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An introduction to Gencon 2022

Gencon was last revised almost 30 years ago. That version was introduced by BIMCO as a modest review, designed to add clarity and certainty, but making no fundamental change to the basic character of the charter. The result was a document which stays surprisingly close to its 1922 ancestor.

In 2018 BIMCO set up a new sub-committee to consider a broader revision of the Gencon form. By then, it was clear that the time had come to rethink the form's purpose and context. According to the available statistics, based on BIMCO's records of electronic access, Gencon was the most widely used of its voyage charters; but these records did not disclose how far its content was modified by the addition of manuscript clauses – including the Clause Paramount, as recommended by the P&I Clubs.¹ Simply put, if you paste such a provision onto Gencon 1994, you might as well draw a heavy black line through its famous clause 2.

Clause 2: "Owners' Responsibility"

This clause 2 was perhaps the most distinctive feature of the Gencon form. Labelled "Owners' Responsibility", it was often, and perhaps more accurately, referred to as its exceptions clause.² Basically, it exempted the shipowner from any liability for loss of, or damage to the cargo or for delay in delivering the cargo unless caused by "the personal act or default of the Owners or their Manager". And this immunity was reinforced in 1994 by the expansion of the Bills of Lading clause to include a broad indemnity.

So far, so good. But the charter was silent about potential breaches outside the ambit of the contract of carriage – not least the consequences of delay through accident on the approach voyage to the loadport, or liability for cargo's contribution in general average. From this, it was clear that both parties would benefit from a rethinking of the express division of risk under the charter.

Under the new form ("Gencon 2022"), the indemnity under the Bills of Lading clause has been kept intact; but clause 2 has been amended to follow the logic of the Hague Rules and the Hague-Visby Rules. Subject to whatever risks or responsibilities the charterers may have assumed, the owners are to exercise due diligence to provide a vessel which is fit for loading the cargo, and which is

¹ See, eg: "As club managers we often receive queries from our membership, predominantly owner members, as to whether a clause paramount should be included into the subject voyage or time charter. Our general answer is 'yes'" (Standard Club, "Web alert: the importance of a clause paramount", 22 December 2014, www.standard-club.com/knowledge-news/web-alert-the-importance-of-a-clause-paramount-250); "Generally, owners are advised to include clause paramount in their charterparties as (1) they may be entitled to rely on the exceptions under the HV Rules, (2) their absolute duty of seaworthiness is reduced to one to exercise due diligence and (3) they may be able to rely on the one year limitation period for cargo claims under the HV Rules" (West of England Defence Guides: "Clause paramount in a nutshell" (January 2018), www.westpandi.com/getattachment/786542da-2969-40b6-9800-84a3e2f252a0/defence-guide_clause_paramount_4pp_v2_lr.pdf); "It is nearly always beneficial for an owner to have a clause paramount incorporated into a charterparty" (Standard Club, "News & Insights", 4 June 2021, www.standard-club.com/knowledge-news/article-clause-paramount-3587).

² "... [T]hat compels me now to construe the 'Gencon' exceptions clause ... The exceptions clause – owners' responsibility clause – is Clause 2" (Louis Dreyfus & Cie v Parnasso Cia Naviera SA (The Dominator) [1959] 1 Lloyd's Rep 125).

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seaworthy for the intended voyage; but these due diligence obligations apply only at the commencement of loading (as to cargo-worthiness) and at the beginning of the loaded voyage (as to seaworthiness). The owners are entitled to rely on all rights, defences, limitations and time bars as specified and applicable under the Hague-Visby Rules.

The new charter has also added a General Exceptions provision (clause 18). This is a mutual clause, designed to excuse what would otherwise be a breach. While it extends to cover the respective servants, agents and subcontractors of the parties, it also provides that the cause alleged must be such as could not reasonably be avoided or guarded against, and that the clause does not interrupt laytime nor excuse any payment obligation.

Cargo

Having limited the handling of the cargo to “free in and out” (FIO) terms, Gencon 1994 placed all the related responsibility on the charterers, with this work to be carried out “free of any risk, liability and expense whatsoever” to the owners. But experience has shown that this is not really workable in practice because there are areas where some responsibility must remain with the owners – most obviously where, unknown to the charterers, the stowage will impair the ship's stability.

Gencon 2022 seeks to resolve this issue by stating that the charterers will carry out their cargo work “under the supervision of the Master but at their risk, responsibility and expense.” (subclause 4(a)) Deliberately, this wording mirrors the approach adopted by the NYPE time charter, where the case law offers guidance as to its practical application.

In the past 25 years or so, there has been a notable increase in legislation and mandates relating to the cargo and cargo-related matters, largely driven by concerns of safety, pollution and the environment. And by their nature, most of these issues lie close to the line defining the obligations assumed by the charterers under a FIO charter.³ To deal with such concerns, Gencon 2022 contains a new clause which addresses, inter alia, the charterers' responsibility for the proper description and lawfulness of the cargo, its fitness for carriage and the timely provision of information required for advance cargo declarations (clause 3).

Because of the legal and practical difficulties which goods carried on deck can create for the shipowner, depending on the applicable jurisdiction under the contract of carriage and the nature of the ship and the cargo, this has been transferred to a separate provision (clause 6). This provision states that the ship will not be required to load deck cargo without the owners' prior written agreement.

Cancelling and termination

Under Gencon 1994, the charterers had the right to cancel if the vessel was not ready to load on the cancelling date, whether in berth or not. Gencon 2022 continues to tie the

cancellation right to the cancelling date (as opposed to the time of arrival), but it is now triggered by failure to present the notice of readiness; and the charterers then have 48 hours to declare the charter cancelled (clause 14). The interpellation clause (subclause 14(b)) has been abridged, so that the owners' revised ETA is now taken to be the proposed new cancellation date, without any tolerance for further delay.

The new charter also seeks to resolve a problem which is separate from, but tied to the cancelling date (subclause 9(c)). Suppose the ship arrives at the loading port and has to wait for some time at the anchorage. The master properly tenders notice of readiness on anchoring; but when the ship eventually comes alongside, it fails both the initial inspection and also a subsequent joint reinspection. Under this new provision, the owners then have until the expiry of 96 hours or the cancelling date, whichever is the later, to put things right. If they fail to do so, the charterers have 12 hours within which to terminate the charter. But if they do so, they must compensate the owners at the demurrage rate for the time lost waiting at the anchorage following the initial tendering of the notice of readiness.

Notice of readiness and laytime

Like some other modern charters, Gencon contains a mixed regime for the commencement of laytime. If the loading or discharging place is available and accessible on the ship's arrival, the contract functions as a berth charter. But if the vessel must wait at the anchorage, it operates more like a port charter, subject to exclusion of the actual shifting time.

This is at best a clumsy arrangement, and often gives rise to a difficult question, especially prior to loading: how can the master present a valid notice of readiness if the vessel is not, as a matter of fact, then ready? In practical terms, this situation is rather unsatisfactory, depending as it does on subjective questions of honesty and truth-telling.⁴ But it is evidently what the market expects, and it is the solution which was adopted by Gencon 1994;⁵ and so it has been kept in the new charter.

Subclause 9(d) states that the notice of readiness may be tendered prior to the opening of the laydays; but laytime is not to commence before that time unless cargo operations commence sooner.

Users of Gencon 2022 should note that the BIMCO Laytime Definitions for Charter Parties 2013 have now been incorporated into and form part of the contract, except where inconsistent with its terms (subclause 10(a)). This is not a partisan document: it was prepared jointly with the Baltic Exchange, CMI⁶ and FONASBA;⁷ and users of the new

⁴ “... [A] notice of readiness proved to be given by the master or chief officer with knowledge that it was untrue, that is to say in the knowledge that the vessel was not then ready would be ineffective to start time running. There must by implication be a requirement of good faith” (*Cobalfret NV v Cyclades Shipping Co Ltd (The Linardos)* [1994] 1 Lloyd's Rep 28).

⁵ Earlier versions of Gencon had adopted a different approach: “Time lost in waiting for berth to count as loading or discharging time, as the case may be”.

⁶ Comité Maritime International.

⁷ Federation of National Associations of Ship Brokers and Agents.

³ Obvious examples are the IMSBC (International Maritime Solid Bulk Cargoes) Code; disposal of cargo and hold-cleaning residues; treatment and disposal of dunnage; pollution from dust; and advance cargo declarations.

charter form should consider carefully whether it matches their understanding and intent.⁸

For the sake of clarity, Gencon 2022 divides up the laytime-related issues into separate clauses: notice of readiness (clause 9); laytime (clause 10); commencement of laytime (clause 11); running of laytime (clause 12); and demurrage and despatch (clause 13).

The earning and payment of freight

Unlike Gencon 1994, the new charter does not provide for the possibility of freight being earned at the time of delivery. How it is earned is dealt with in subclauses 7(b) and (c): apart from lumpsum freight (which is earned only on completion of loading), the freight is earned progressively as the cargo is loaded, and is based on the quantity stated in the Mate's Receipts.

The payment is dealt with in subclause 7(a), which states the freight rate, and the timing and place of payment; and it provides that payment will be free of bank charges other than those which may be imposed by the owners' bank.

Subclause 7(d) provides that freight is non-returnable, ship and/or cargo lost or not lost. And subclause 7(e) states that "freight paid" bills of lading will not be issued or endorsed until the freight has been paid in full.

Some issues raised before the courts

The meaning of the term "demurrage" has been mentioned above with regard to the Court of Appeal decision of *The Eternal Bliss* (see footnote 8). Permission to appeal has been granted by the Supreme Court, for hearing in 2023. The Court of Appeal has recently held that, absent some other breach, a charterer is not liable to pay damages in addition to demurrage for failing to complete loading or discharge within the laytime. This appears to be consistent with the BIMCO laytime definition that demurrage is "an agreed amount payable to the owner in respect of delay to the Vessel once the Laytime has expired, for which the owner is not responsible". If that is not the intention, the charter should be amended to say so.

A 1985 decision of the Court of Appeal is generally regarded as having construed "weather permitting" to mean the same as "weather not prohibiting," so that the expression is to be treated, not as an exception to, but as a description of laytime.⁹ Subclause 10(b) of Gencon 2022 seeks to maintain the old sense, the expression "weather permitting" being replaced with the following: "except to the extent that the actual loading/discharging is delayed or prevented by weather".

In a 2002 decision, the High Court confirmed an award which stated that demurrage was only payable when the vessel was actually detained by the charterers.¹⁰ This

has been criticised as inconsistent with the concept of demurrage as liquidated damages for the charterer's failure to free the ship within the laytime. Accordingly, subclause 13(b) of Gencon 2022 provides that demurrage is to run continuously and without interruption except where the vessel is not available to perform the service immediately required by the charterer.

In a 2016 opinion, the Privy Council advised that it was open to a shipowner, in clear language, to contract out of or waive its statutory right of limitation of liability.¹¹ Subclause 27(b) of Gencon 2022 stipulates that the terms of access and use at any berth which is not expressly identified under the charter may not prejudice any right of limitation.

Lien, suspension and termination

Clause 15 of Gencon 2022 contains a lien clause that is very similar to that of the 1994 form, but extended to include general average contributions and salvage, and also the costs of recovery including legal costs.

Clause 16, headed "Suspension and Termination", expands the concept contained in the "Demurrage" provision (clause 7) of the 1994 form, adopting an approach which is not unlike that appearing in some time charters. Under subclause 16(a), the owners have the right to suspend performance if the charterers should fail to pay sums due under the charter; and subclause 16(b) allows the owners to terminate the charter and/or to discharge the cargo if the charterers fail to make payment or provide acceptable security within 96 hours of receipt of notice. Subclause 16(c) contains the charterers' indemnity and a requirement for security.

Exactly how such a provision as clause 16 will operate in practice will depend to a large extent on the timing and circumstances surrounding its exercise, not least because of the effect on a third party holding the bill of lading; but the indemnity and security requirements must surely emphasise the requirement for prompt payment.

Congenbill 2022

Clause 19 of Gencon 2022 is similar to clause 10 of the 1994 form. But rather than specifying the use of Congenbill 2022, it simply provides that, as presented, the bill will be in terms no less favourable to the carrier than the BIMCO form.

Congenbill 2022 is substantially the same as the 1994 form, but with three important changes: (i) where the governing charter is not unambiguously identified, clause (1) states that it will be the voyage charter which regulates the carriage of the cargo; (ii) an exclusive law and arbitration provision has been inserted as clause 7; and (iii) an express reference to this exclusive law and arbitration clause now appears on the face of the document.

John Weale, Chairman of BIMCO's Gencon subcommittee

⁸ For example, the meaning of demurrage as disputed in *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)* [2022] 1 Lloyd's Rep 12. See further below.

⁹ *Dow Chemical (Nederland) BV v BP Tanker Co Ltd (The Vorras)* [1983] 1 Lloyd's Rep 579.

¹⁰ *Stolt Tankers Inc v Landmark Chemicals SA (The Stolt Spur)* [2002] 1 Lloyd's Rep 786.

¹¹ *Bahamas Oil Refining Company International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (Bahamas)* [2016] 2 Lloyd's Rep 469.