.4) the dispute in *The Astra and Spar Shipping*, *supra*, fn.5. See also generally infra, fnn 74–84, and associated text.

unprovided for as options,[12] and BIMCO recognise that the sharp difference in treatment between short- and long-term charters (the cut-off being at five months) should best be reviewed on a case-by-case basis.[13]

In any case, it is the practice of modern forms to adopt standard clauses which are intended to be plugged in as add-ons, rather than for the forms as a whole to be integrated. Thus, for example, BPTIME 3 has an entire section of "Special Provisions", standard clauses that can be plugged into virtually any form,[14] and Shelltime 4 adopts standard War Risks, Both to Blame Collision and New Jason Clauses.[15] Baltime sets out CONWARTIME 1993.[16] What matters is that these clauses work anywhere, and do not conflict with other provisions of the charterparty. NYPE 2015 continues this practice, but the plug-in clauses are brought up to date, including for example the BIMCO War Risk Clause CONWARTIME 2013 and the BIMCO Piracy Clause for Time Charter Parties 2013,[17] both of which were largely reactions to the Somali piracy threat, and cases arising therefrom.[18] Some of the new NYPE clauses, such as the bunker provision, the fuel consumption warranty, and the slow steaming clause,[19] might stand as models in their own right, whether or not the whole form is adopted, lock, stock and barrel. One wonders whether the fate of NYPE 2015 will be to have its best clauses cherry-picked,[20] rather as appears to be the fate of the Rotterdam Rules in some parts of the world.[21] As instruments become more complex, whether they be charterparties or international Conventions, maybe obtaining acceptance in their entirety becomes more difficult.

NYPE in general

The description of the vessel matters more to time than to voyage charterers. Whether they are using the vessel for their own cargo, or to trade, effectively as owners on their own account, they pay on a time basis, and are responsible for the provision of bunker fuel. Unlike voyage charterers, they have a direct interest in the speed and fuel consumption of the vessel, quite apart from the other characteristics, tonnage, dimensions, equipment, cargo-carrying capacity, and so on. NYPE 2015 differs from its predecessor in setting out the vessel description in an appendix (A), and to resolve possible conflicts, provides that:

12. See further infra, fnn 82–84, and associated text.
13. See *infra*, fn.36. Also recommended for consideration on a case-by-case basis are the cancelling provisions: *infra*, fn.66.
14. Including, eg, War Risks, General Average, New Jason, Both-to-blame Collision, and Oil Pollution Prevention.
15. Shelltime 4 (2003 revision), respectively cll 35–37.
16. Baltime 2001, cl.20 (War).
17. Respectively cll 34 and 39 (clauses which have a similar overall objective, albeit for different risks).
18. See *infra*, fnn 39–48, and associated text.
19. See infra, fnn 49–50, and associated text.
20. The revision might also be of value as an academic study, much as the INTERTANKO forms have been in the tanker market, into which they favour shipowners to too great an extent to receive acclaim in their entirety.
21. Eg, the Chinese Maritime Code takes only the best bits from various Conventions: *www.admiraltylaw.com/papers/countrytable.pdf*; Si and Zhang, "An Analysis and Assessment on the Rotterdam Rules in China's Marine Industry": *www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Prof.%20Si%20Yuzhuo%20and%20Dr.%20Zhang%20Jinlei.pdf*.

"In the event of any conflict of conditions, the provisions of any additional clauses and Appendix A shall prevail over those of the main body to the extent of such conflict, but no further".

The use of an appendix is already common in the tanker trade, and is similar to Shelltime 4's Appendix A, and the BPTIME 3 Questionnaire.[22] Dry cargo descriptions have tended to lag behind their tanker counterparts in the past.

The same has been true of speed and consumption warranties, and this has also been addressed in NYPE 2015, with a much fuller provision than before.[23]

As a dry-cargo form, NYPE has always favoured charterers to a greater extent than Baltime (very much a shipowner's charter),[24] but to a lesser extent than tanker forms such as Shelltime and BPTIME. These (compared to dry cargo) operate in a charterer's market. The 2015 revision does not seem significantly to change the balance. Some of the changes favour shipowners and some charterers; many are neutral, being clarifications or reflecting changing trade practice, and it is difficult to discern any general movement in the new form, towards either shipowners or charterers. We can see changes in both directions, for example, in the new grace period and withdrawal provisions, for failing to make punctual payment of hire.[25]

Main 2015 changes

Some changes are essentially cosmetic or linguistic, rather than of substance. For example, cl.1 (Duration/Trip Description) has been expanded to consolidate related provisions previously found in separate clauses in the 1993 form, such as Trading Limits (formerly cl.5), Berths (formerly cl.12) and Sublet (formerly cl.18). The first paragraph of cl.16 (Delivery/Cancelling) of NYPE '93 has been moved to a more prominent position, so that it more closely reflects the chronological order of events.[26] Redelivery now has its own clause (4), whereas in the old form some aspects were dealt with in the hire clause.[27] In any revision, it makes sense to engage in a tidying-up process.

Most of the changes are far more than cosmetic, however. On BIMCO's main NYPE 2015 page appears the following:[28]

"The form can be used either for trip charters or period time charters. There are some additional clauses that apply only to period time charters (where the minimum charter period exceeds five months) and parties are advised to check carefully whether the additional clauses (see Clause 52 (Period Applicable Clauses)) should or should not apply in the context of their own agreement."

22. BPTIME 3 also has conflict resolution provisions (as between the various parts of the form) in the Preamble.
23. See *infra*, fn.60.
24. Baltime, for example, has no payment of hire grace period, and an off-hire provision (11) without the put-back ("same or equidistant position") in NYPE 2015, The final voyage provision in the redelivery clause (7) is, however, similar to NYPE 2015: see generally *infra*, fnn 80–84, 31–32, and associated text.
25. See *infra*, fnn 73–79, and associated text. Also favouring charterers are the removal of the extension of cancelling provision, the more sophisticated description of vessel, the more comprehensive performance clause, and slow steaming, whereas owners benefit from changes to suspension of hire.
26. It is now in cl.3: NYPE 2015 Explanatory Notes, 6.
27. NYPE 2015 Explanatory Notes, 11.
28. *www.bimco.org/Chartering/Clauses_and_Documents/Documents/Time_Charter_Parties/NYPE_2015.aspx*. On cl.52, see *infra*, fn.55.

Since this is the only change specifically alluded to there, BIMCO presumably regard it as the most fundamental. I will therefore begin by considering that, then revisions reflecting changing trade practice, and finally revisions of interest to the lawyer.

Space does not permit an exhaustive review, but it is hoped to provide at least a flavour of NYPE 2015 here.

Period (long or short) or trip?

Catering for the trip-time charterparty, then, and drawing a distinction between short and long fixtures, are the headline changes in the 2015 revision. The trip charter is a species of short fixture, and the cut-off point is sharp, being chosen at five months.

As far as the trip-time charter is concerned, cl.1 is little more than cosmetic, being headed "Duration/Trip Description", to emphasise that it can be used for a trip. The need to provide for the trip charter has also, however, influenced the cancelling provision,[29] and given rise to the option for owners to bunker the vessel for the entire trip, charterers paying on the basis of an estimated fuel consumption and price, with an adjustment at the end of the trip.[30]

Clause 52 (Period Applicable Clauses) applies only if "the minimum period of this Charter Party exceeds five (5) months", so drawing a clear distinction between short and long-term fixtures. Clause 52(a) provides for completion of a last voyage, but only where the vessel is "on a ballast voyage to the place of redelivery or on a laden voyage, reasonably expected to be completed within the employment period when commenced", and only at the charter rate, "or the prevailing market rate, whichever is higher, for any extended time as may be necessary for the completion of the last voyage of the Vessel to the place of redelivery".

This very limited provision compares unfavourably, from a charterers' perspective, with a clause such as that in *The World Renown*,[31] where, as long as the vessel was "upon a voyage at the expiry of the period of this charter, Charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided by this charter". On a rising market, any charterer would prefer the *World Renown* clause, allowing the voyage to continue at charter rates. But that was Shelltime 3,[32] and provides a useful illustration of the difference between pro-charterer tanker markets, and the shipowners' market in which NYPE 2015 operates.

Clause 52(b) (Drydocking), which gives the owners the option to drydock, explicitly applies only to fixtures exceeding five months,[33]

"because the duration of the charter party may be too short to allow drydocking without significantly affecting the charterers' commercial use of the ship—particularly in the case of a trip charter

29. See *infra*, fn.66.
30. NYPE 2015, cl.9(a)(ii); see *infra*, fn.55.
31. *Chiswell Shipping Ltd* v *National Iranian Tanker Co (The World Symphony and The World Renown)* [1992] 2 Lloyd's Rep 115, where the clause also, unlike that in NYPE 2015, allowed the charterers to continue even on an illegitimate last voyage.
32. Now reproduced in Shelltime 4, as part of cl.19 (Final Voyage).
33. NYPE 2015, cl.19.

agreement. If, however, the minimum period of the charter party exceeds five months then the owners have the option to drydock the ship by prior agreement with the charterers".[34]

The other sub-clauses that are triggered by the minimum period of the charter exceeding five months are the charterers' options to add off-hire periods to the charter period, and to fly their own house flag and paint the vessel with their own markings.[35]

The distinction between short and long fixtures is innovative, makes good sense, and is a distinction of real substance. The cut-off is however very sharp and, as BIMCO say on their website, "parties are advised to check carefully whether the additional clauses (see Clause 52 (Period Applicable Clauses)) should or should not apply in the context of their own agreement".[36] It could matter.

Changing trade practices

Turning to the other main substantive changes, there are some which are reflective simply of changing trade practices. Some these changes (the bunker provisions, for example) are highly innovative, and might perhaps herald a new way forward.

Among provisions reacting to changing trade practices are NAABSA, piracy, slow steaming, fuel and bunkers, liquefaction, electronic bills of lading, cancelling and arbitration provisions. (The account here remains non-exhaustive.)

NAABSA: Not Always Afloat But Safely Aground

The NAABSA (Not Always Afloat But Safely Aground) provision was absent from the 1993 revision, and appears to be a throwback to the 1946 form.[37] It has, however, been optionally reintroduced into cl.1(d) of the 2015 form, "because the practice of lying aground while loading is still common in grain trades and remains an important provision for those involved in such trades, but with a separate indemnity provision added".[38] Clause 1(d) is optional, the default being that it does not apply, and it is subject to the vessel being able to lie safely aground "without suffering damage". There is also an indemnity provision, covering "any loss, damage, costs, expenses or loss of time, including any underwater inspection required by class, caused as a consequence of the Vessel lying aground at the Charterers' request". Obviously, the owners need to be properly protected from the consequences of operating such a clause.

Piracy

Not taken into account in 1993, because it would have been very difficult to predict, was the kidnap for ransom type of piracy that became endemic around the Horn of Africa during the first decade of the current century (but which seems now to be declining).

34. NYPE 2015 Explanatory Notes, 16.
35. Respectively cll 52(c) and (d).
36. *Supra*, fn.1.
37. NYPE 1946, cl.6.
38. NYPE 2015 Explanatory Notes, 4.

NYPE 2015 updates the previous provision, by including both BIMCO's CONWARTIME 2013 and the BIMCO Piracy Clause for Time Charter Parties.[39] Both were revised to deal explicitly with this type of piracy.

In very general terms, the old CONWARTIME (previously revised in 2004) allowed shipowners to refuse to proceed:[40]

"… where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks",

or to be indemnified in respect of additional costs, if they agreed to proceed. "Acts of piracy" were included within the definition of a war risk, but there were cases which restricted (or appeared to restrict) the owners' right to rely on this provision. In particular, in The Product Star (No 2)[41] the Court of Appeal appeared to require there to be an escalation in risk since the making of the charterparty, and in *The Triton Lark*,[42] Teare J construed "are likely to" in a way that was thought seriously to constrain the operation of the clause.

CONWARTIME 2013, set out in NYPE 2015, cl.34, defines piracy widely, "to include acts of 'violent robbery and/or capture/seizure'",[43] and clarifies that the clause can be triggered "whether such risk existed at the time of entering into this Charter Party or occurred thereafter";[44] also, operation of the clause requires only that, "in the reasonable judgement of the Master and/or the Owners", proceeding is dangerous, etc. The words "are likely to" no longer appear, and the high threshold test from *The Triton Lark* is thereby avoided.

Parts of cl.39 (the piracy clause) do no more than repeat cl.34, though there are costs issues specific to piracy, such as the taking out of Kidnap and Ransom ("K&R") insurance. There is also the issue of off-hire, which had been addressed, in both cases under an amended version of the 1946 form, by Gross J in *The Saldanha*[45] and by Cooke J in The Captain Stefanos.[46] Under the new clause,

"The Vessel shall remain on hire throughout the seizure and the Charterers' obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure until release".[47]

It seems that "[the] period of 90 days has been used simply because this is the current average period of time that vessels are held by Somali pirates before release".[48]

39. NYPE 2015, respectively cll 34 (War Risks) and 39.

40. Otherwise charterers might be entitled to insist on shortest route, on the principles of *Whistler International Ltd* v *Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638; [2001] 1 AC 638.

41. *Abu Dhabi National Tanker Co* v *Product Star Shipping Ltd (The Product Star) (No 2)* [1993] 1 Lloyd's Rep 397; but *cf* the qualifications in *The Paiwan Wisdom* [2012] 2 Lloyd's Rep 416 (*supra*, fn.6), cited NYPE 2015 Explanatory Notes, 21.

42. *Pacific Basin Ihx Ltd* v *Bulkhandling Handymax AS (The Triton Lark)* [2011] EWHC 2862 (Comm); [2012] 1 Lloyd's Rep 151.

43. NYPE 2015, cl.34(a)(ii).

44. NYPE 2015, cl.34(b) (hence removing any escalation requirement).

45. [2011] 1 Lloyd's Rep 187; *supra*, fn.4.

46. *Osmium Shipping Corp* v *Cargill International SA (The Captain Stefanos)* [2012] EWHC 571 (Comm); [2012] 2 Lloyd's Rep 46.

47. NYPE 2015, cl.39(f).

48. G Hunter, "BIMCO Piracy Clauses" (Editorial) (2009) 15 JIML 291, 292.

There are two points worth making here. First, what the new form does is simply to adopt clauses from elsewhere, and slot them in. These are well-drafted clauses, and this may cause no problem, but the repetition between the two clauses is perhaps regrettable. Secondly, charterparties are interpreted as a whole, and it is important, when slotting in new clauses, to ensure that they do not have unintended ramifications elsewhere in the charterparty. Fortunately, in cl.39 at least, this has been thought of, at least for off-hire. Clause 39(g) provides that

"In the event of a conflict between the provisions of this Clause and any implied or express provision of the Charter Party, this Clause shall prevail".

There might still be problems where, during a piratical attack, an off-hire event (ie, within the off-hire clause) occurs which would not have occurred but for the attack. The real point to be made here, though, is that slotting in clauses has its dangers, in respect of which those responsible for drafting standard forms need to take great care.

Ransom piracy attacks appear to be on the decline, so adopting these clauses might be likened to the development of strategies for fighting the last war, but the clauses are capable of dealing with piracy generally, and hence a useful addition, although perhaps too late to deal with the immediate crisis.

Slow steaming

Perhaps in response to lean economic times, there is a new slow steaming clause (38), permitting the charterers to instruct the Master to reduce or adjust the speed of the ship, which could allow savings of fuel, or to adjust speed to arrive at a specified time. Slow steaming negates the due despatch obligation,[49] as might be expected, and slow steaming periods are also excluded from calculations for the speed and consumption warranty.[50] Clause 38 provides alternatively for slow and ultra-slow steaming, the latter of which can include reductions in engine speed "below the cut-out point of the Vessel's engine(s) auxiliary blower(s)". Naturally there are appropriate safeguards for owners, and the slow-steaming (as opposed to ultra-slow steaming) option applies by default.

Fuel and bunkers

There is a significantly revised Bunkers clause (9), covering Bunker quantities and prices, Bunkering Prior to Delivery/Redelivery, Bunkering Operations and Sampling, Bunker Quality and Liability, Fuel Testing Program, Bunker Fuel Sulphur Content, and Grades and Quantities of Bunkers on Redelivery.[51] Reflecting modern pollution controls, there are low sulphur requirements in cl.9(f).[52] The Explanatory Notes observe that:[53]

49. NYPE 2015, cl.8 (Performance of Voyages), which is made subject to the slow steaming clause; see also cl.38(e).
50. NYPE 2015, cl.12(a) (Speed and Consumption).
51. NYPE 2015, respectively cll 9(a)–(g).
52. NYPE 2015 Explanatory Notes, 11.
53. NYPE 2015 Explanatory Notes, 8.

"[all] of these are matters that are commonly absent from or insufficiently provided for in many standard form time charter parties. Many older time charter forms contain bunker clauses covering the fundamental principles under the charter, but do not contemplate today's situation where ships are required to carry and use different grades of fuel and where sampling and testing regimes are an integral part of the process."

There is, of course, a tension between shipowners' and charterers' interests, in that charterers pay for bunker fuel, but owners require fuel of a particular quality, to avoid damage to engines and other equipment, and to comply with pollution legislation.[54]

Inevitably there will fuel on board at delivery and redelivery (or other termination), and there needs to be a mechanism for pricing these. The option with trip-time charterparties, for the owners to provide fuel for the entire trip, has already been explained.[55] There are two other options (which can also be adopted for trip-time, but might be thought less appropriate). The simplest, which is also the default (even for a trip-time charter), is for the charterers to take over and pay for on delivery, and the owners on redelivery, such bunkers as are on board the vessel, prices being stipulated in the charterparty.[56] The other option is for the charterers to redeliver with about the same quantity as they take on delivery, with a price adjustment for any differences, but based on actual amounts paid, "as evidenced by suppliers' invoice or other supporting documents".[57] Clause 9(b) allows charterers to bunker prior to delivery and owners prior to redelivery. This guards against fuel of the correct specification not being available at the places of delivery and/or redelivery, but also (especially if combined with the alternative option just described) allows the parties to take account of varying fuel prices in different parts of the world.[58]

The bunkering provision is far more sophisticated than that in NYPE 1993, or indeed anything in any of the other main forms (including the tanker forms), and may perhaps set the standard for the future. It should be remembered that many dry-cargo charters today remain on the NYPE 1946 form, which is almost entirely silent on bunkers.[59] The new form, if used, should resolve many of the disputes.

On the subject of bunkers, there is a new Speed and Consumption clause (12), providing for a continuing warranty by the owners, "in good weather on all sea passages with wind up to and including Force four (4) as per the Beaufort Scale and sea state up to and including Sea State three (3) as per the Douglas Sea Scale", unless otherwise specified. Detailed performance clauses have been common in the tanker forms for decades,[60] and it is good to see dry cargo beginning at last to catch up.

54. Sulphur provisions in cl.9(f) also require that the Vessel shall be able to consume fuels of the required sulphur content, when ordered by the Charterers to trade within an emission control area.

55. NYPE 2015, cl.9(a)(ii), *supra*, fn.30. Note that the amount used is eventually paid for by the charterers.

56. NYPE 2015, cl.9(a)(i).

57. NYPE 2015, cl.9(a)(iii).

58. NYPE 2015 Explanatory Notes, 9.

59. NYPE 1946, cl.3, providing effectively for the default option (above) on taking over bunkers on delivery and redelivery; similarly NYPE 1993, cl.9(a) (cl.9(b) being a bunker quality provision referring to NYPE 1993, Appendix A). Shelltime 4, cl.15 has payments "supported by paid invoices", ie, the alternative NYPE 2015 option (there is also a grade provision in cl.29).

60. Eg, Shelltime 4, cl.24 (Detailed Description and Performance); BPTIME 3, cl.18 (Performance of vessel—speed and consumption). These remain more comprehensive than NYPE 2015, and also more favourable to charterers, eg in the Beaufort Scale limits (again, presumably reflecting the pro-charterer nature of the tanker market).

Liquefaction

Another issue that is addressed explicitly by NYPE 2015 is that of liquefaction, included in cl.29(a) (Solid Bulk Cargoes/Dangerous Goods).[61] This clause requires essentially that charterers provide proper information,[62] and is no doubt a step in the right direction, but one of the issues with this type of cargo is the difficulty of knowing, at time of loading (or indeed at any time before a disaster occurs), whether or not a cargo is prone to liquefaction. What is really needed is improved tests, but that is necessarily beyond the scope of a standard form charterparty. (There is also a small number of vessels which are capable of carrying this type of cargo safely.[63])

Electronic bills of lading

Clause 32 (BIMCO Electronic Bills of Lading Clause) makes provision for electronic bills of lading, waybills or delivery orders, to be used at charterers' option. There is little by way of detail in this clause, presumably because it is not known how this technology will develop.[64] The clause assumes subscription to an Electronic (Paperless) Trading System, subscription fee for charterers' account, and requires indemnity in respect of additional liabilities that might arise.

Cancelling

Many charterparties (including NYPE 1993) require charterers to declare if they intend to invoke the cancelling clause, to spare the owners a wasted ballast voyage.[65] There is, however, no such provision in NYPE 2015. One reason for not making this common provision is that it would cause difficulties for trip-time charterers. Another reason is the march of technology, that "vessel tracking methods and more stringent eta/itinerary provisions would serve much the same purpose". But to change the balance generally, because of difficulties for trip-time charterers, is surely the tail wagging the dog, and "BIMCO encourages parties to discuss on a case-by-case the inclusion of [an] 'Extension of Cancelling' clause if they feel it appropriate and important to their particular business".[66]

Arbitration

For the first time, an option is given for arbitration in Singapore, with either English or Singapore substantive law applying.[67] Other options remain as before, for New York or

61. The dangers of liquefaction were starkly demonstrated by the sinking (with the loss of 15 lives) of *Harita Bauxite* in 2013, carrying a cargo of nickel ore. On this and similar incidents, see generally, eg, *www.atlanticmarineassociates.com/pdf/The_Deadliest_Cargo.pdf*.

62. NYPE 2015 Explanatory Notes, 19.

63. *www.atlanticmarineassociates.com/pdf/The_Deadliest_Cargo.pdf*.

64. See generally N Gaskell, "Bills of lading in an electronic age" [2010] LMCLQ 233; M Goldby, "The CMI Rules for electronic bills of lading reassessed in the light of current practices" [2008] LMCLQ 56.

65. Eg NYPE 1993, cl.16 (Delivery/Cancelling).

66. NYPE 2015 Explanatory Notes, 5.

67. NYPE 2015, cl.54 (Law and Arbitration).

London. To prevent the options themselves becoming a source of dispute, a default of New York applies if no alternative is agreed, and English law where Singapore arbitration is chosen, but there is no choice of substantive law.[68]

Other clauses

Clause 2 (delivery) makes provision for the now not uncommon practice for ships to be delivered at one place but the first cargo to be loaded at another place. "The delivery provisions of NYPE '46 and '93 are often amended to take this practice into account."[69] The changes are to avoid the need for commonly-made amendments.

We should remember that the form most commonly used today remains NYPE 1946, cl.20 of which provides:

"Fuel used by the vessel while off hire, also for cooking, condensing water, or for grates and stoves to be agreed as to quantity, and the cost of replacing same to be allowed by owners."

Grates and stoves were going out of use even in 1946, so this clause was out of date even then, but it had the effect of making the owners responsible for domestic fuel used by the crew.[70] Not surprisingly, "grates and stoves" make no appearance in 2015, nor indeed did they in 1981 or 1993, but the NYPE position now is for charterers to "provide and pay for all the bunkers except as otherwise agreed".[71] In other words, the balance has shifted towards the owners since 1946. By contrast, Shelltime 4 retains the original division, responsibility for "fuel used for domestic services" remaining with the owners.[72] Perhaps this does no more than illustrate how the tanker market favours charterers, to a greater extent than dry cargo.

The owners are, however, responsible under the 2015 form "for all provisions, cabin, deck, engine-room and other necessary stores, boiler water and lubricating oil; shall pay for wages, consular shipping and discharging fees of the crew and charges for port services pertaining to the crew/crew visas". So the general time charter division, whereby owners provide for master and crew, are retained in NYPE 2015.

Of particular legal interest

Quite apart from changes to keep up to date with modern trading practice, there are aspects of NYPE 2015 which are of particular interest to lawyers.

The withdrawal provision for failure to make punctual payment of hire provides, as did the old form, for a grace period before the shipowners are entitled to withdraw.[73] Under the old form, the charterers could take advantage of this only if late payment was due to

68. NYPE 2015 Explanatory Notes, 31.
69. NYPE 2015 Explanatory Notes, 4.
70. The clause was considered in *Summit Investment Inc* v *British Steel Corp (The Sounion)* [1987] 1 Lloyd's Rep 230 (CA). Coal was used to power the ship, but also for "burning in grates and stoves to enable the crew to cook and remain warm, which were owners' purposes". The owners were therefore required to replace any coal used for these purposes.
71. NYPE 2015, cl.7(a). Also the position in 1993.
72. Shelltime 4 (2003 revision), cl.7(a) (Charterers to Provide).
73. NYPE 2015, cl.11(b).

"oversight, negligence, errors or omissions on the part of the Charterers or their bankers". This was apparently a source of dispute, and so has been dropped,[74] but in this respect at least the changes favour the charterers.

The same cannot be said for the withdrawal provision itself,[75] which entitles "the Owners, without prejudice to any other rights or claims the Owners may have against the Charterers:

(i) to withdraw the Vessel from the service of the Charterers;
(ii) to damages, if they withdraw the Vessel, for the loss of the remainder of the Charter Party."

It is (ii) that provides, in effect, for the position adopted by Flaux J in The Astra,[76] where protection of the charter rate for the remainder of the charter, on a severely falling market, was the consequence of his view that failure punctually to pay hire (under the 1946 form) amounted to a breach of condition, not just an innominate term. This provision is more than simply for the avoidance of doubt, however, as the authorities did not unequivocally support Flaux J, and the opposite view has since been taken by Popplewell J in Spar Shipping.[77] Where the law is unclear, as it is here, it is well that the standard form is clear. This is also, of course, a provision favouring the owners, in the relatively rare situation where they withdraw on a falling market. The provision does nothing, of course, to resolve the general issue whether the prompt payment term constitutes a condition, but renders the question irrelevant, where protection of charter rates for the remainder of the term is the only issue.[78] Retained from 1993, and also benefiting owners, is the right of suspension while hire is outstanding.[79] On a falling market owners might not wish to commit to withdrawing the vessel, but suspension (coupled with an indemnity from the charterers) could well be in their interests, putting pressure on charterers to pay promptly.[80] The 2015 differs from the 1993 provision in that the owners no longer need to wait for the grace period to expire (such is the importance of prompt payment).

The off-hire clause in the 1946 form has been a potent source of dispute over many decades, and one might have expected to see a radical revision. There are certainly useful clarifications in the new form, cl.17 of which now provides for "detention by the arrest of the Vessel, … , or detention by Port State Control or other competent authority for Vessel deficiencies", thereby resolving issues such as those in the line of cases considered in *The Laconian Confidence*.[81] We also see continuation of "any other similar cause preventing the full working of the Vessel", the word "similar" (which was also in the 1993 form) making clear that *ejusdem generis* principles of interpretation apply.[82]

74. NYPE 2015 Explanatory Notes, 13.
75. NYPE 2015, cl.11(c).
76. *Supra* fn.4.
77. Supra, fn.5.
78. See also NYPE 2015 Explanatory Notes, 13.
79. NYPE 2015, cl.11(d); NYPE 1993, cl.11(a).
80. The indemnity would appear to be of sufficient width to cover the situation in *ENE Kos 1 Ltd* v *Petroleo Brasileiro SA (The Kos)* (No 2) [2012] UKSC 17; [2012] 2 AC 164; [2012] 2 Lloyd's Rep 292 (not a case on the NYPE form), and also the consequences of non-performance of voyages.
81. *Andre & Cie SA* v *Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139.
82. The actual results in *The Laconian Confidence* (*supra*, fn.81) and *The Saldanha* [2011] 1 Lloyd's Rep 187 (*supra*, fn.4).

Nonetheless, the off-hire revisions seem rather conservative. *In The Saldanha*,[83] Gross J was considerably exercised over the meaning of "average accidents to the Vessel or cargo", and one wonders what such an antiquated phrase is doing in a modern charterparty form. Also, given the options used elsewhere in the form, it is strange that there is no provision for the most common amendments here, such as "any other cause whatsoever".[84] Maybe there is simply an acceptance that some amendments will be made, whatever provision is made in the new form. It is, after all, quite easy for the parties to delete "similar" and add "whatsoever" (though it is interesting to consider the effect of doing the first and not the second).[85] Maybe it is feared that too radical an alteration to this much-used clause will discourage use of the new form.

Conclusion

This review of the latest revisions to New York Produce Exchange, though far from exhaustive, nonetheless demonstrates that there is a lot that is innovative. Even if the form as a whole does not gain widespread acceptance, some of the clauses might. A great deal of thought, for example, has gone into the bunkering provisions, which are ground-breaking. It also makes sense to accord different treatment to longer and shorter term charterparties, but whether the brightline cut-off of NYPE 2015 will work well is perhaps more doubtful.[86]

If the new version of NYPE succeeds in curtailing casual amendments and the rider syndrome, the redrafting will certainly have been a worthwhile exercise. As long ago as the nineteenth century, the courts accepted that what is specially agreed upon in relation to a particular fixture will prevail over printed words that are to apply generally, where there is a conflict between them.[87] The assumption is presumably that greater consideration is given to the particular than to the general. The problem in a charterparty context is that amendments may be made by people with little or no legal expertise, and be accorded less, rather than more, expert consideration than the standard clauses. The law reports abound with disputes arising from sloppy amendments.[88] There is also authority that charterparties are interpreted as a whole,[89] and those responsible for drafting standard forms can (in principle at least) ensure that the form works as a whole, whereas this is unlikely to be

83. [2011] 1 Lloyd's Rep 187, [10–18].

84. Discussed in both *The Laconian Confidence* and *The Saldanha* but opted for in neither case.

85. At first sight this appears to be the same as the wording in The Laconian Confidence and *The Saldanha*, suggesting that *ejusdem generis* should continue to apply, but the parties have addressed their minds specifically to the deletion of "similar", so the result may well be different.

86. See *supra*, fn.36

87. See *Glynn* v *Margetson* [1893] AC 351, 355 (Lord Herschell LC) and 357 (Lord Halsbury). In that case, the handwritten words applicable to the particular voyage prevailed over the printed standard words (which included a wide liberty to deviate) in determining the "main object and intent" of the contract.

88. Eg (famously), *Oldendorff (EL) & Co GmbH* v *Tradax Export SA (The Johanna Oldendorff)* [1974] AC 479; [1973] 2 Lloyd's Rep 285. There were alternative discharge ports of "London or Avonmouth or Glasgow or Belfast or Liverpool/Birkenhead (counting as one port) or Hull", but whereas a typed amendment made provision for commencement of laytime for Avonmouth, Glasgow or Hull, it failed to do so in respect of Liverpool/Birkenhead, which was where she was ordered. Hence the parties faced litigation to the House of Lords.

89. *Nereide SpA di Navigazione* v *Bulk Oil International (The Laura Prima)* [1982] 1 Lloyd's Rep 1, where however the problem was created by a poorly-revised standard form (which later became, and remains, Asbatankvoy). It is not only the casual amender who needs to be careful.

true of the casual amender. If NYPE 2015 can counter the problem of the casual amender, and can work well as a coherent whole, it is very much to be welcomed. However well it has been thought out, though, only the most diehard optimist would believe that it can topple the heavily amended NYPE 1946 form.

NYPE 2015 brings dry-cargo time chartering up to date. It is a form that matches or exceeds its tanker cousins in its attention to detail, something that has by no means always been true of dry-cargo forms. It seems to strike a reasonable balance between shipowners and charterers. Some of the clauses, have, it is true, been slotted in from elsewhere, and some parts (such as off-hire) might be regarded as rather conservative, but it would be a shame to see the effort that has gone into NYPE 2015 fail. Whether or not it is the end at last for a seventy-year-old form, it is to be hoped that at least some of its clauses find favour, and act as a standard for the future. To be cherry-picked is at least better than to be ignored.