JUDGMENT : Mr Justice Moore-Bick: Commercial Court. 9th July 2003.

1. This matter comes before the court by way of two appeals on questions of law arising out of an award made in an arbitration between Petroleo Brasileiro S.A. and Kriti Akti Shipping Co. S.A., the owners of the tanker *Kriti Akti*.

2. On 17th February 2000 the owners of the *Kriti Akti* chartered the vessel on the Shelltime 3 form with various amendments and additions to Petroleo Brasileiro for a period of 11 months, 15 days more or less in charterers' option. The vessel was delivered into service under the charter on 25th May 2000.

3. The charter contained the following three clauses which are of particular importance to the dispute which subsequently arose between the parties:

"*3. Owners agree to let and Charterers agree to hire the vessel for a period of 11 (eleven) months, 15 days more or less in Charterers' option . . . .*

. . . .

18 . . . . Notwithstanding the provisions of clause 3 hereof, should the vessel be 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. . . . .

. . . .

CLS 50 – EXTENTION

Any loss of time during which the vessel is off hire shall count as part of the charter period and may be used by charterers at their option as an extention of the aforesaid charter period."

4. During the charter the vessel was off hire on various occasions. There is a dispute about the total period involved: the charterers say it was 36 days, the owners say it was only 17.6 days, but for the purposes of this appeal it is necessary to assume, for reasons which will become apparent a little later, that the charterers' figure is correct.

5. The 11-month period provided by clause 3 expired on 24th April 2001. On 13th March 2001 the charterers told the owners that they were exercising their option to extend the final date of the charter to 14th June. That was on the basis that they were entitled to add to the 11 month period, the further 15 days provided for in clause 3 and 36 days off-hire.

6. On 29th May while the vessel was discharging at Saõ Sebatiaõ the charterers ordered her to carry out another voyage with cargo from Saõ Sebatiaõ to New York for discharge and redelivery there. The owners took the view that the charter had already expired and that the vessel should therefore be redelivered where she was. They offered to perform the proposed voyage to New York, but only at an increased rate of hire.

7. On 1st June the charterers issued fresh voyage orders requiring the vessel to sail from Saõ Sebatiaõ to Santos and there load a cargo for carriage to New York where she would be redelivered. Again the owners refused, requiring the charterers to redeliver the vessel on completion of discharge at Saõ Sebatiaõ if they were unwilling to pay additional hire for the voyage to Santos and thence to New York. The charterers declined to agree to these terms and the owners therefore took back the vessel at Saõ Sebatiaõ leaving the charterers to find another vessel to carry out the voyage to New York.

8. In due course the charterers commenced arbitration against the owners seeking damages for their refusal to comply with what they maintained were legitimate orders for the vessel's employment. It soon became apparent that their claim could succeed only if they were entitled to take advantage of clause 18 of the charter which allows the charterers to complete a final round voyage on the charter terms if the vessel is already engaged on it at the expiry of the charter period. It was therefore necessary for the charterers to establish that the period of the charter had not already expired on 7th June when the vessel completed discharge at Saõ Sebatiaõ and that they could only do if they were entitled to add to the 11 months provided for in clause 3 the 15 days "*in charterers' option*" also provided for in that clause and the period of off-hire allowed as an extension under clause 50.

9. Accordingly, the parties asked the tribunal to determine the following two questions as preliminary issues:

"*(i) whether the "period of this charter" in clause 18 includes or excludes any additional period for which Charterers may elect to keep the vessel on charter in exercise of their option under clause 50, and*

(ii) if it includes clause 50 periods, whether the charter as so extended by clause 50 includes the tolerance of 15 days in clause 3."

10. The tribunal held that the charterers could add the off-hire period to the 11 months, but that they could not add to that the 15 days in charterers' option referred to in clause 3. They reached this latter conclusion with obvious reluctance and only because they considered that they were bound by the decision of the Court of Appeal in ***Gulf Shipping Lines Ltd v Compania Naviera Alanje S.A. (The 'Aspa Maria')*** [1976] 2 Lloyd's Rep. 643 so to hold. Accordingly, they held that the charterers' claim failed.

11. The charterers subsequently obtained leave to appeal on this latter question and the owners were given leave to appeal on the question whether the expression "*the period of this charter*" includes any off-hire period which the charterers chose to make use of as an extension to the charter under clause 50. Thus all the issues canvassed before the tribunal were open for argument before this court.

12. Mr. Christopher Hancock Q.C. on behalf of the charterers submitted that the tribunal's decision on the first point was correct, but that its decision on the second point was wrong. In particular, he submitted, the tribunal was wrong in thinking that it was bound by the decision in *The Aspa Maria*. It was free to give the charter the construction which it clearly preferred and which was in fact correct. Mr. Steven Berry Q.C. submitted that the tribunal was wrong on the first point but right on the second.

The effect of clause 50

13. Unlike clauses 3 and 18 clause 50 is an additional typed clause. It carries within it a certain tension because it provides for loss of time during which the vessel is off hire to count as part of the charter period, but goes on to provide that it may be used by the charterers as an extension of the charter period. However, I do not think that it is necessary or desirable to devote time to analysing its different parts because I think that in the important respect its intention is clear enough, namely, that the charterers are entitled, if they so wish, to add any period of off-hire to the period of the charter, thus restoring to them a period of practical service of which they would otherwise be deprived. This may well give rise to some uncertainty when, as in the present case, there is a disagreement about the period for which the vessel has been off hire, but as the tribunal noted, this can be accommodated without too much difficulty by the exercise of caution on both sides and in the event the construction of clause 50 itself was not in dispute. The expression "the charter period" in clause 50 obviously refers to the period prescribed in clause 3.

The construction of clause 18

14. The real argument in this case revolves around the expression "*the expiry of the period of this charter*" in the final sentence of clause 18 which itself refers in its opening words to clause 3. Clause 3 defines the period for which the vessel is to be placed at the charterers' disposal. I shall refer to the period of 11 months as the "basic period" in order to distinguish it from the 15 days more or less which I shall refer to as the "*option period"* and shall use the same expressions when I come in a moment to consider some of the decided cases. In the present case there is also the period of off-hire to be considered insofar as the charterers may have exercised their option to use it to extend the charter. I shall refer to this as the "*extension period*".

15. The rival contentions of the parties can be summarised as follows. The charterers say that the reference to the period of the charter in clause 18 means the total period for which they would otherwise be entitled to employ the vessel. In the present case that means the basic period plus the extension period plus the option period. The owners, on the other hand, say that the period of the charter means the basic period only, or at most the basic period plus the extension period, but in either case excluding the option period. They say that follows from the language of the charter itself, but they also say that the decision in ***The Aspa Maria*** is binding authority that the period of a time charter in this form is the basic period and does not include the option period.

16. Although the question is presented simply as one of the construction of a few words in clause 18, it does in fact conceal broader questions concerning the charterer's right to employ the vessel and what does or does not constitute a legitimate last voyage. This follows from Mr. Berry's submission that the option period is nothing more than a margin of tolerance which forms no part of the period for which the vessel is put at the charterers' disposal, and which he has no absolute right to use, but which is designed simply to protect him if unforeseen events prevent him from redelivering the vessel on the final day of the basic period. It follows, if he is correct, that the charterer does not have the right to order the vessel on a final voyage that is expected to be completed after the expiry of the basic period, but that if, having sent the vessel on a final voyage which is expected to allow redelivery on or before the last day of the basic period, or if the final voyage is completed before the last day of the basic period, he is protected provided that the vessel is redelivered not more than 15 days early or late. It is necessary, therefore, to examine the authorities dealing with legitimate last voyages.

17. Although the question was considered at some length in ***Timber Shipping Co. S.A. v London & Overseas Freighters Ltd (The 'London Explorer')*** [1972] A.C. 1, I can take as my starting point for present purposes the decision of the Court of Appeal in ***The Alma Shipping Corporation of Monrovia v Mantovani (The 'Dione')*** [1975] 1 Lloyd's Rep. 115. In that case the vessel *Dione* was chartered on the Baltime form for a period of 6 months, 20 days more or less in charterers' option. The charterers sent her on a final voyage which finished just over 8 days after the expiry of the option period and the owners made a claim for damages representing the difference between the charter rate of hire and the market rate in respect of those 8 days.

18. Lord Denning considered the existing authorities on the charterer's right to employ the vessel at the end of the charter period and set out a number of propositions which he considered could be derived from them. Having pointed out that in the absence of any express margin or allowance the law will imply a reasonable margin, he recognised that it is open to the parties to agree a margin, for example by using language such as "20 days more or less". In such a case, he concluded, the law will treat the parties' agreement as defining the appropriate margin and will not imply any additional margin. He therefore concluded that the terms of the charter in that case excluded any further implied tolerance. Browne L.J. agreed with Lord Denning; Orr L.J. dissented.

19. As Bingham L.J. later pointed out in ***Hyundai Merchant Marine Co. Ltd v Gesuri Chartering Co. Ltd (The 'Peonia')*** [1991] 1 Lloyd's Rep. 100, some of the passages in Lord Denning's judgment in *The Dione* in which he deals with the consequences of a failure on the part of the charterer to redeliver the vessel within the charter period are difficult to reconcile with others, but what matters for present purposes is that he treated the option period as part of the charter period for the purposes of determining whether the charterer's orders for a last voyage were

legitimate or not. Thus at page 117 col. 2, having referred to the earlier cases dealing with implied and express margins, he said

*"In view of those three propositions, when I speak of the **"charter period"**, I mean the stated period plus or minus any permitted margin or allowance, express or implied. There follow these two propositions:*

*(d) If the charterer sends the vessel on a legitimate last voyage - that is, **a voyage which it is reasonably expected will be completed by the end of the charter period,** the shipowner must obey the directions*" (emphasis added).

20. The question next came before the courts in ***The Peonia.*** In that case the vessel was chartered on the New York Produce Exchange form for

"about minimum 10 months maximum 12 months time charter, exact duration in charterers' option."

The charter also gave the charterers an option to complete a last voyage. The vessel was delivered on 11th June 1987 so the basic period expired on 11th June 1988. On 6th May 1988 the charterers sub-chartered her for a voyage from the River Plate to the Far East which, if it had been performed, would have resulted in her not being redelivered before 19th July 1988. The owners considered that even making full allowance for the use of the expression "about" the vessel ought to be redelivered by 25th June 1988 at the latest, but the charterers refused to give alternative orders that would enable that to occur. They also refused the owners' demand to pay hire at the market rate after that date. The owners therefore withdrew the vessel from the charterers' service.

21. A dispute thus arose between the parties whether at the time in question the charterers were entitled to order the vessel to perform a voyage that would result in her being redelivered as late as 19th July 1988. The Court of Appeal held that where the parties have expressly agreed a margin of tolerance, for example, by agreeing a minimum and maximum period, the law will not imply any further margin and that in such a case the contractual period of the charter finally comes to an end when the period agreed by the parties expires. This has since become known as the "*final terminal date*". The charterer is bound to redeliver the vessel by that date and (unless prevented from doing so by the owner) is in breach of contract if he fails to do so. Consistently with that the court held that the charterer is not entitled to send the vessel on a voyage which cannot reasonably be expected to be completed by the final terminal date.

22. In his discussion of the principles governing orders given to the vessel at or near the end of the charter period Bingham L.J. said at page 107 col. 2:

"The cases and books draw a distinction between two cases which have become known as "the illegitimate last voyage" and "the legitimate last voyage". In the former case the charterer gives orders for the employment of the vessel which cannot reasonably be expected to be performed by the final terminal date. He is therefore seeking to avail himself of the services of the vessel at a time when the owner had never agreed to render such services. It is accordingly an order which the charterer is not entitled to give (just as an order to visit a prohibited port would be) and in giving it the charterer commits a breach of contract (perhaps a repudiatory breach but that we need not decide). The owner need not comply with such an order, because he has never agreed to do so. Alternatively, he may comply with the order although not bound to do so: if he does comply, he is entitled to payment of hire at the charter-party rate until redelivery of the vessel and (provided he does not waive the charterer's breach) to damages (being the difference between the charter rate and the market rate if the market rate is higher than the charter rate) for the period between the final terminal date and redelivery. . . . . In the contrasting case of the legitimate last voyage the charterer gives orders for the employment of the vessel which can reasonably be expected to be performed by the final terminal date. These are orders which the charterer is entitled to give, and so legitimate."

23. The important thing to emerge from this part of Bingham L.J.'s judgment is that where the parties have expressly defined the period for which the vessel is to be at the charterer's disposal, whether in terms of a minimum and maximum period or by allowing a period "more or less in charterer's option" or in some other way, the charterer is entitled, in the absence of some contrary provision, to make use of the vessel's services for the whole of the period in question. Accordingly, he is entitled to send the vessel on a voyage which he reasonably expects she will complete by the end of what I have called the option period, even though she may not be expected to complete it before the end of the basic period. If he fails to redeliver the vessel by the final terminal date, however, he will be in breach of contract and liable in damages. The same approach is reflected in the judgments both at first instance and on appeal in ***Chiswell Shipping Ltd and Liberian Jaguar Transports Inc v National Iranian Tanker Co (The 'World Symphony' and 'World Renown')*** [1991] 2 Lloyd's Rep. 251.

24. In the light of these decisions I return to the final sentence of clause 18. On the face of it its purpose is to override the provisions of clause 3 to enable the charterer to complete a final round voyage after the expiry of the charter on the charter terms. That being so, one would expect it to come into effect at the moment the charterer would otherwise be in breach of contract and so liable to pay damages in the form of increased hire if the market has risen against him. Mr. Berry submitted, however, that when it speaks of "the period of this charter" clause 18 is referring only to the basic period provided for in clause 3, not to that period as extended by the exercise of the option given by clause 50, nor to the total period represented by the basic period and the option period.

25. Three main arguments were advanced in support of that proposition. The first was that clause 18 is to be construed as at the date of the charter. That being so, no account is to be taken of periods of off-hire which at that time do not exist and may never exist. The second, which is closely related to the first, was that it would make little sense to add a further option period to a basic period which had already been extended under clause 50.

In other words, clause 50 was really intended to take the place of the option period. The third was that the phrase "the period of this charter" is not apt to refer to anything other than the basic period provided for by clause 3.

26. None of these arguments strikes me as very persuasive. I see no reason why clause 18 should be construed as at the date of the charter when both parties were aware that they had provided in clause 50 for the charter period to be extended by reference to events occurring at a later date. That is particularly so given that the effect of clause 50 is to restore to the charterer, if he so wishes, a period of practical service for which clause 3 provides. Nor do I think that there is anything odd in entitling the charterer to take advantage of both the extension period and the option period. Again, once one accepts that the extension period is designed to restore a period of active service that would otherwise be lost to the charterer, the effect of adding the option period is simply to enable him to make use of the vessel's services for the whole of the period originally contemplated. Finally, the argument that the expression "the period of this charter" is inapt to refer to anything other than the basic period seems to me to proceed on a false basis. The expression actually used in clause 18 is *"at the expiry of the period of this charter"*. In my view that naturally directs the reader to the point at which the charter finally runs out, or, to use the language of Bingham L.J. in ***The Peonia,*** the final terminal date. This seems to me to be consistent with both the language and the commercial purpose of the clause and I can see no good reason why the parties should have sought to identify for the purposes of clause 18 some earlier point at which the vessel was still performing under the charter and would continue to do so for some days or perhaps weeks. If the matter were free from authority, therefore, I would hold that under this charter clause 18 comes into operation only at the point at which the basic period, the extension period and the option period cumulatively have all expired.

27. Mr. Berry's response to this approach was that ***The Aspa Maria*** is authority which binds me to hold that "the period of this charter" in clause 18 means the basic period alone and does not include the option period. In that case the vessel was chartered for a period described in lines 13 and 14 of the charter as "6 months, 30 days more or less at charterers' option". Clause 13 provided that

"the charterers shall have the option of continuing this charter for a further period of six months, 30 days more or less at charterers' option, declarable at the end of the fourth month."

28. The charterers exercised their option for the additional period and the question then arose as to the maximum duration of the charter: the charterers said it was for 12 months plus 60 days at their option; the owners said it was for 12 months plus 30 days at charterers' option. The Court of Appeal rejected the charterers' argument, Orr L.J. and Waller J. agreeing with Lord Denning. In view of the weight that Mr. Berry sought to place on Lord Denning's judgment I think it appropriate to set out the relevant passage in full. He said at page 645 col. 1

*"The point depends on the effect of the words which stated the original period to be **"6 months 30 days more or less"**. Mr. Pickering says that that gave the charterers a time charter for any period from five to seven months at charterers' option. I cannot agree. I think it only gives the charterers six months with a margin of tolerance of 30 days either way. If the **"30 days more or less"** were not mentioned, the law would imply a reasonable margin of tolerance before or after the six months. The reason being because the time charterer of a ship cannot be sure exactly at what date he can get the ship redelivered. He must have some tolerance before the end of the six months or a few days afterwards. But the parties can expressly stipulate what the margin of tolerance is. That is made clear in the recent case of **The Dione** [1975] 1 Lloyd's Rep. at 115. They can and do expressly stipulate what that margin is to be. In that case the words were **"six months time charter 20 days more or less"**. It was held that the 20 days was an express agreement as to the exact extent of the tolerance. So here the 30 days is not an extension of the charter. It is simply an express agreement as to the tolerance permitted. If that is the right interpretation of the original period, then, when one comes to the option clause, when it speaks of **"a further period of a further 6 months"**, it means a further period following on the first six months - not following on five months or seven months. So at the end of the first six months there is to be a further period of a further six months **"30 days more or less"**. So it means that the time charter lasts for six months plus six months - that is, 12 months in all-30 days more or less. It means that it goes for the full period of 12 months **"30 days more or less"**. In my opinion, therefore, the owners were right in saying that after the 12 months expired there were only 30 days left. These expired by July 28, 1974. The vessel ought to have been redelivered then. She was not redelivered then, and they were entitled to withdraw the vessel, as they did, on Aug. 6, 1974. The Judge so decided and I agree with him. Any other view would mean that the charterers could have redelivered the vessel at any time between 10 months and 14 months. That would not make business sense, at any rate, to my mind.*

*There is another point I would mention. It seems to me that the phrase **"30 days more or less at charterers' option"** was not a true option. It did not have to be exercised by express notice or declaration such as Lord Devlin said would be necessary for a true option: see the **Reardon Smith** case, [1963] 1 Lloyd's Rep. 12; [1963] A.C. 691. The charterer could properly redeliver the vessel within the 30 days more or less so long as he gave the proper notice of redelivery, which would be 30 days in this case. It would not be necessary for him to do anything more by way of exercising an option."*

29. In fact, as has already been noted, in both ***The Dione*** and ***The Peonia*** the court treated the option period as part of the period available to charterers as of right, in the sense that it was a period prior to the final termination date during which they were entitled to make use of the services of the vessel, not simply a margin to protect them from an unforeseen overrun. The problem facing the court in ***The Aspa Maria*** was how to read clause 13 in conjunction with lines 13 and 14 and in particular to decide whether the additional period given by clause 13 was to be added to an initial period of 6 months, or to an initial period of 6 months plus or minus 30 days. In one

sense the answer might be said to have been obvious as a matter of business commonsense since, as Orr L.J. pointed out,

"it can hardly have been the intention of the parties that the charterers in the circumstances of this case should have the benefit of two tolerance periods in respect of only one delivery."

However, it was nonetheless necessary to identify the initial period to which the extension was to be added.

30. When he gave his judgment in *The Aspa Maria* Lord Denning clearly had the recent decision in ***The Dione*** well in mind and it is difficult to accept that he was seeking to qualify what he had said in that case about the effect of the option period generally. In holding that the charter was for an initial period of 6 months with a margin of 30 days either way I do not understand him to have been saying that the option period did not form part of the charter period for any purposes. Rather I understand him to be emphasising that the parties had agreed a basic 6 month period and that it was that basic period to which the extension in clause 13 applied. I think that is how Orr L.J. and Waller J., both of whom expressly agreed with Lord Denning, also approached it. Lord Denning's comment that the agreed margin did not give rise to a *'true option'* requiring express notice or declaration must be read in that light. He was, I think, seeking to draw a distinction between the kind of option that must be expressly exercised in order to take effect (as was the case with the option for the second 6 months in that case) and the margin or allowance which, although expressed as an option, does not require formal notification for its exercise. I do not think, therefore, that Lord Denning's reasoning is inconsistent with what he had said a little earlier in ***The Dione*** and for these reasons alone I am unable to accept that ***The Aspa Maria*** binds me to reject the charterers' argument in this case.

31. However, even if I am wrong in my understanding of Lord Denning's judgment in that case, I am still unable to accept that ***The Aspa Maria*** is fatal to the charterers' case. Mr. Berry submitted that the decision is authority for the meaning of the expression "*the charter period*", as if that expression could only ever have one meaning whatever its context. However, the expression is not a term of art but one which is liable to take its colour from its context. Thus, as Mr. Hancock pointed out, one finds in this charter the use of expressions such as *"the period of this charter"* and "*the charter period*" in a variety of different clauses whose terms indicate clearly that they apply throughout the time the vessel is employed under the charter. As I have already pointed out, the expression actually used in clause 18 is "*at the expiry of the period of this charter*" and it occurs in a context quite different from that which was under consideration in ***The Aspa Maria***. I am therefore unable to accept Mr. Berry's submission that the decision in that case constrains me to give it a meaning which I do not think that it naturally bears.

32. Two further points deserve mention. The first is that the construction of clause 18 of this same charter form and its relationship to clause 3 were considered in ***The World Symphony***. The charter in that case was for a period of 6 months, 15 days more or less charterers' option. The issue between the parties was whether clause 18 applied only to a legitimate last voyage, that is, one that could reasonably have been expected to be completed in time to allow redelivery on or before the final terminal date, or whether it gave the charterer the right to send the vessel on a final voyage which he could not reasonably expect would allow redelivery to take place on or before the final terminal date. All three members of the Court of Appeal agreed that the latter view was correct and that, in effect, it added a round trip to the period identified in clause 3. However, the important point as far as the present case is concerned is that both Hobhouse J. at first instance and the Court of Appeal proceeded on the footing that the expression "at the expiry of the period of this charter" referred to the final terminal date.

33. The second point is that Mr. Berry submitted that to construe the words "*the period of this charter*" as referring to anything other than the basic period provided for in clause 3 would lead to an absurd and unreasonable result because it would introduce too much uncertainty about the date of redelivery. For the reasons I have already given I am unable to accept that, but it should be noted that that very argument was rejected by the tribunal in this case which was no doubt chosen by the parties for (among other things) its understanding of the practicalities of commercial life. That being so, the argument can carry little if any weight.

34. It follows that in my view the tribunal was wrong to consider itself bound by the decision in ***The Aspa Maria*** to reject the charterers' construction of clause 18 and that their appeal must be allowed. For the reasons I have already given the owners' appeal fails.

Mr. Christopher Hancock Q.C. and Mr. Lawrence Akka (instructed by Ince & Co.) for Petroleo Brasileiro S.A.
Mr. Steven Berry Q.C. (instructed by Holman Fenwick & Willan) for Kriti Akti Shipping Co. S.A.