TIME CHARTERS

SEVENTH EDITION

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SEVENTH EDITION BY

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To Claire, Astri, Philippa, Caroline and Christie

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T.G.C. J.D.K.

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Preface to the Seventh Edition

We welcome an additional author to this edition, Tom Belknap of Blank Rome LLP, New York, as co-author with John Kimball for the U.S. law sections that continue to bring to this book (as to its sister title *Voyage Charters*) a vital and unusual dimension.

From its first edition this book has been built on the framework of the wording of the 1946 revision of the New York Produce form of time charter. Despite showing its age – the original form has just celebrated its one hundredth anniversary – it continues to dominate the dry cargo trades, albeit often heavily amended. Meanwhile, use of the once-popular Baltime form has continued to decline to the point at which we have decided the time has finally come to dismantle its dedicated chapter and to distribute its content around the rest of this book according to subject matter. The full text of the Baltime is, however, still set out, at F.3. Tanker-specific commentary continues to appear in our final chapters, on the Shelltime 4 form for English law and the ExxonMobil Time 2005 form (which has replaced the STB form) for U.S. law.

The updating and revision necessitated by new decisions from courts and arbitrators since the 6th edition has been substantial, with developments in many important areas. We have also undertaken some rewriting and reordering of material, in accordance with our ongoing desire to make the material easy to access and as clear in meaning as its nature allows. In conjunction with *Voyage Charters*, we have introduced the letter A to distinguish more clearly references to U.S. law paragraphs from those concerned with English law, allowing for an improved Index and for greater continuity of the paragraph numbering in the U.S. law text for the future; the U.S. law text continues to be marked by a vertical margin line.

It remains our aim to present the law in our chosen area in a way which will help those engaged in chartering and operating ships (and their advisers) to refer to the leading authorities on any particular point of doubt as quickly and easily as possible.

Our intention has been to state the law as at mid 2014.

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Introduction

I.1 This book concerns time charters. Its focus is time charters of cargo ships, although many aspects of the law set out in the book will be relevant to time charters of any type of ship. The book aims to present the legal principles and decided cases concerning time charters in a manner that will be of practical assistance to parties interested to identify and understand the rights and liabilities arising under them, whether they are negotiating a charter, considering some question arising during the course of a charter, or pursuing or defending legal claims arising out of a charter. Throughout the book, passages on U.S. law are distinguished from those on English law by a margin line, and by an A in the paragraph number.

I.2 As in all previous editions of this book, the law is organised principally by working through the provisions of the 1946 version of the New York Produce form, which remains the most important standard form for dry cargo charters. Thus, each of chapters 1 to 36 takes as its text the wording of the New York Produce form on the subject matter of that chapter. The discussion of the law there presented, however, is not limited to a textual analysis of that particular wording. Rather, the topic in question is considered generally, so as to be of assistance to readers whatever charter form they have in front of them. For users of the NYPE 93 form or the Baltime form (2001 revision), material differences in that form are highlighted as they arise in chapters 1 to 36. We have not retained for this edition a separate commentary on the Baltime form. English and U.S. case law on tanker time charters is highlighted in, respectively, chapter 37 on the Shelltime 4 form and chapter 38 on the ExxonMobil Time 2005 form.

Introduction to time charters under English law

I.3 Here, as an introduction to the English law of time charters set out in the rest of the book, the basic nature of a time charter is explained and the main features of a time charter of a cargo ship are outlined. Some general material, found in various places in the book prior to the 6th edition, is now collected here or in the Glossary of English Legal Terms that follows chapter 38.

Nature of a time charter

I.4 "Under a time charter-party. . . the shipowner undertakes to make the vessel available to the charterer for the purposes of undertaking ballast and loaded voyages as required by the charterer within a specified area over a stated period": *per* Donaldson, J., in *The Berge Tasta* [1975] 1 Lloyd's Rep. 422, at page 424. Or similarly, "A time charter. . . is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charter-party the charterer is entitled to give to them": *per* Lord Diplock in *The Scaptrade* [1983] 2 Lloyd's Rep. 253, at pages 256 to 257.

I.5 A time charter is not a lease. Under a time charter, the charterers do not acquire possession of the ship or any other right of property in her: see *The Scaptrade*, above, and *Port Line* v. *Ben*

Line [1958] 1 Lloyd's Rep. 290, *per* Diplock, J., at page 299. They acquire, rather, the right, within the limits set by the charter, to direct the use to which the owners put their ship. That is the sense in which Lord Reid spoke of the charterers' right to the 'use' of the ship when he said this, in *The London Explorer* [1971] 1 Lloyd's Rep. 523, at page 526: "Under [a time] charter there is no hiring in the true sense. . . the chartered vessel remains in the possession of the owners, and the master and crew remain the owners' servants. What the charterer gets is a right to have the use of the vessel." Similarly, in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 156, Lord Hobhouse said that the owners of a ship under time charter transfer to the charterers "the right to exploit the earning capacity of the vessel". Since time charterers have no ownership interest in the ship, or right of possession of the ship, if a negligent third party damages a ship under time charter, the time charterers generally have no claim against the third party in tort: see *The Mineral Transporter* [1985] 2 Lloyd's Rep. 303 (P.C.)

Contrasted with demise charters

I.6 Time charters are, therefore, to be contrasted with demise charters, also called "bareboat" charters, which in the Lloyd's Shipping Law Library are the subject of *Bareboat Charters*, and not this book. A demise charter is a contract for the leasing of a ship under which the charterers take possession of the ship, and also provide their own crew and ship management to operate her. In *Sea & Land Securities* v. *Dickinson* (1942) 72 Ll.L.Rep. 159, at page 163, Mackinnon, L.J., said that the difference between the two kinds of charter was like the difference between "hiring a boat in which to row yourself about, in which case the boat is handed over to you, and contracting with a man on the beach that he shall take you for a row, in which case he merely renders services to you in rowing you about". Thus, under a time charter the owners continue to officer and crew their ship, but agree that the ship, through her master, will follow the charterers' orders, within the limits set by the charter. That a time charter does not operate by way of demise is confirmed expressly in Clause 26 of the New York Produce form (Line 170): "Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers."

Contrasted with voyage charters

I.7 Time charters are also to be contrasted with voyage charters, which are, naturally, the subject of *Voyage Charters*. Under a voyage charter the owners agree that their ship, officered, crewed and bunkered by them, shall carry specified cargo on an agreed voyage in exchange for freight, characteristically a single payment for the voyage calculated by reference to the quantity of cargo loaded or discharged. In *The Hill Harmony*, above, Lord Hobhouse explained, at page 156, that the owner who, instead of time chartering his ship, fixes her on voyage charters, "is using the vessel to trade for his own account. He decides and controls how he will exploit the earning capacity of the vessel, what trades he will compete in, what cargoes he will carry. He bears the full commercial risk and expense and enjoys the full benefit of the earnings of the vessel."

I.8 A voyage charter may cover more than one voyage, these voyages being separated either by the necessary ballast voyages (a "consecutive voyage" charter: see, for example, *The Saxon Star* [1958] 1 Lloyd's Rep. 73 (H.L.)) or by repositioning voyages upon which the owners may carry cargoes for others than the charterers (an "intermittent voyage" charter: see, for example, *The Oakworth* [1975] 1 Lloyd's Rep. 581). When, as is often the case, a consecutive voyage charter is expressed to be not for a specified number of voyages, but for as many voyages as can be completed within a certain period, it will share at least some of the attributes of a time charter:

see the comments of Donaldson, J., in *The Berge Tasta* [1975] 1 Lloyd's Rep. 422, at page 424. This will also be true of a 'slot' charter, under which a specified part of a containership's capacity is made available for the charterers' containers in exchange for 'hire': see the judgment of Teare, J., in *The MSC Napoli* [2009] 1 Lloyd's Rep. 246 at paragraph 14, in which he says: "Thus it appears that HPL's and Stinnes' slot charter agreements with MSC have some features in common with a time charter. They last for a period of time and hire is paid for the use of cargo carrying capacity. It is not however comparable to a time charter in that the charterer does not direct the vessel where to go. Clause 5.1 of the Implementing Agreement provides that the itinerary of each voyage shall be as mutually agreed. In this respect it is more akin to a voyage charter or consecutive voyage charter."

Terminology

"Let"

I.9 Although time charters are not leases, nevertheless it is the norm – adopted by all the charter forms considered in this book – to say that by a time charter the owners "let" the ship and the charterers "hire" it. For that purpose, the ship is said to be "delivered" to the charterers and, at the end of the charter, "redelivered" to the owners.

I.10 As will be appreciated, this is not a strictly accurate use of language. So, in *Sea & Land Securities* v. *Dickinson* (1942) 72 Ll.L.Rep. 159, above, MacKinnon, L.J., said, also at page 163, "There is no 'letting' or 'hiring' of the steamer, or anything of the sort, here . . . 'Redelivery' is only a pertinent expression if there has been any delivery or handing over by the shipowners to the charterers. There never has been anything of that sort here; the ship has at all times been in the possession of the shipowners and they simply undertook to do services with their crew in carrying the goods of the charterers."

I.11 In this judgment, MacKinnon, L.J., suggested that words such as these were found in time charters because this type of charter had grown out of the demise charter (which, in 1942, he said "has long been obsolete", although it has revived strongly since). However, although modern time charters may contain verbal echoes of earlier forms of demise charter, their historical roots may be found as much among early voyage and consecutive voyage forms.

I.12 It may also be that in nineteenth-century shipping parlance the words "let" and "hire" did not necessarily connote a transfer of possession as we would understand it. For example, in the first edition of *Abbott on Shipping* (1802) "let" forms part of the general definition of "charter-party", which clearly includes the voyage charter, perhaps to emphasise that under any normal charter-party, by contrast to a bill of lading, it is "an entire ship, or some principal part thereof" that is "let to a merchant"; Abbott also uses 'hire' freely in this context.

"Delivery" and "redelivery"

I.13 In all events, as with the word 'let', the terms "delivery" and "redelivery", when used in a time charter, do not signify any transfer of possession of the ship. Rather, they are used in the sense of delivery into and redelivery out of the service of the charterers. Speaking of a time charter in *Tankexpress* v. *Compagnie Financiere Belge des Petroles* (1948) 82 Ll.L.Rep. 43, Lord Wright said at page 52: "The charter-party was not a demise, and 'delivery' was the term used to describe the rights to the service of the vessel enjoyed by the charterers under the contract." See also *The Berge Tasta* [1975] 1 Lloyd's Rep. 422, *per* Donaldson, J., at page 424. The ship is delivered when it begins the charter service and redelivered when the charter comes to an end. As there is no transfer of the ship in the meantime, "redelivery" in the context of a time charter is "something

of a metaphor since, under a time (as distinct from a demise) charter, the vessel remains in the possession of her owner, albeit at the disposal of her charterer": *per* Rix, L.J., in *The Achilleas* [2007] 2 Lloyd's Rep. 555, at page 558.

"Employment"

I.14 It is common to refer to "the charter service" or "the employment of the ship". This refers either to the services demanded by the charterers' orders, or the performance by the ship of those services, or to the period of time during which the ship is engaged in this way. To exploit the earning capacity of the ship, most obviously the charterers will direct her to undertake particular cargo-carrying commitments. The charterers' orders in that regard are commonly referred to as "voyage orders".

"Hire"

I.15 The owners' reward for putting the ship into the charterers' service is the right to be paid hire. A key feature of any time charter is that the charterers agree to pay for the services of the ship on a time basis, paying "hire", as it is called, at a rate per time unit (most often a day) shorter than the whole period of the charter. "Hire" is another word which, when used in a time charter, has no connotations of leasing (and thus of a transfer of possession of the ship). As Lord Denning, M.R., pointed out in *The Nanfri* [1978] 2 Lloyd's Rep. 132 at page 140, it was at one time common to describe the owners' remuneration under a time charter as "freight" – later "time chartered freight" or "time freight". But for many years now, the word "freight" has been reserved for all forms of voyage charter (and bills of lading) and the word "hire" used, by way of distinction, in time (and demise) charters. Time charter hire is typically payable in advance at set intervals throughout the course of the charter.

Period charters

I.16 It is customary to distinguish between different types of time charter by reference to the manner in which their intended duration is set by the charter. The charter may provide that the ship is to be chartered for a period of time defined in the abstract, be it short or long, fixed or variable, for example "6 months", or "6 to 9 months", or "6 months 15 days more or less". Such a charter is referred to as a period time charter, or period charter for short, and the charterers may direct the ship to undertake as few or as many individual voyages within the agreed period as they wish.

Trip charters

I.17 On the other hand, the charter may both define its period and confine the services to be undertaken to a particular voyage or "trip" (or a number of specified trips). Such a charter is referred to as a time charter for a trip, or trip time charter, and the service (or each service) to be performed is a "time charter trip". Although, as in any other time charter, the owners' remuneration will still be periodic (typically daily) hire, a trip time charter may in other respects have more in common with a simple voyage charter than with, for example, a long period charter for worldwide trading carrying all manner of cargoes. Whether all of the ordinary incidents of a time charter apply equally to a trip time charter for a fixed or narrowly-defined particular trip has not been fully explored in the cases. That said, it can be a source of error too readily to consider such a time charter as akin to a voyage charter: see, for example, the criticism in the Court of Appeal of aspects of the first instance judgment in *The Doric Pride* [2006] 2 Lloyd's Rep. 175, *per* Rix, L.J., at pages 178 and 179, albeit they did not

affect the result in that case. For a recent decision by Teare, J., as to whether a particular fixture was a voyage charter or a trip time charter, see *The Sabrina 1* (2011) LMLN 814.

Hybrids

I.18 Between the classic period time charter and the single trip time charter for a specifically defined trip there are other variants. Of owners' and charterers' ability to construct any manner of particular hybrid, Hobhouse, J., said in *The World Symphony* [1991] 2 Lloyd's Rep. 251, at page 257, "The variety of contractual structures that can be adopted by charterers and shipowners for any given transaction are as various as the ingenuity of chartering brokers and the ever changing demands of the market may determine. It is not for Courts to fit the parties' transactions within a strict and limited frame-work which the parties themselves may not have chosen to adopt." Lord Donaldson, M.R., echoed his words in the Court of Appeal [1992] 2 Lloyd's Rep. 115, at page 117, noting at page 118 that by Clause 18 of the Shelltime 3 charter the parties had in effect "bolted on" a round trip charter to their basic time charter.

Governing law

I.19 It is a fundamental legal concept that any contract is governed by a particular system of law. In England, the question which law applies to a contract is governed by the Rome I Regulation. Or more precisely, in any case brought before an English court, or before arbitrators who apply English choice of law rules, the governing law of any contract entered into on or after 17 December 2009 is determined by Regulation (EC) 593/2008 dated 17 June 2008 (the "Rome I Regulation"). The Rome I Regulation replaces, for such contracts, the Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"), which has the force of law in England under the Contracts (Applicable Law) Act 1990 and which now only applies to contracts entered into after 1 April 1991 but before 17 December 2009. (Neither the Regulation nor the Convention apply to arbitration or jurisdiction agreements.)

I.20 By Article 3.1 of the Rome I Regulation or Rome Convention, as applicable, where contracting parties have chosen what law is to govern their contract, that choice is generally valid. That is to say, the law so chosen generally *is* the law governing the contract, so long as the choice is "made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case" (to quote the Regulation; the Convention wording is similar). A full consideration of the law in this area is not undertaken here and if that is required reference should be made to *Dicey, Morris & Collins*, paragraphs 32–039 *et seq*.

I.21 In time charter cases, the parties will usually have made a clear choice as to which law is to govern their agreement. First, there is often an express governing law stipulation either in the standard form used (see, for example, Clause 22 of the Baltime form or Clause 46(a) of Shelltime 4) or in the clauses added by the parties. Second, if there is no express governing law stipulation there is usually an arbitration provision requiring arbitration of any disputes in a particular forum (for example, London). That is ordinarily taken to imply a choice of governing law (English law, where London arbitration is selected): see *Dicey, Morris & Collins*, paragraph 32–064, *Egon Oldendorff* v. *Libera Corporation* [1995] 2 Lloyd's Rep. 64, *Egon Oldendorff* v. *Libera Corporation (No. 2)* [1996] 1 Lloyd's Rep. 380, and *The Wisdom C* [2014] 2 Lloyd's Rep. 198. Similarly, a provision requiring disputes to be referred exclusively to the courts of a particular country ordinarily implies a choice that the law of that country should govern.

I.22 In the rare case where the law governing a time charter is not determined by Article 3.1, the position under the Rome I Regulation or Rome Convention, as applicable, is somewhat

complex. Article 4.1(b) of the Rome I Regulation then stipulates that a contract for the provision of services shall be governed by "the law of the country where the service provider has his habitual residence". For a time charter, which is a contract for the provision of services, that would be the law of the country of the "habitual residence" of the owners. By Article 19 of the Regulation, that will be determined by locating the "place of central administration" of the owners or, if the charter is "concluded in the course of the operations of a branch, agency or other establishment" of the owners, by identifying "the place where the branch, agency or. . . establishment is located". It is thought this will apply the law of the location of the commercial and technical management of the ship, rather than the law of the place of incorporation of the owners.

I.23 Article 4.1 of the Rome Convention is in different terms, stipulating a general rule that the governing law in the absence of a choice under Article 3.1 is "the law of the country with which [the contract] is most closely connected". In applying that test, one may find that the services to be undertaken under a time charter tie the charter closely to a particular jurisdiction; for example, a time charter expressly restricted to coastal trading between U.S. ports. Or if the charter is fixed through an intermediate broker in a particular country, or through owners' and charterers' brokers both being in the same country, that could be taken to connect the charter closely to that country. Very often, however, the range of services capable of being ordered under the time charter is so broad that the contract cannot be said to be closely connected to any one country, and the charter will have been fixed through agents or brokers operating in more than one territory.

I.24 In that case, if Article 4.1 of the Rome Convention has to be applied, resort can be had to the presumption stated by Article 4.2, namely that, where a contract is entered into in the course of a party's trade or profession, the contract is most closely connected with the country where the party who is to effect the performance characteristic of the contract has its principal place of business, unless that presumption is disapplied by Article 4.4 (see below). The Article 4.2 presumption points to the law of the country of the principal place of business of the owners, because in contracts for services the provision of the services, rather than payment for them, is taken to be characteristic for the purposes of Article 4.2: see *Dicey, Morris & Collins*, paragraphs 32–075 to 32–077 and *The Wisdom C*, *supra*, at [30]. Where (as is common) the business of a shipowning company is carried on by a management company on the shipowners' behalf, the management company's place of business is to be regarded as the shipowners' principal place of business: see *Dicey, Morris & Collins*, 11–118 *et seq* and, again, *The Wisdom C*, at [30].

I.25 By Article 4.4 of the Rome Convention, Article 4.2 does not apply to a "contract for the carriage of goods" and for that purpose "single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods". Although the possibility has been raised that this may cover time charters (see *Dicey, Morris & Collins*, paragraph 33–094), Popplewell, J., has now decided, in *The Wisdom C*, *supra*, at [28]–[29], that it does not and that, therefore, the Article 4.2 presumption does apply to time charters. It is tentatively suggested in any event that, in the absence of any other factor particularly connecting the contract to one territory, the law of the country from which the ship is managed would probably determine the law of a time charter under Article 4.1 even if Article 4.2 did not apply.

Key terms of art in English contract law

I.26 In the rest of this book, a degree of familiarity with certain basic contract law concepts is assumed or may be helpful. For the assistance of readers unfamiliar with them, certain important and frequently used terms are identified and briefly defined or explained in the alphabetical Glossary of English Legal Terms at the end of the book (after chapter 38). A detailed or comprehensive review

of the law of contract is far beyond the scope of this book. If more detail is needed, reference should be made to contract law texts, for example *Chitty*.

The scheme of a time charter

I.27 In this section, the principal obligations arising under a time charter governed by English law are identified, guiding the reader to where they are dealt with in the main part of the book (chapters 1 to 36), and then an overview of the primary features of a time charter is provided so as to complete this Introduction to the subject.

Principal obligations

I.28 The owners' main obligations under a time charter are as follows:

(1) The owners promise that the description of the ship that they have given in the charter is accurate at the time when the contract is concluded (chapter 3).
(2) In most cases, they promise at least to act diligently to ensure that the ship is delivered to the charterers by a particular date (chapter 7).
(3) In particular, they promise that she will be seaworthy (or at least that they will have acted diligently to make her seaworthy) (chapter 8).
(4) Once the ship has been delivered into the charterers' service, the owners undertake that the ship will comply with the charterers' orders as to her employment, executing them promptly (chapters 18 and 19).
(5) They undertake to co-operate with the charterers in loading and unloading cargoes—although exactly how much they undertake to do will depend on the terms of the particular charter (chapter 20).
(6) In order to facilitate the charterers' commercial use of the ship, the owners undertake that they will enter into contracts with third parties for the carriage of cargoes loaded onto the ship, as and when directed to do so by the charterers and, generally, on such terms as the charterers may require (chapter 21).
(7) Throughout the period of the charter, the owners promise to keep the ship properly officered and crewed, to provide her with all necessary supplies (other than bunkers) and to meet her running expenses. They also undertake to carry out any necessary cleaning of the ship between cargoes and to maintain her in a fit condition for service (chapter 11).

I.29 For their part, the charterers' most significant obligations are these:

(1) They promise to pay hire, for as long as the ship is performing the charter service, from the time that the ship is delivered until she is redelivered (chapters 16 and 25).
(2) Although it is for them to choose how they use the ship, they usually promise to trade the ship only within certain limits (chapter 5), in particular only at and between places which can be expected to be safe for her (chapter 10) and loading only certain kinds of cargo (chapter 9).
(3) Although it is generally the owners' responsibility to keep the ship supplied, the charterers undertake to supply the ship with bunkers and also to pay the costs of calling at the ports to which the ship is traded (chapter 12).
(4) They promise to co-operate with the owners in loading and unloading cargoes—although exactly how much they undertake to do will depend on the terms of the particular charter (chapter 20).

(5) They undertake that they will finish using the ship, and redeliver her, at the end of the charter period—neither any sooner, nor any later (chapter 4).
(6) Finally, there is typically an undertaking, implied if not express, to indemnify the owners against loss suffered as a result of complying with the charterers' orders (chapter 19).

I.30 There are also important duties falling on both parties equally:

(1) There is an implied duty to co-operate in the performance of the contract and, it is suggested, to communicate honestly in that regard. A time charter is a complex contract and many of the stages of its performance require the parties to co-operate.
(2) There is an implicit obligation, in particular, to co-operate to settle the charter account. Any sums due on the charter account must be paid within a reasonable time.

The parties

I.31 The time charter will identify the parties contracting as owners and charterers, and the ship to be chartered, or provide a mechanism by which they are to be identified, for example, by nomination. Issues relating to the identification of the parties to the contract are considered in detail in chapter 2.

The ship

I.32 As regards the ship to be chartered, the charter will normally do more than merely identify her by name. Some detail as to the characteristics and capabilities of the ship will ordinarily be stipulated, whether by reference to standard particulars such as those in Lines 4 to 11 of the New York Produce form or by an additional, detailed vessel description, or both. An additional, detailed description is sometimes based on a questionnaire completed during the negotiation of the charter.

I.33 It will be the responsibility of the owners to ensure that the ship complies with the description given in the charter. That responsibility may have to be discharged at the time the charter is concluded, at the time when the ship is delivered, or both. This may be an 'absolute' obligation or a qualified obligation, typically a due diligence obligation. When considering such matters, it may be important whether the charter incorporates any version of the Hague or Hague-Visby Rules, for example, the United States Carriage of Goods by Sea Act 1936 in the case of the New York Produce form, under Clause 24. These matters are discussed in chapters 3, 8 and 34 (as regards the impact of the Hague Rules).

I.34 There will normally be a further promise by the owners concerning the maintenance of the ship's condition and fitness for service during the course of the charter. That could, in theory, be an absolute undertaking. Far more commonly, however, it is only an obligation of due diligence. Indeed, the arguably unqualified maintenance language of Clause 1 of the New York Produce form is interpreted as imposing only an obligation of diligence. For discussion of the owners' maintenance obligations, see chapter 11.

Delivery

I.35 In order to trigger the start of the charter service, various requirements may have to be satisfied. For example, the ship may have to reach a particular location or the owners may have to serve a notice of readiness. However, subject to any such requirements in any particular case, the delivery of the ship consists simply in putting the ship at the charterers' service. In *The Niizuru*

[1996] 2 Lloyd's Rep. 66, at page 68, Mance, J., said that, ". . . delivery refers to the placing by the owners of the vessel at the disposal of the charterers, . . . with a view to starting the time for payment of hire running". Similarly Roskill, J., said in *The Madeleine* [1967] 2 Lloyd's Rep. 224, at page 238: "An owner delivers a ship to a time charterer . . . by placing her at the charterers' disposal and by placing the services of her master, officers and crew at the charterers' disposal, so that the charterers may thenceforth give orders (within the terms of the charter-party) as to the employment of the vessel to the master, officers and crew, which orders the owners contract that their servants shall obey." On delivery generally, see further chapter 7. Under the New York Produce form, there is a particular question whether delivery occurs before time starts to run: see paragraphs 7.32 and 7.33.

I.36 The charter will normally make provision for when delivery is to take place. The typical pattern, as under Clause 14 of the New York Produce form, is to entitle the charterers to refuse delivery earlier than a certain time and to cancel the charter if delivery has not occurred, or at least if the ship has not made herself ready for delivery, by a certain time. Time charterers' cancellation rights are specifically considered in chapter 24.

Redelivery

I.37 Redelivery occurs when the charter comes to an end. Everything going well, the ship will be redelivered when the owners have completed the charterers' final voyage orders, so that the charter service is at an end. The charter may require the ship to have reached a certain place before it is redelivered or it may require the charterers to serve a notice of redelivery. However, in the absence of such requirements, a time charter ends "in exactly the same way as a voyage charter-party ends when the last cargo is discharged": see *The Berge Tasta* [1975] 1 Lloyd's Rep 422, *per* Donaldson, J., at page 424.

I.38 Where the charter comes to an end prematurely, 'redelivery' is said to occur there and then. For example, if one party repudiates the charter and the innocent party elects to terminate the charter, the ship is thereupon 'redelivered'. Some of the consequences of a premature 'redelivery' may be different from those of a redelivery in the ordinary course at the end of the intended period as provisions of the charter that operate on redelivery may, properly construed, relate only to the latter. On redelivery, see further chapters 4 and 15.

Employment

I.39 As already noted (paragraphs I.4 and I.5, above), what the charterers pay for under a time charter is, fundamentally, the right to exploit the chartered ship as a revenue-generating chattel. The charter will set limits upon the employment that the charterers are entitled to direct, for example, limits of geography or limits upon the types of cargo that may be carried. The effect of trading limits generally is the subject of chapter 5, which also comments on war risks clauses. The two particular trading limits most often giving rise to disputes and claims – safe cargoes and safe places – are considered in detail in chapters 9 and 10 respectively.

I.40 Within the trading limits set by the charter, it is the charterers' right to have the ship comply, and comply promptly, with whatever orders they may give as to her employment. That being the fundamental right conferred upon the charterers under a time charter, it features in the analysis of particular issues throughout the rest of this book. It is, however, directly the subject matter of chapters 18 and 19.

Bills of lading

I.41 Time charterers may enter into a time charter exclusively for the purpose of moving their own goods. Far more common, however, and a key expectation of almost all time charters, is that the ship will be carrying cargoes, albeit on the time charterers' orders, ultimately for third party cargo interests. Shipment of such cargoes will typically be acknowledged by the issue of bills of lading. Such bills of lading may be issued by or on behalf of the owners, the time charterers or some other carrier (for example, sub-time charterers). They will govern the carriage as between the holders of the bills and the bill of lading carrier, regulating in particular that carrier's responsibility and liability to the holders of the bills for loss of or damage to the cargo.

I.42 The owners will normally promise, by the time charter, that the master will sign bills of lading "as presented" by or on behalf of the time charterers. Moreover, the time charterers will normally be entitled to bind the owners to bills of lading by signing themselves, personally or by an agent, on behalf of the master. Various important issues arising out of this feature of time charters are discussed in chapter 21.

I.43 Bills of lading issued pursuant to a time charter are also important in connection with requirements commonly imposed by the time charter for owners to have a "lien" over cargoes being carried or freight being earned by the ship, to secure sums payable to the owners under the time charter. In relation to that, see further chapter 30.

Indemnity

I.44 Whether in connection specifically with bills of lading issued under the charter, or in connection more generally with the employment of the ship, many time charters contain express indemnities, in favour of the owners, against liabilities or other harmful consequences incurred as a result of complying with the charterers' orders. In any event, in respect of matters of choice exercised by the time charterers in relation to the employment of the ship, such an indemnity will ordinarily be implied. As will be seen from the discussion in chapters 19 and 21, the precise scope of and limits upon the implied right to indemnity are not yet fully worked out.

Hire

I.45 In return for giving the time charterers the right to dictate how the ship is employed, the owners receive the benefit of a regular, defined cash flow, by way of hire payable periodically under the time charter. The charterers' most basic obligation under a time charter, therefore, is to make full and punctual payment of hire. At any time, and for any period between delivery and redelivery, the ship is 'on hire', that is to say hire is payable, unless the charterers can bring themselves within some exception. The principal exception in most cases is the 'off-hire' clause, by which in specified circumstances hire may cease to be payable for a time. Off-hire clauses are discussed in chapter 25. Other possible exceptions are identified in chapter 16.

Withdrawal

I.46 Unless an off-hire clause or other lawful excuse justifies it, the consequence of not paying hire is normally that the owners will be entitled to 'withdraw' the ship from the charterers' service, putting an end to the time charter. There are frequently detailed terms imposing restrictions upon the owners' right of withdrawal or imposing conditions upon its exercise. Such 'anti-technicality' clauses, as the name suggests, are typically designed to ensure that the charterers

do not lose the charter through inadvertent, minor error in complying with their hire obligations. The charterers' obligation to pay hire and the owners' associated right of withdrawal are dealt with in chapter 16.

Supplying the ship

I.47 Since a ship under time charter is managed, maintained and operated by her owners, it is the owners' obligation to supply the ship with most of what she needs to operate and to comply with the charterers' employment orders. Express provision will normally be made as to the matters that, by way of exception, it is for the charterers to "provide and pay for", which is the time-honoured phrase in this context. Chief among these is fuel. That is to say, it is ordinarily made the charterers' duty to supply the ship with the fuel she needs to carry out the charter. The charterers' responsibility to "provide and pay for" fuel and certain other matters is discussed more fully in chapters 12 and 13. Another requirement commonly placed upon the charterers, at least in dry cargo charters, is that of providing any special or unusual fittings or equipment particularly required by the cargo directed to be loaded: see, for example, Lines 45 and 46 in Clause 2 of the New York Produce form (paragraphs 8.66 *et seq*., below).

Cargo operations

I.48 For historical reasons, bills of lading issued under a time charter will typically impose on the carriers under the bills (be they the owners or the time charterers) legal responsibility for the cargo from the ship's rail or its equivalent (for example, the ship's permanent manifold connection for bulk liquid cargoes) at the loadport to the ship's rail or equivalent at the discharge port.

I.49 As between the owners and the charterers, the owners are responsible for loading, stowing and discharging cargo unless the time charter provides otherwise. Very commonly, however, the time charter does provide otherwise, that is to say responsibility for some or all cargo operations is very often placed upon, and accepted by, the charterers. For example, under Clause 8 of the New York Produce form, "Charterers are to load, stow, and trim the cargo". The standard form wording is often supplemented and it may be specially provided, in any given case, either that the charterers' responsibility has been confirmed or extended, or that it has been negated altogether, restoring responsibility to the owners.

I.50 Where the time charter also incorporates, in one form or another, the Hague or Hague-Visby Rules, the question has arisen whether it is open to the owners to allocate responsibility for cargo operations to the time charterers. Under English law, it is settled that in general, the Hague or Hague-Visby Rules do not prevent owners and time charterers agreeing between them an allocation of responsibility for cargo operations. It is suggested the better view is that this is true even where the cargo operation has an impact on the seaworthiness of the ship, although this remains somewhat contentious.

I.51 The complexity and uncertainty involved in deciding who is responsible, as between owners and time charterers, for loss of or damage to cargo carried under a time charter, led to the Inter-Club Agreement, an agreement between major P. & I. Clubs providing for a relatively simple, mechanistic apportionment between owners and charterers of different types of claim. Time charters frequently stipulate that cargo claims are to be apportioned between owners and charterers under that Agreement.

I.52 All these matters are considered in detail in chapter 20.

Co-operation

I.53 It is an important implied term of any contract that the parties will co-operate with each other, where co-operation is required for the proper performance of the contract by one or other of them. The smooth performance of any time charter is likely to require good co-operation between owners and charterers at many stages, if not every stage, of the service. As a result, whichever party bears primary responsibility for an operation, as allocated under the time charter, final responsibility for a difficulty that arises may in fact turn upon the co-operation shown, or not shown, by the other party. This should never be lost sight of when analysing any particular issue or dispute that has arisen. As part of the duty to co-operate, it is suggested, it is ordinarily to be implied that the parties will communicate honestly with each other in relation to the performance of the contract. The scope of such an implied obligation of honesty in the context of time charters has yet to be explored, but see generally *Yam Seng* v. *International Trade Corporation* [2013] 1 Lloyd's Rep. 526, *per* Leggatt, J., at [119] – [156].

The charter account

I.54 At the end of the charter, the parties will attempt to calculate whether any balance is owed by one to the other on the charter account. The most important elements of the account are hire, taking into account any off-hire periods, and bunkers taken over by the charterers on delivery and by the owners on redelivery. However, there are numerous other expenses which may be paid during the course of the charter by one party which are "for the account of" the other, that is to say which, according to the charter, are to be paid or borne by the other. The parties' respective statements of the account are usually described and referred to as their "final hire statements". It is suggested that, as an incident of the general duty of co-operation, the parties are each obliged to provide a final hire statement to the other, so as to identify all areas of agreement and any areas of disagreement on the amounts due in each direction.

CHAPTER 1

Formation of the Contract

THE NEW YORK PRODUCE EXCHANGE TIME CHARTER (1946)

"1. This Charter Party, made and concluded in ..... day of ..... 19 ....."

No need for special form

1.1 A contract for chartering a ship is normally intended to be drawn up on a printed form and signed by or on behalf of the parties. However, a charter does not have to be made on a form. It can be made in correspondence. Even an oral agreement to charter a ship, if proved, is binding: see observations of Wigram, V.C., in *Lidgett* v. *Williams* (1845) 14 L.J. Ch. 459.

1.2 In practice, it is common for parties to conclude a contract – or, in chartering language, 'a fixture' – by an exchange of emails (or, in the old days, telexes or faxes): see, for example, the judgment of Tomlinson, L.J., in *Golden Ocean* v. *Salgaocar Mining* [2012] 1 Lloyd's Rep. (C.A.) 542 at [22]. In such cases, the terms of the contract are usually recorded in an email (formerly a fax) recapitulating the terms finally agreed (a 'recap') and the parties usually intend to be bound by their contract as soon as its terms are agreed, even though the formal charter may not be drawn up until some days or weeks later: see further paragraphs 1.35 *et seq*., below. Indeed, it is also not uncommon that the parties never draw up the charter on a printed form, so that their contract has to be found in the correspondence they exchanged. In such a case, the recap is often referred to as "the charterparty": see, for example, *Welex A.G.* v. *Rosa Maritime* [2002] 2 Lloyd's Rep. 81, [2003] 2 Lloyd's Rep. 509 (C.A.).

Intention to make a binding contract

1.3 The general rule is that parties are not bound by an agreement until they have agreed all the terms that they regard as essential to the contract. Lord Blackburn, in *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124, said, at page 1151: "If some particulars essential to the agreement still remain to be settled afterwards, there is no contract."

1.4 However, it is for the parties to decide what terms are essential to the contract; they decide at what stage in negotiations an agreement becomes binding. "Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. . . Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed. . . [T]here is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later": *per* Lloyd, L.J., in *Pagnan* v. *Feed Products* [1987] 2 Lloyd's Rep. 601, at page 619. Similarly, in *Global Container Lines* v. *State Black Sea Shipping* [1999] 1 Lloyd's Rep. 127 (C.A.), at page 155, Hobhouse, L.J., said, "Where you have an agreement which provides for the parties to agree on something further, then it may be inferred as a matter of construction that the whole contract is conditional as a contract upon the further agreement of those

particular points. [But] That is not a conclusive presumption because it is always possible to have a contract which does refer to a further agreement in such terms but nevertheless constitutes a binding agreement." In practice, however, the parties' freedom to leave matters over for later agreement, and yet be bound immediately, is limited by the principle that an agreement which leaves critical matters to be agreed at a later stage may be too uncertain to be enforced: see the discussion at paragraphs 1.42 *et seq*., below.

1.5 Ultimately, therefore, the question in every case is whether, from an objective perspective, the parties have expressed an intention to be bound by their agreement. "The Court's task is to review what the parties said and did and from that material to infer whether the parties" objective intentions as expressed to each other were to enter into a mutually binding contract": *per* Bingham, J., in *Pagnan* v. *Feed Products* above, at page 610.

1.6 However, often it is not immediately clear whether the parties intended to bind themselves or not. "In such cases, the court examines the background circumstances, the nature of the alleged contract and the negotiations between the parties, and seeks to infer what a reasonable person (a projection of the judge) would have taken their common intention to be. . . remembering always that the burden of establishing the existence of a contract lies with the party which asserts it. . .": *per* Toulson, J., in *Spectra International* v. *Tiscali UK* [2002] All E.R. (D) 209, [101].

1.7 In ascertaining the intentions of the parties, three basic rules apply.

1.8 First, one is concerned only with the objective intentions of the parties. As Lord Denning, M.R., put it in *Storer* v. *Manchester City Council* [1974] 1 W.L.R. 1403 at page 1408H: "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough."

1.9 Second, one must look at the communications between the parties as a whole: ". . . where exchanges between parties have continued over a period the Court must consider all these exchanges in context and not seize upon one episode in isolation in order to conclude that a contract has been made. There will be some cases where continued negotiations after a contract has allegedly been made will lead to the inference that the parties never in truth intended to bind themselves. . . .": *per* Bingham, J., in *Pagnan* v. *Feed Products*, above, at page 611. Similarly Kerr, L.J., in *The Astyanax* [1985] 2 Lloyd's Rep. 109, at page 112, said, citing *Hussey* v. *Horne Payne* (1879) 4 App. Cas. 311, that "one must go right to the end of any communications for the negotiation of a contract in order to determine whether this has in fact been concluded and, if so, what its terms are".

1.10 Third, every case must be looked at in its context. What can be inferred about the parties' intentions very much depends upon who the parties are and the circumstances in which they are negotiating. "One case may concern a protracted negotiation, perhaps conducted in writing through lawyers, between parties who have had no dealings of any kind before. Another may concern a series of quick-fire exchanges between professionals, both of them practitioners of the same trade, both having had many previous dealings, and with a wide measure of common experience, knowledge, language and understanding between them. One could not sensibly approach these cases in the same way": *per* Bingham, J., in *Pagnan* v. *Feed Products*, above, at page 611.

Words that negative the intention to contract

1.11 In practice, parties very often indicate that they do not yet intend to make a binding contract by saying that their agreement is 'subject to' conditions. To say an agreement is 'on subjects' means that it is not binding until the 'subjects' in question have been 'lifted'. Generally,

only when all subjects are lifted does an agreement become a binding contract. At that point, the ship is 'fully fixed'.

"Subject to contract" and similar phrases

1.12 Outside the chartering business, the words "subject to contract" have repeatedly been held to show an intention not to be bound until a formal contract is subsequently entered into. This phrase is not commonly used in the chartering business. However, it is assumed that it would have the same effect in a charter agreement: see the remarks of Somervell, L.J., in *Sociedade Portuguesa de Navios Tanques* v. *Polaris* [1952] 1 Lloyd's Rep. 407 (C.A.) at page 417.

1.13 In *The Mercedes Envoy* [1995] 2 Lloyd's Rep. 559, the terms of an agreement stipulated that the ship was "fixed in good faith". At page 564, Mance, J., rejected an argument that the effect of this phrase was to indicate that the parties did not intend to be bound to a contract.

"Subject to details" and similar phrases

1.14 Charterparties are often negotiated in two stages: first, the parties negotiate the 'main terms', that is, the principal commercial terms, such as the period, the rate of hire and the place of delivery; then, once the main terms are agreed, they negotiate details, that is to say the less important terms. Often there is a 'recap' of the main terms before negotiation of the details begins. In such cases, the question may arise whether the parties have made a binding contract as soon as they have agreed the main terms or whether they intend to bind themselves only once the details have been agreed.

1.15 Usually the parties answer this question by using the expression "subject to details". Under English law, that expression prevents the formation of a binding contract despite agreement on all the main contractual terms, unless and until the details have been agreed. It should be noted that there are U.S. cases to a contrary effect (see paragraphs 1A.16 *et seq*., below) but in the case which follows it was suggested by Steyn, J., that in this respect the United States courts were out of step with the way in which the shipping trade works.

Following negotiations for a voyage charter of the *Junior K*, the owners' broker sent a telex to the charterers' broker setting out the terms agreed which began "Confirm telcons here recap fixture sub details" and ended "sub dets Gencon CP". The telex contained all the essential terms of a charterparty and no matters had been specifically raised in the negotiations which remained unresolved. The owners contended that there was a binding contract. It was held by Steyn, J., on an interlocutory application, that the owners' contention had no realistic prospect of success. He said: "It is plain that the parties had in mind a contract on the Gencon form but that they had not yet considered the details of it. By the expression, 'subject to details of the Gencon charterparty' the owners made clear that they did not wish to commit themselves contractually until negotiations had taken place about the details of the charterparty. Such discussions might have covered a number of clauses. It does not follow that the owners were willing to accept all the detailed provisions of the standard form document. After all, it is a common occurrence for some of the detailed provisions of the Gencon form to be amended during the process of negotiation. In any event, the Gencon standard form contains within it alternative provisions which require a positive selection of the desired alternative". The Judge then gave as an example the alternative laytime options in the Gencon charter, and continued "No discussion whatever had taken place about these options. . . Against this background it seems to me clear that the stipulation 'subject to details of the Gencon charterparty' conveys that the fixture is conditional upon agreement being reached on the details of the Gencon form, which had not yet been discussed."

The Junior K [1988] 2 Lloyd's Rep. 583.

1.16 In *The Nissos Samos* [1985] 1 Lloyd's Rep. 378, a case about a contract for the sale of a ship, Leggatt, J., remarked, at page 385: "'Subject details' is a well-known expression in broking

practice which is intended to entitle either party to resile from the contract if in good faith either party is not satisfied with any of the details as discussed between them." But Steyn, J., in *The Junior K*, above, considered that, in so far as he was referring to the qualification of good faith, Leggatt, J., was simply recording and stating broking practice and not the strict legal position. If no binding contract has been formed, the reason for a party's withdrawal from negotiations is irrelevant.

1.17 In *The CPC Gallia* [1994] 1 Lloyd's Rep. 68, the parties' agreement was "subject to details/logical amendments". Potter, J., rejected the submission that the additional words modified the effect of the phrase "subject to details", saying, at page 74, that that phrase "is a well-known term. . . I consider that if, by use of additional words, the parties are to be treated as restricting the customary effect of that term, the words of limitation relied on should be clear in their content and context".

1.18 However, as soon as the parties have agreed the details, there is normally a binding contract: see *The Junior K*, above, *per* Steyn, J., at page 586. In *Egon Oldendorff* v. *Libera Corporation* [1995] 2 Lloyd's Rep. 64, Mance, J., in contrasting English law with the supposed position under Japanese law, remarked, at page 69: "There is nothing in the concept of 'subject to details' in English or under English law which requires details so agreed to be recapitulated, still less which requires any recapitulation to be confirmed by either or both of the parties."

1.19 The expression "subject to details" is often used in an abbreviated form – "sub details" – but it means the same: see *Thoresen* v. *Fathom Marine* [2004] 1 Lloyd's Rep. 622. Similar expressions may also be construed as having the same effect: see, for example, *Ignazio Messina* v. *Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, where the parties' agreement was "subject to appropriate amendments" to the Norwegian Sale Form "to be mutually agreed".

1.20 What is the position where the parties have agreed main terms, but have not expressly made their agreement "subject to details"? The answer will depend upon the words used in the particular case. However, as a general rule, parties are unlikely to regard themselves as bound by a contract while the negotiation of the "details" of the agreement is continuing: see, for example, *The Bay Ridge* [1999] 2 Lloyd's Rep. 227 *per* Cresswell, J., at page 242. Leggatt, J., in *The Intra Transporter* [1985] 2 Lloyd's Rep. 158, at page 163, said: "Although the negotiation had not been expressed to be 'subject to details', it obviously was so treated by both parties. Although it is theoretically possible to agree the main terms of a charter-party without agreeing the details, such a course would be a fruitful source of dissention and very unusual."

Agreement to be "finalised"

1.21 In *Global Container Lines* v. *State Black Sea Shipping* [1999] 1 Lloyd's Rep. 127 (C.A.), an agreement was signed providing for the sale of a number of ships. The agreement provided that the sale was to take place "under the MOA to be finalised as per terms and conditions stated herein above". It was argued that this wording showed that the parties did not consider that their agreement was complete and that further agreement was required to conclude a contract. The Court of Appeal rejected that, saying that the words "to be finalised" did not relate to leaving anything to be agreed, but related to questions of formalisation or performance of documents and transactions: *per* Hobhouse, L.J., at page 156.

"Subject to survey" and similar phrases

1.22 When the parties have in their negotiations used the phrase "subject to survey" or something similar, it is a matter of construction of all the exchanges in their context to decide whether there is (*a*) no binding contract at all, or (*b*) a contract which binds immediately but whose

main obligations come into operation only if and when the relevant requirement has been fulfilled, or (*c*) a contract which binds immediately but will cease to do so if the requirement is not fulfilled.

1.23 In some cases, the terms of the parties' agreement may make it clear how the "subject" in question is to take effect. However, where the parties have simply agreed that their charter is, for example, "subject to survey", the position is more difficult. It is not easy to identify in the case law clear principles by which to determine whether a particular case falls into category (*a*), (*b*) or (*c*).

1.24 In *Astra Trust* v. *Adams* [1969] 1 Lloyd's Rep. 81, a ship sale contract was said to be "subject to a satisfactory survey". Megaw, J., adopted construction (*a*); the words were a condition precedent to contract, preventing any binding contract for the sale of a ship from coming into existence for the time being. The buyers had an unrestricted right to decide whether the survey was satisfactory or not. When and if they declared the survey satisfactory, the contract became binding. Until then, either party could freely withdraw. The decision would have been the same had the phrase been simply "subject to survey". The effect of this decision is to give the words "subject to (a satisfactory) survey" nearly the same effect as "subject to contract", above.

1.25 Lord Denning, M.R., expressed some doubt about the correctness of Megaw, J.'s decision in a subsequent sale contract case, *The Merak* [1976] 2 Lloyd's Rep. 250, and remarked, at page 254, that in some circumstances there might be an immediately binding contract despite such a phrase. The buyer would be obliged to make the survey and the seller to permit it and the contract would come to an end only if the survey were unsatisfactory, presumably on an objective view.

1.26 In that case, the use of the phrase "subject superficial inspection" in telex negotiations for a sale contract intended to be based on the Norwegian Saleform was held not to prevent the conclusion of an immediately binding contract (including, however, the usual printed provisions of the Norwegian Saleform for rejection by the buyers after inspection).

1.27 But in *The John S. Darbyshire* [1977] 2 Lloyd's Rep. 457, a time charter case, Mocatta, J., held that the words "subject to satisfactory completion of two trial voyages" meant that there was not to be any binding charter unless and until these trial voyages had been satisfactorily completed and the parties had then agreed to enter into the contract.

Starch manufacturers agreed to take the *John S. Darbyshire* on time charter to bring starch to their factory, but only "Subject to satisfactory completion of two trial voyages", as they wanted to be sure that a compressed air piping system which they paid to have fitted to the ship would activate the starch sufficiently during transport to keep it in slurry form. The two trial voyages were performed under a separate voyage charter. After the second trial voyage the charterers said they were not going ahead with the time charter. Before the Commercial Court they argued that no binding time charter had been made. Mocatta, J., agreed. He said, at page 466, that the effect of the relevant words was that the terms of the time charter "had been prepared and agreed, so to speak, in escrow, to use if and when it was further agreed between the parties that they should be bound contractually by them".

The John S. Darbyshire [1977] 2 Lloyd's Rep. 457.

1.28 Where it is held that the parties have made a contract, but that contract is 'subject' to a particular condition, the parties may come under implied obligations with respect to how and when the condition is fulfilled. For example, where one party has the right to cancel if not satisfied by a survey, he has an implied duty to exercise that power in good faith: see *obiter* remarks of Mocatta, J., in *The John S. Darbyshire*, above, at page 466, and of Megaw, J., in *Astra Trust* v. *Adams* [1969] 1 Lloyd's Rep. 81, at page 87. Further, Mocatta, J., thought that the charterers' genuine dissatisfaction must be limited to technical aspects of the ship's performance and would not extend to matters relating to the profitability of the venture: see page 466.

"Sub stem"

1.29 "Sub stem" is a phrase normally seen only in voyage charters. It means that the contract is conditional upon the charterer being able to find a cargo.

Subject to permission or approval from third parties

1.30 Where a contract is made the performance of which is subject to obtaining some kind of permission or approval from a third party, for example, a government or a shipper, there may be an immediately binding contract containing an implied obligation on one or both of the parties not to prevent the fulfilment of the requirement or even to exercise reasonable diligence to try to fulfil it: see *Brauer* v. *Clark* [1952] 2 Lloyd's Rep. 147 and *Hargreaves Transport* v. *Lynch* [1969] 1 W.L.R. 215.

Other uses of "subject to"

1.31 The words "subject to" may be used by a party merely to introduce into negotiations a particular term or clause, as in "subject to war risks clause". The use of these words does not prevent a binding agreement if the other party assents to the proposal; but the whole phrase must identify with sufficient clarity the particular clause intended, for otherwise it may be read as meaning "subject to our being able to agree upon a suitable war risks clause" and prevent the formation of a binding contract. For example, in *Love & Stewart* v. *Instone* (1917) 33 T.L.R. 475 terms were agreed for the sale of a quantity of coal "subject to strike and lock-out clauses"; it was held by the House of Lords that there was no contract because, although the parties had agreed that there should in their contract be such a clause, they had not agreed what it should say. The following case also illustrates this point:

Agents for the prospective purchasers of the steamer *Ring* made a "firm offer of £22,000, less 1 per cent, subject to drydocking clause". The agents of the owners of the ship replied: ". . . I have to inform you that the offer is accepted by the sellers, and we shall try to send you contract on Monday." Bailhache, J., held that there was not a concluded contract, saying: "It is sufficient to say, as far as I know, there is no drydocking clause which can be said is the usual drydocking clause and invariable in its terms. This offer and acceptance, which are bound together, were subject to a drydocking clause undetermined in terms, and it prevents a concluded contract between the parties in this case. There is a reference to a contract and both parties contemplated a contract, but the mere fact that a contract is contemplated is not sufficient."

Svenska Lloyd v. *Niagassas* (1921) 8 Ll.L.Rep. 500.

Conduct which dispenses with 'subjects'

1.32 Parties may make an agreement which is subject to one or more matters – so that their agreement has no contractual force when made. However, if they subsequently start to perform their agreement, the court may take the view that they have dispensed with the 'subjects' and agreed to treat themselves as bound.

1.33 In *Howard Marine* v. *Ogden* [1978] 1 Lloyd's Rep. 334, an offer to charter barges was made "subject to availability and charterparty". Although terms were thereafter agreed, no charter was ever signed. However, it was held that when the barges were delivered to and employed by the charterers a contract came into being on the agreed terms by conduct: see page 339. This follows the authority of *Brogden* v. *Metropolitan Railway* (1877) 2 App. Cas. 666.

1.34 In *The Botnica* [2007] 1 Lloyd's Rep. 37, an agreement to charter a ship was made "subject

to the signing of mutually agreeable contract terms and conditions". Aikens, J., held that the 'subject' prevented the creation of a binding contract as at the date of agreement. However, the ship was subsequently delivered into service. The judge analysed the case in terms of waiver (in the sense of election), holding that the charterers had elected to treat the charter as binding and waived the requirement for a signature as a pre-condition of contracting: see pages 51 to 53.

Is there a fixture before a formal charter is signed?

1.35 In the vast majority of cases, a binding agreement is made before the formal charter is drawn up and signed. It is common to find that parties indicate that a binding agreement has been reached by saying the ship is "fully fixed" or that "all subs are lifted". It is also common that, when the parties have made a fixture, a recap is sent (nowadays typically by email) to record that fact. In some cases there is an exchange of messages confirming the accuracy of the recap, so that the recap can be said to form part of an agreement in writing; in other cases, the recap may be no more than evidence of an agreement reached in earlier oral exchanges. However, the fact that the parties call a message a "recap" does not of itself indicate that the parties have concluded a contract. Parties often recap where they have got to in their negotiations before a fixture has been concluded: see, for example, *Electrosteel* v. *Scan-Trans* [2003] 1 Lloyd's Rep. 190 or *The Bay Ridge* [1999] 2 Lloyd's Rep. 227, *per* Cresswell, J., at page 242.

1.36 The mere fact that the parties intend to execute a formal document does not raise a presumption that their agreement is not to have contractual force until such a document is executed: see *The Blankenstein* [1985] 1 Lloyd's Rep. 93 (C.A.). See also, *Global Container Lines* v. *State Black Sea Shipping* [1999] 1 Lloyd's Rep. 127 (C.A.), discussed at paragraph 1.21, above.

1.37 However, everything depends on the words used in the particular case. The communications between the parties must be construed, in the light of the circumstances, to see whether it was the parties' intention that their agreement was not to have contractual force until the formal document was signed: see *The Blankenstein* [1985] 1 Lloyd's Rep. 93 (C.A.), *per* Robert Goff, L.J., at page 104. Parker, J., said in *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, at pages 288 and 289: "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored." See also the judgment of Tomlinson, L.J., in *Golden Ocean* v. *Salgaocar Mining* [2012] 1 Lloyd's Rep. 542 (C.A.) at [30], a case dealing with the formation of a charter and its ancillary guarantee.

1.38 In rare cases, parties have made agreements which are not intended to have contractual force until formalised: see, for example, *Okura* v. *Navara* [1981] 1 Lloyd's Rep. 561, [1982] 2 Lloyd's Rep. 537 (C.A.) (the terms of the agreement provided for it to become effective only when signed); *Sociedade Portuguesa de Navios Tanques* v. *Polaris* [1952] 1 Lloyd's Rep. 71 at pages 75 and 407 (C.A.), at page 417 (the parties' correspondence implicitly treated signing as the point at which the charter was to become effective); *Zarati Steamship* v. *Frames Tours* [1955] 2 Lloyd's Rep. 278 at page 290 (broker made clear that he needed to revert to his principal with a draft text before the contract was concluded); and *The Botnica* [2007] 1 Lloyd's Rep. 37 (agreement expressly "subject to the signing of mutually agreeable contract terms and conditions").

Where the terms of the formal charter differ from the terms of the recap

1.39 Where parties have concluded an agreement which is reflected in a recap, it sometimes happens that the brokers draw up a formal charter but the formal charter is never signed. In that case, the formal charter does not affect the parties' rights; their agreement is still to be found in the correspondence. Where, however, a formal charter is drawn up and signed, the signed charter supersedes the earlier contract; see, for example, *Electrosteel* v. *Scan-Trans* [2003] 1 Lloyd's Rep 190, *per* Gross, J., at [25]. In *HIH* v. *New Hampshire* [2001] 2 Lloyd's Rep. 161, at [81], Rix, L.J., said, "Where. . . one contract has been intended to supersede an earlier contract, it must follow that the parties' contract must be found exclusively in the later contract. Thus the earlier contract cannot be used to add to, or modify, the later contract".

1.40 But, in such a case, the earlier contract is admissible as an aid to construing the later contract. In the *Electrosteel* case, above, a recap telex evidenced the terms of a contract which had subsequently been superseded by a signed contract. Gross, J., held, at [28], that the recap was admissible as an aid to construing the signed contract. However, as Rix, L.J., commented in *HIH*, above, at [83], the earlier contract may not be of much assistance in that regard.

1.41 What, then, is the position if one party says that the signed charter has, by accident or mistake, changed the terms that the parties earlier agreed? In such a case, that party's remedy is to seek rectification of the signed charter. In so doing, he has the difficult job of providing convincing proof that the charter does not reflect the intentions of the parties at the time it was signed and that those intentions are accurately reflected in the revised wording he now proposes: see the judgment of Gross, J., in the *Electrosteel* case, above, at [41]. In this context the intentions that matter are not the subjective thoughts of the parties but the intentions they have outwardly manifested; "It is the words and acts of the parties demonstrating their common intention, not the inward thoughts of the parties that matter", *per* Mustill, J., in *The Olympic Pride* [1980] 2 Lloyd's Rep. 67, at page 72 rhc, quoted by Christopher Clarke, J., in *The Aktor* [2008] 2 Lloyd's Rep. 246, at [42]. The test for determining whether there was a prior accord or common intention to which the executed contract was intended to give effect, and if so what it was, is objective, i.e. it is concerned with what is outwardly expressed. That has now been settled by *Chartbrook* v. *Persimmon Homes* [2009] 1 A.C. 1101 and *Daventry District Council* v. *Daventry & District Housing* [2012] 1 WLR 1333. So rectification will not necessarily be granted merely because the signed charter differs from an earlier recap. Indeed it would appear from the *Electrosteel* and *Aktor* cases, that that may be so even where the parties did not discuss any relevant amendment in the interval between the recap and their signing of the charter. However, everything must depend on the facts. The lack of any discussion of an amendment may signify, objectively, that the prior accord subsists, i.e. that neither party is indicating that they no longer intend to contract on that basis. Rectification should lie therefore where the purpose of drawing up the charter was only to create a more formal record of the deal set out in the recap.

Contracts too uncertain to be enforced

1.42 In rare cases, the parties may appear to have intended to make a contract, but the terms they have agreed may be so incomplete, uncertain or unworkable that their apparent agreement cannot be enforced. In such a case, there is no contract. (In other cases, the fact that the parties have agreed terms that are incomplete or uncertain in important respects may be an indication that their agreement was not intended to be a binding contract.)

An agreement to purchase a van stated that "this order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years". It was held by the House of

Lords that there was no contract. As there were many different types of hire-purchase terms this stipulation was so uncertain in meaning that agreement was lacking on what was clearly a material point. Viscount Maugham said: "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus *ad idem* would be a matter of mere conjecture." Lord Wright said: "It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."

Scammell v. *Ouston* [1941] A.C. 251 (H.L.).

1.43 However, such cases are rare. Where the parties have intended to bind themselves, the courts will strive to uphold their bargain.

1.44 Gaps in a contract can usually be filled by implication. In the words of Viscount Maugham in *Scammell* v. *Ouston* [1941] A.C. 251, at page 255: "In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract: see *Hillas & Co*. v. *Arcos Ltd*." The facts of the case referred to by Viscount Maugham were as follows:

Timber merchants entered into an agreement to buy "22,000 standards of softwood goods of fair specification" of Russian origin during 1930. The agreement gave them an option to purchase in 1931 "100,000 standards" at a stated discount from the sellers' official price list for that year, but gave no details as to the kind, size or quality of those standards nor as to the manner of shipment. No problems arose with regard to the purchases in 1930, but the sellers sought to avoid liability under the option for 1931 on the ground that it was too uncertain in its terms to constitute a binding agreement. The House of Lords held the option for 1931 enforceable: the gaps in its terms could be filled by reference to the terms of the agreement for 1930, and where those terms were themselves vague (as in describing the softwood goods merely as "of fair specification") their meaning could be ascertained by implying what was just and reasonable.

Hillas v. *Arcos* (1932) 43 Ll.L.Rep. 359.

1.45 Meaningless or self-contradictory provisions can be severed or ignored: see, for example, *Nicolene* v. *Simmonds* [1953] 1 Q.B. 543, in which a contract purported to incorporate "usual conditions of acceptance" but there were no such usual conditions.

The arbitration clause in a contract for the sale of timber provided for "Any dispute" to be referred to arbitration in London and for "Any other dispute" to be arbitrated in Moscow.

The Court of Appeal held that the whole clause was meaningless and that it should be disregarded altogether. The clause being severable from the rest of the contract, the dispute between the parties as to non-delivery and defective quality would be dealt with by the courts.

Lovelock v. *Exportles* [1968] 1 Lloyd's Rep. 163.

1.46 Particular difficulties have been caused by agreements which require the parties to agree further terms. An agreement to make a contract is too uncertain to be unenforceable. So too is an agreement to negotiate a contract: see *Walford* v. *Miles* [1992] 2 A.C. 128 (H.L.). Likewise, where an agreement leaves over for further negotiation a matter which is fundamental or essential for a workable contract, the whole bargain will be void for uncertainty: see *Courtney & Fairbairn* v. *Tolaini Bros*. [1975] 1 W.L.R. 297, in which an agreement for building works was held not to be a contract because it left the parties to negotiate a fair price. Even when the parties have made a binding contract, a term within that contract providing for the parties to agree a certain matter may itself be unenforceable: see *Mallozzi* v. *Carapelli* [1976] 1 Lloyd's Rep. 407 (C.A.). In that case, a c.i.f. contract provided for goods to be discharged at two Italian ports. A term in the contract which provided that the parties should agree the order of discharging ports was held to be unenforceable.

In that case, the consequent redundancy of the particular term did not prevent or interfere with performance of the basic contract. Where it is otherwise because agreement on the particular matter is essential to the performance of the parties' bargain, the courts have either implied terms (see below) or held the whole agreement to be too uncertain to be enforced.

1.47 However, there are various ways in which an agreement to agree can be made certain, so that the parties' bargain can be enforced.

1.48 First, a clause which provides for further agreement may be treated as sufficiently certain if the envisaged agreement is to be made by reference to some form of objective standard. In *Didymi Corporation* v. *Atlantic Lines and Navigation* (*The Didymi*) [1988] 2 Lloyd's Rep. 108, an additional clause in the New York Produce form charter provided that, if the ship achieved a better average performance than the stipulated speed and consumption, the owners were to be indemnified by an increase in hire calculated "equitably. . . by an amount to be mutually agreed between owners and charterers". The Court of Appeal upheld the judgment of Hobhouse, J., [1987] 2 Lloyd's Rep. 166, that the indemnity agreement was enforceable. The essential agreement was that in the circumstances the owners should be indemnified and the procedure for calculating the exact amount merely a matter of machinery. But the stipulation for an objective standard which was indicated by the use of the word "equitably" was a necessary element in the court's decision. Nourse, L.J., said at page 118 of the Court of Appeal report: "Accordingly, the parties having agreed upon an objective standard, it seems to me that the identity of those to whom the agreement is referred, albeit that they are the parties themselves, is of no real importance. . . I desire to emphasise that my view of this case depends wholly on the parties having prescribed a standard by reference to which their agreement. . . was to be made. I do not intend to suggest that an agreement for sale, lease, charter or whatever at a price, rent, hire or other sum "to be agreed" between the parties to the agreement could be one to which the law would give effect."

1.49 Second, the court may imply an objective standard in order to make an agreement enforceable, so long as this implication is necessary or obvious. In *Foley* v. *Classique Coaches* [1934] 2 K.B. 1, a contract for the sale of land included an agreement that the purchaser would buy petrol for a number of years "at a price to be agreed by the parties. . . from time to time". The Court of Appeal held that a term was to be implied that the price agreed was to be a reasonable price: see *per* Scrutton, L.J., at page 10.

1.50 An objective standard is likely to be implied where the parties have acted in the belief that they have a binding contract or where one party has either had the advantage of some performance under the agreement or has made an investment in reliance on that agreement: see *Mamidoil-Jetoil Greek Petroleum* v. *Okta Crude Oil Refinery* [2001] 2 Lloyd's Rep. 76, particularly the judgment of Rix, L.J., at page 89. As Lord Denning, M.R., said in *Sykes* v. *Fine Fare* [1967] 1 Lloyd's Rep. 53, at page 57, "In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions."

1.51 An objective standard may also be implied where an 'agreement to agree' forms part of a bargain for performance over a lengthy period and reflects the parties' wish to allow certain matters to be adjusted over time, in the light of changing circumstances.

Jetoil and the Okta refinery, between whom a commercial relationship had existed for many years, entered into another contract in 1993 for the handling of crude oil shipments brought in tankers to Jetoil's facilities in Greece. This new agreement was expressed to be "valid for 10 years", but only fixed the handling fees for the first two years. Nothing was said in the contract about fees for subsequent years. Thereafter the parties agreed handling fees between themselves until, in 1999, Okta wanted to switch the handling arrangements away from Jetoil to other rival facilities. Okta contended that in the absence of any agreement on handling fees they were no longer bound by the 1993 contract. It was held by the Court of Appeal, reversing Thomas, J., that the contract was for a fixed period of at least 10 years and a term was to be implied that Okta should pay a reasonable fee for the remainder of the 10-year term. There was no difficulty in working out a reasonable

fee (as the parties themselves had done in the past) and the presence of an arbitration clause in the contract was of some significance in that it provided a contractual mechanism for resolving "Any dispute. . . which cannot be amicably resolved".

Rix, L.J., emphasised the willingness of the courts to imply terms to enable the contract to be carried out where the parties have acted in the belief that they had a binding contract. He went on, at page 89 of the report: "This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long-term relationship, or has had to make an investment premised on that agreement. For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable."

Mamidoil-Jetoil Greek Petroleum v. *Okta Crude Oil Refinery* [2000] 1 Lloyd's Rep. 554, [2001] 2 Lloyd's Rep. 76 (C.A.).

1.52 Third, in a number of cases it has been suggested that an 'agreement to agree' is more likely to be regarded as enforceable if the parties have agreed an arbitration clause: see *per* Lord Denning, M.R., and Dankwerts, L.J., in *Sykes* v. *Fine Fare* [1967] 1 Lloyd's Rep. 53, at pages 58, 59 and 60. In *Mamidoil-Jetoil Greek Petroleum* v. *Okta Crude Oil Refinery*, above, Rix, L.J., said at page 89: "The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute." While Rix, L.J.'s *dictum* is not the first time the courts have placed emphasis on the existence of an arbitration clause, it is not easy to explain why it should make a difference – arbitrators have no different or greater powers to 'complete' agreements by implication than do the courts.

U.S. Law

Applicable law

1A.1 A time charter is a contract for the use of a ship for an agreed period of time. Under a time charter, the owner remains responsible for the navigation and operation of the ship and the charterer assumes responsibility for arranging the employment of the ship, providing fuel and paying for certain cargo-related expenses. By contrast, under a bareboat charter, the charterer has exclusive responsibility for the navigation, operation and use of the ship. A voyage charter is a different species of agreement by which the owner agrees to provide the ship to a charterer to carry cargo from one or more loading ports to one or more discharge ports. In the United States, charterparty disputes can be decided in state or federal courts or by arbitration. Whichever forum is chosen, the governing law is the general maritime law of the United States. The general maritime law consists of case law decided by the Supreme Court and lower courts, as well as federal statutes which affect shipping. In charterparty cases, arbitration awards are sometimes referred to for guidance even though they are not binding as precedent.

1A.2 Admiralty and maritime cases are given specific recognition in the Constitution of the United States as a proper subject of federal jurisdiction. American courts have long recognized the importance of promoting uniformity in the law which governs maritime cases. As a result, the general maritime law is paramount to state laws. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). This is true even though by virtue of the "Savings to Suiters" clause of the Judiciary Act of 1789 (which is now codified at 28 U.S.C. § 1333), claimants in most types of maritime cases have the option of suing in federal court under admiralty jurisdiction or seeking a common law remedy in a state court or federal court exercising diversity jurisdiction. *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N.Y.2d 576, 307 N.Y.S.2d 660 (1970). Whenever the cause of action is maritime, federal substantive law is supreme even if the case is brought in a state court. See, e.g., *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961); *Offshore Logistics Inc.* v. *Tallentire*, 477 U.S. 207, 222–223 (1986); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942).

1A.3 Charters have long been considered maritime contracts. *The Ada*, 250 F. 194 (2d Cir. 1918). The general maritime law governing charters embraces the principles of ordinary contract and agency law. *Kirno Hill Corp.* v. *Holt*, 618 F.2d 982, 985 (2d Cir. 1980); *Navieros Oceanikos S.A.* v. *The Mobil Trader*, 554 F.2d 43, 47 (2d Cir. 1977). Charters are not subject to such state enactments as the Statute of Frauds or the Uniform Commercial Code. *Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1919).

1A.4 It is open to the parties to a charter to include a choice of law clause which specifically provides for the application of state or foreign laws. For example, a charter may provide that any disputes between the parties will be governed by the laws of the State of New York. A choice of law clause of this type is valid and ordinarily will be given effect by the courts. See *Milanovich* v. *Costa Crociere*, 954 F.2d 763, 1993 AMC 1034, 1040 (D.C. Cir. 1992). Clauses of this type will govern unless the particular state chosen has no substantial relationship to the parties or the transaction or the state's law conflicts with maritime law or public policy. *Stoot* v. *Fluor Drilling Services*, 851 F.2d 1514, 1989 AMC 20, 24 (5th Cir. 1988); *Hale* v. *Co-Mar Offshore Corp.*, 1986 AMC 1620, 1624–1625 (W.D. La. 1984). See generally *Angelina Cas.* v. *Exxon Corp.*, 876 F.2d 40, 1989 AMC 2677 (5th Cir. 1989), a case where the charter incorporated both Louisiana law and federal maritime law and the court held the latter governed.

Choice of law clauses which provide for the application of foreign laws are also enforceable. See, e.g., *Bunker Holdings, Ltd.* v. *Green Pac. A/S*, 2009 AMC 2394 (4th Cir. 2009) ("It is well settled under United States law that absent a compelling reason of public policy, a freely negotiated

choice of law clause in a maritime contract should be enforced.") (citing *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972) ("There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be enforced.").

1A.5 The vast majority of charter disputes in the United States are settled by arbitration at New York. If the existence of an arbitration clause in the contract is at issue, however, that question ordinarily must first be heard by the federal court. See, e.g., *Pollux Marine Agencies Inc.* v. *Louis Dreyfus Corp.*, 455 F. Supp. 211 (S.D.N.Y. 1978), *aff'd,* 595 F.2d 1209 (2d Cir. 1979).

For example, the federal court in New York sitting in admiralty is deemed to have jurisdiction once it is alleged that there is a maritime contract providing for arbitration at New York. If the existence of the contract and its arbitration provision are upheld, then the issues of breach of charter and damages normally will be referred to arbitrators.

1A.6 It is open to the parties to agree that arbitrators should decide whether a binding contract exists.

1A.7 In *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), however, the court ruled that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." 514 U.S. at 944. This standard varies the rule that where there is an arbitration clause, doubts concerning the scope of arbitrable issues are to be decided in favor of arbitration. The Supreme Court reinforced the latter rule by its decision in *Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S.Ct. 588, 2002 U.S. Lexis 9235 (2002), holding that issues concerning the timeliness of an arbitration demand should be decided by the arbitrator rather than the court. The proper application of the *First Options* standard was discussed in *U.S. Titan, Inc.* v. *Guangzhou Zhen Hua Shipping Co., Ltd*., 241 F.3d 135, 147, 2001 AMC 2080 (2d Cir. 2001), (*reh'g en banc denied*), where it was held that the parties did not enter into an *ad hoc* agreement to arbitrate the issue of the formation of the charterparty.

1A.8 In a somewhat unusual case, the court held that it was for arbitrators to decide whether a charter had come into existence. *Northern Tankers (Cyprus) Ltd.* v. *Lexmar Corp.*, 781 F. Supp. 289, 1992 AMC 1021 (S.D.N.Y. 1992). In that case, the owner demanded arbitration of a claim for damages arising from the charterer's repudiation of the charter. The charterer accepted the arbitration demand, but raised as a defense its assertion that no charter had ever been agreed. In these circumstances, the court found there was an arbitration agreement and that the arbitrators should decide the issues raised by the charterer's defense. See paragraph 29.24, below, for a more complete discussion of this issue.

Rules of construction

1A.9 Charterparties are governed by ordinary contract law. ". . . [A] charter party is just a species of contract, subject to the same rules of interpretation as any other binding agreement." *Cargill Int'l S.A.* v. *The Pavel Dybenko*, 991 F.2d 1012, 1019, 1994 AMC 2258 (2d Cir. 1993).

1A.10 Under ordinary contract principles as applied in the general maritime law, charter language is to be interpreted to give full effect to the plain meaning of the words used. The charter should be read as a whole. Unambiguous provisions of the charter should be given their plain meaning and a court may not look beyond the words chosen by the parties to determine their intent. See generally *Wilson* v. *Job Inc.*, 958 F.2d 653, 657 (5th Cir. 1992). Where the language used by the parties is susceptible to more than one interpretation, it will be deemed ambiguous and the court may look to extrinsic evidence to make a fact finding as to its meaning. See, e.g., *Kroft Entertainment Inc.* v. *CBS Songs*, 653 F. Supp. 1530, 1533 (S.D.N.Y. 1987); *Chi Sun Hua Steel Co. Ltd.* v. *Crest Tankers*, 1990 AMC 2816, 2817–2818 (N.D.Cal. 1990). The court may consider

such factors as whether a particular interpretation creates or avoids a redundancy; the existence of limiting definitions in the charter; the breadth of the language of the disputed provision; and the surrounding provisions of the whole contract. *Capozziello* v. *Lloyd Brasileiro*, 443 F.2d 1155, 1159, 1971 AMC 1477 (2d Cir. 1971). Where the language contained in the charter is ambiguous, the disputed provision will be construed in the light least favorable to the party who drafted it, and will be given the meaning the other party believed it would have. *Navieros Oceanikos S.A.* v. *The Mobil Trader*, above. These rules of construction are discussed at length in *Restatement (Second) of Contracts*, §§ 201–208.

Formation of the contract

1A.11 A charter comes into existence when the parties agree to its essential terms. *Great Circle Lines Ltd*. v. *Matheson & Co.*, 681 F.2d 121, 1982 AMC 2321 (2d Cir. 1982). See also *U.S. Titan, Inc.* v. *Guangzhou Zhen Hua Shipping Co., Ltd*., 241 F.3d 135, 146, 2001 AMC 2080 (2d Cir. 2001) (*reh'g en banc denied*). Other important cases discussing this point include *Christman* v. *Maristella Compania Naviera*, 349 F. Supp. 845 (S.D.N.Y. 1971), *aff'd,* on opinion below, 468 F.2d 620 (2d Cir. 1972); *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., 523 F.2d 527, 534 (2d Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976); *Pollux Marine Agencies Inc*. v. *Louis Dreyfus Corp*., above; *The Cielo Rosso*, 1980 AMC 2088 (Arb. at N.Y. 1980). It is not necessary to have a document signed by both parties to have a binding charter. An oral charter is valid and enforceable. *Kossick* v. *United Fruit Co*., 365 U.S. 731 (1961); *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., above. At the same time, an oral maritime contract may refer to and incorporate by reference the terms of a written document. *Sun Oil Co*. v. *Dalzell Towing Co. Inc*., 55 F.2d 63 (2d Cir. 1932), *aff'd,* 287 U.S. 291 (1932); *The Independence*, SMA 3049 (Arb. at N.Y. 1994). The parties may by their conduct establish a course of dealing which will reflect the terms of their contract even though a signed written agreement does not exist. See *Arbitration between Horizon Development Corp. Ltd. and Mantua Oil Co.*, SMA 2734 (Arb. at N.Y. 1990). A fixture recap may also evidence the terms and conditions agreed by owner and charterer. See, e.g., *The Oceanis*, SMA 2772 (Arb. at N.Y. 1991). In *Central Marine Service Inc*. v. *Ocean Marine Contractors Inc*., 1984 AMC 1730 (5th Cir. 1982) (*per curiam*), the court stated that the admiralty parol evidence rule does not bar proof that a written agreement was later orally altered.

1A.12 The parties may, of course, agree that the charter will be subject to specified conditions. If conditions are agreed, they must either be satisfied or waived before the charter will come into existence. The parties have a duty to act in good faith with respect to the fulfillment of conditions. In *The Zakynthos*, SMA 2097 (Arb. at N.Y. 1985), the fixture telex included the following condition in favor of charterer: "subject to favorable report after inspection of ship at Curaçao on present voyage." After inspecting the ship, the charterer rejected her and deemed the charter cancelled. The arbitrators ruled, however, that a standard of reasonableness was implicit in the clause and "did not give charterer a blank check to reject the ship without reasonable cause." The panel found that the charterer acted capriciously in rejecting the ship and held that this was a breach of the contract which permitted the owner to recover damages.

1A.13 The rule followed in the United States concerning "sub details" is discussed below at paragraphs 1A.16 *et seq*.

Essential terms

1A.14 Whether a term is by its nature "essential" is a question of fact which depends on the intent of the parties. In *Uninav* v. *Molena Trust*, 1973 AMC 1386 (S.D.N.Y. 1973), *aff'd,* 490

F.2d 1406 (2d Cir. 1974), it was held that there was no binding contract where the parties never agreed on the issue of crew overtime, which was considered to be an essential element of the charter. In *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., above, agreement on delivery range, insurance terms, and a dry-docking clause was considered essential to the charter. Similarly, in *Orient Mid-East Great Lakes Service* v. *Int'l Export Lines Ltd*., 315 F.2d 519, 1964 AMC 1810 (4th Cir. 1963), the court held that there was no charter because the parties had not reached agreement on the quantity of stores and bunkers the owner would be allowed to maintain. In *Himoff Indus*. v. *Seven Seas Shipping Corp*., 1976 AMC 1030 (N.Y. Sup., 1976), the court held that there was no charter where there was never any meeting of the minds on the cancellation date and redelivery notice period, as well as other material terms of the fixture. In *Bulk Charters (Pty) Limited* v. *Korea Shipping Corporation*, 1981 AMC 2877 (S.D.N.Y. 1981), it was held that because of a disagreement over a proposed clause providing for a lump sum payment in lieu of hold cleaning, no meeting of the minds had taken place on a "main term" and therefore a charter was not concluded. See also *The Independence*, SMA 3049 (Arb. at N.Y. 1994), where arbitrators ruled that the absence of agreement on numerous provisions which would be considered "main terms" in many time charters was not essential for the formation of the charter at issue.

1A.15 The parties may stipulate that agreement on particular charter terms, otherwise minor, is a precondition to a "fixture" coming into being. Thus, in *The Toxon*, SMA 913 (Arb. at N.Y. 1974), the charterer proposed a charter on a new Mobiltime charter form neither the owner nor its brokers had ever seen. The owner expressly reserved the right to review the new form before committing itself to the fixture, and once it had reviewed the form, requested a number of changes. The charterer never responded to this request, and it was held that there was no charter. See also *The Harpagus*, SMA 323 (Arb. at N.Y. 1968), holding that there was no fixture where the owner's telex accepting the charterer's offer also stated: "Accept except details mutually agreed and delivery area to be declared latest 5 Oct." According to the panel, this was in fact a counter offer: "Any alteration in an offer constitutes a counter, no matter what wording is used."

"Sub details"

"main terms"

1A.16 The widespread practice of fixing "sub details" ordinarily will not be construed as requiring agreement on each and every charter term before a binding contract is created. Once there has been agreement on essential terms, a contract is deemed to exist and the negotiation of remaining details becomes a ministerial task. As the court stated in *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., 523 F.2d 527, 535 (2d Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976): " . . . 'sub details' meant filling in the blanks—not reviewing the whole negotiations again." A similar result was obtained in *Atlantic & Great Lakes S.S. Corp*. v. *Steelmet Inc*., 74 Civ. 5048 (S.D.N.Y., Feb. 22, 1977), *aff'd,* 565 F.2d 848, 1978 AMC 107 (2d Cir. 1977), where the court held that the words "Genjascrap sub details" did not create a condition precedent for a meeting of the minds and the execution of a written contract.

1A.17 These principles are illustrated by *Pollux Marine Agencies Inc*. v. *Louis Dreyfus Corp*., above. There, brokers began negotiations for a three-year time charter of a bulk carrier. One of the early points that was specifically traded was an "ITF Clause" and at one point negotiations were broken off because of the parties' inability to agree on such a clause. A few days later, however, a compromise was suggested and a provision in substitution of a standard ITF Clause was found acceptable. Trading of other terms then resumed in earnest and later on a Friday all essential terms

were agreed. The broker thereupon sent the customary fixture telex setting out all the terms agreed and adding the usual qualification "sub details." On the following Monday the parties began working out the details, using as agreed the charterer's *pro forma* time charter form. While these negotiations were in progress the charterer sought to modify the substitute ITF Clause which had previously been agreed. The owner objected. "Without prejudice" to its position that a fixture had been concluded, however, the owner did attempt to agree on a redraft of the wording. In the meantime, negotiations continued on "details" and, by the close of business on Monday, all details had been agreed. This left only the substitute ITF Clause. After several attempts to work out a compromise, negotiations ceased, with the charterer maintaining that no fixture had been agreed.

1A.18 Ultimately, however, the owner made a claim for damages for repudiation and demanded arbitration. Since it denied that a charter had been agreed, the charterer refused to arbitrate and the issue was thereupon referred to the court in New York. After a trial, the court found that the parties had in fact reached agreement on all essential terms on Friday, that the term "sub details" was not a condition precedent to a binding fixture, and that the charterer's insistence on reopening negotiations on the substitute ITF Clause on Monday was a repudiation. The decision was affirmed by the Court of Appeals for the Second Circuit. *Pollux*, 595 F.2d 1209 (2d Cir. 1979).

1A.19 A similar result obtained in *Great Circle Lines Ltd*. v. *Matheson & Co. Ltd*., 1982 AMC 567 (S.D.N.Y. 1981), *aff'd,* 681 F.2d 121, 1982 AMC 2321 (2d Cir. 1982). Again negotiations of main terms were concluded on a Friday and a "fixture recap" was sent by the brokers, "subject details." Subsequently both parties proposed changes in various clauses, including some of the "main terms" previously agreed. The defendant shipowner sought to insist, however, on plaintiff charterer agreeing to London arbitration. Under the agreed charter form, the New York Produce form, the place of arbitration was New York. The court found that the place of arbitration was a detail not specifically traded. The court then held that since a binding contract already existed, the owner could not properly demand changes in its terms. Although the charterer had proposed modifications, they were no more than suggestions: a contract had been concluded and neither party could unilaterally insist on changes. See also *Cobec Brazilian Trading and Warehousing* v. *H. & J. Isbrandtsen*, 79 Civ. 3833 (S.D.N.Y. 1979).

1A.20 In *Great Circle Lines*, above, the Second Circuit stated that main terms "include the name of the charterer, name of owner, ship and its characteristics, time and place of delivery, duration of the charter, place of redelivery, hire rate, printed form upon which the contract is based, and any other term that a party deems important." 1982 AMC at 2326. The court further noted that minor terms include "fuel used, speed of vessel, exact time of ship's delivery to charterer, brokerage, breakdown, option to extend the charter, cargo capacity, demurrage, and whatever else is deemed by the parties to be of minor importance." 1982 AMC at 2327. Clearly, however, many of the items the Second Circuit labeled as "minor" will frequently be very material "main" terms in most time charters. The fact that the court referred to them as "minor" does not mean that they will not be deemed to be main items if one or both of the parties indicate that the term is important.

1A.21 In *J. Lauritzen A/S* v. *Korea Shipping Corporation*, 1986 AMC 2450 (S.D.N.Y. 1986), a dispute arose concerning the alleged fixture of a contract of affreightment to carry four separate grain shipments from the United States to Japan. A telex recap which was labeled "fixture sub-details" was sent by owner to charterer, but a disagreement subsequently arose concerning a freight payment clause contained in the pro forma charter referred to in the fixture telex. The court held that the question whether the freight payment clause was a main term or a minor detail presented a genuine issue of material fact which had to be resolved by a trial. In *P.E.P. Shipping* (*Scandinavia*) *APS* v. *Noramco Shipping Corp.*, 1997 AMC 2933 (E.D.La. 1997), the court ruled there was a binding charter when the telefax confirming the fixture recorded the name of the ship, the name of

owner and charterer, the freight and demurrage rates, responsibility for port expenses, and time and place of delivery and redelivery.

1A.22 In *Arbitration between Swiss Marines Services S.A. and XCoal Energy & Resources LLC*, SMA 4015 (Arb. at N.Y. 2008) (Nichols, Szostak, Mordhorst), the Panel addressed the question of what document reflected the contract terms. The Panel found that the recap governed, as there were too many changes in a broker-generated COA that were not part of the recap for it to be the true contract.

Fixture before formal charter signed

1A.23 In the usual case, an oral agreement to charter a ship is subsequently confirmed in writing by a fixture letter, fax or email, and all of the details agreed to are ultimately set forth in a final printed charter signed by both parties. The final written charter then becomes the evidence of the contract, and all prior oral or written agreements on details are deemed to have been merged therein. *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., above. This principle is especially important where there are differences between the fixture confirmation and the final charter. In *Interocean*, for example, there were a number of differences between the fixture telex and the final charter on details such as trading limits, speed, performance, penalties, and method of payment. The court held that this disparity did not vitiate the agreement, and stated that the terms of the telex "should be viewed as having merged in the subsequent written document, whether favorable to one side or the other. The party that wanted a provision which was omitted or altered could have pressed for its inclusion in the final written instrument." (523 F.2d at 535)

1A.24 In *The Oceanis*, SMA 2772 (Arb. at N.Y. 1991), a fixture recap was found to evidence the provisions of the charter where owner refused to sign a formal written charter. In *The Independence*, above, a written charter signed by owner was found to establish the terms and conditions which had been agreed notwithstanding charterer's refusal to sign it.

1A.25 In *Compania Naviera Aisgiannis S.A*. v. *Holt*, 1984 AMC 2228 (E.D. Pa. 1983), however, the final written charter named a non-existent corporation as charterer, so the court instead inserted the name used in the fixture confirmation.

1A.26 In *Toisa Ltd v*. *Camac International Corp*, 2012 U.S. Dist. LEXIS 74714, *28 (S.D. Tex. Nov. 30, 2011), the owner argued that all main terms of a charter had been agreed and petitioned to compel arbitration when the purported charterer refused to perform. The court rejected plaintiff's petition, finding that no contract existed because the parties had "objectively manifested a mutual intent to negotiate a comprehensive charter party and to be bound only when both parties had signed a final, fully agreed contract."

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CHAPTER 2

Parties to the Contract

"2. Between .....

3. Owners of the good ..... { Steamship / Motorship } .....

12. ..... and ..... Charterers of the City of ....."

General

2.1 Lines 2 and 3 of the New York Produce form provide a space in which the name of the owners is to be inserted and Line 12 provides a space for the charterers' name. In most modern versions of the form there is, at the bottom of the printed form, a signing space for the owners and for the charterers. The charter is normally signed either by the owners and charterers themselves or on their behalf by an agent, such as a manager or a shipbroker.

2.2 This chapter deals with three principal subjects: (*a*) how the parties to the charter are identified, in cases of doubt; (*b*) the rights and obligations that may arise when a charter is concluded – or purportedly concluded – through agents; and (*c*) the exceptional cases in which persons other than the parties are bound by the charter, or acquire rights under it.

Identifying the parties

2.3 Normally there is no difficulty in identifying the parties to the charter. But where there is uncertainty, the proper approach to resolving it depends on how the contract was made.

2.4 Usually, charters are made in writing; either the parties' agreement is contained in a signed charter or the agreement is made in an exchange of emails or faxes. In such cases, the identification of the parties depends upon the construction of the documents which constitute the contract: see *Shogun Finance* v. *Hudson* [2004] 1 A.C. 919, *per* Lord Phillips at page 972. In other words, it depends upon the meaning of those documents as understood by a reasonable reader equipped with the knowledge of the relevant background that the parties had or would reasonably be supposed to have had.

2.5 In other cases, charters are made partly orally and partly in writing as, for example, where a charter is negotiated both on the telephone and by exchange of emails. In such cases, the identity of the parties has to be established by considering as a whole the documents and the conversations which constitute the contract: see *The Winner* [1986] 1 Lloyd's Rep. 36, *per* Evans, J., at page 44 and, as an example, *The Suwalki* [1989] 1 Lloyd's Rep. 511, *per* Steyn, J., at pages 512 and 513.

2.6 Although there are judicial statements which suggest that the identity of a party to a contract is a question of fact (see, for example, Lord Millett in *The Starsin* [2004] 1 A.C. 715, at page 775), it is suggested that such statements should be treated with caution.

The importance of the signature

2.7 In seeking to identify the parties, the court will look at the relevant document (or documents) as a whole. However, the way in which an agreement has been signed is treated as being of special importance.

The *Elikon* was fixed on a voyage charter which identified the owners as "Sphinx Navigation Ltd, Liberia c/o Internaut Shipping GmbH". The charter was signed, in a box with the printed heading "Signature/Owners", by Internaut Shipping without any qualification indicating that they signed only as agents. The question arose whether the owners under the charter were Sphinx Navigation or Internaut Shipping. The Court of Appeal held that Internaut Shipping had contracted as owners, the form of the signature being of critical importance.
Internaut Shipping v. *Fercometal (The Elikon)* [2003] 2 Lloyd's Rep. 430 (C.A.).

Looking at the factual background

2.8 Where the terms of a charter are insufficient by themselves to identify the parties, the court will look at the relevant factual background to resolve the uncertainty. For example, where a charter does not name the owners, but identifies them merely as, say, "the disponent owners" of the ship, the court will look at the factual background to identify whom the charter was intended to bind.

A charter of *The Double Happiness* was negotiated on behalf of "owners" who, in the emails containing the contract, were not identified other than as the disponent owners of the ship in question and as members of a particular group of companies. Langley, J., held that the charter bound the only company that fitted that description.
The Double Happiness [2007] 2 Lloyd's Rep. 131.

2.9 Similarly, where the terms of a charter contain contradictory indications as to which of two persons is intended to be bound by the charter, the court will look at the factual background to resolve the uncertainty.

A contract was executed by a party referred to in the contract as "DDT Engineering Ltd". Two different companies had, at different times, used that name (although only one of them was properly called DDT Engineering Ltd at the time the contract was executed). The terms of the contract contained contradictory indications as to which of the two had executed it. The court looked at the background to the contract, and in particular its commercial purpose, to determine which company was bound: see at [32].
DDT Trucks v. *DDT Holdings* [2007] 2 Lloyd's Rep. 213.
(See, for another example of the use of background information to resolve doubt, *The Elikon*, above, [2003] 2 Lloyd's Rep. 430 (C.A.), *per* Rix, L.J., at [55] – [56])

Misnomer

2.10 In some cases, when a charter is considered against the relevant factual background, it becomes clear that a party intended to be bound has been referred to by the wrong name. In such cases – called cases of misnomer – the court will look beyond the mistake, construing the charter as if the right name had been used in the document. This is an application of the wider principle that a false description does not vitiate a contract, if the contract as a whole makes clear what is meant. Correcting misnomer is a part of the process of construction; it is not an autonomous principle of law: *per* Langley, J., in *The Double Happiness* [2007] 2 Lloyd's Rep. 131, at pages 136 to 137.

2.11 Often cases of misnomer involve a contract which names a non-existent person as a party in place of the person intended to be named: see *Goldsmith* v. *Baxter* [1970] Ch. 85 and *The Tutova* [2007] 1 Lloyd's Rep. 104. In such cases, there is a binding contract with the intended party provided that a reasonable reader of the contract would regard the intended party as having been sufficiently identified by his characteristics.

2.12 The court can also correct a misnomer where, reading the contract against its factual background, it is clear that the contract mistakenly names one existing person, intending to name another: see, by analogy, *Nittan* v. *Solent Steel Fabrications* [1981] 1 Lloyd's Rep. 633.

2.13 However, this can only be done where the terms of the contract as a whole, together with the relevant background, make clear who was intended to be named. Hence a court is unlikely to find that a misnomer has occurred where the contract as a whole could reasonably be construed as intended to bind the persons actually named in the contract: see the comments of Rix, L.J., in *Dumford Trading* v. *OAO Atlantrybflot* [2005] 1 Lloyd's Rep. 289, at [32] – [38].

2.14 In some cases where a naming mistake cannot be corrected as a matter of construction, it may still be possible to correct the mistake by rectification. So, where a charter is mistakenly drawn up in such a way that it purports to bind A and B, the court may be able to rectify the document or documents containing the charter if it can be shown that the agreement was in fact intended to be made between A and C: see, for example, *The Rhodian River* [1984] 1 Lloyd's Rep. 373, *per* Bingham, J., at page 377.

Agreements providing for the nomination or substitution of parties

2.15 Charters are sometimes negotiated on the basis that one party is "to be nominated" by some other person. In such cases it is difficult to see how in principle a contract can arise until the nomination is made. However, a contract is concluded when a valid nomination is made: for example, in *The Wave* [1981] 1 Lloyd's Rep. 521, Mustill, J., held, at page 528, that a charter had been validly concluded by a parent company, Coastal, acting on behalf of a Coastal subsidiary "to be nominated".

2.16 Charters also sometimes provide that one party may be replaced by a substitute party. In such cases, if and when a substitution is made, the charter is novated with the substitute party. Questions may then arise as to whether the substitute party undertakes the existing liabilities of the person he replaces and also whether the person replaced remains under any liability. The answer to such questions depends on the construction of the relevant terms of the charter: see, generally, *Lorentzen* v. *White Shipping* (1942) 74 Ll.L.Rep. 161, *per* Atkinson, J., at page 165, and *Chatsworth Investments* v. *Cussins* [1969] 1 W.L.R. 1.

Contracts made by or through agents

2.17 Charters are very often negotiated and concluded by or through agents acting on behalf of the parties. For this reason, in order to establish who may sue and be sued, it is often necessary to apply the general rules of the law of agency.

2.18 The effect of agency is considered under five heads: (*a*) the agent's authority to make or negotiate a charter; (*b*) charters made by agents on behalf of an acknowledged or disclosed principal; (*c*) charters made by agents on behalf of an unacknowledged or undisclosed principal; (*d*) contracts made by agents acting in excess of their authority; and (*e*) contracts made by pretended agents.

The authority of the agent

An agent's actual authority

2.19 An agent's actual authority is what he is authorised to do by his principal. Actual authority is based on agreement or consent: "the relationship of principal and agent can only be established by the consent of the principal and the agent. . . the consent must have been given by each of them, either expressly or by implication from their words or conduct": see *Garnac* v. *HMF Faure* [1968] A.C. 1130, *per* Lord Pearson at page 1137.

2.20 Actual authority may be express or implied. In practice, the commonest kind of implied authority is authority arising from the agent's position or employment. This is called usual authority. For example, a chartering manager often has a usual authority to conclude charters on behalf of the owners by whom he has been appointed: see, for example, *The Rhodian River* [1984] 1 Lloyd's Rep. 373, *per* Bingham, L.J., at page 378.

One-ship companies and groups of companies

2.21 Shipping businesses are often carried on through groups of companies. It is common that ships are owned by one-ship companies which form part of a group. Equally, ships are often chartered by the 'chartering arm' of a group of companies. In most such cases, the purpose of carrying on business through a subsidiary is to insulate the rest of the group from the liabilities which the subsidiary undertakes. The courts are therefore reluctant to infer that the subsidiary is acting as an agent on behalf of another group company: see *The Coral Rose* [1991] 1 Lloyd's Rep. 563 (C.A.), *per* Staughton, L.J., at pages 571 and 572 ("The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry. . . . To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine"), and *The Rialto* (*No. 2*) [1998] 1 Lloyd's Rep. 322.

A shipbroker's actual authority

2.22 In considering issues of authority in relation to a shipbroker, it is important to distinguish two very different ways in which shipbrokers can be involved in the making of charters. Sometimes a shipbroker makes a contract on behalf of his principal; that is, he has authority to conclude and sign a charter. However, in the era of telex and now email, it has become very common that a shipbroker acts only as a channel for communications, passing messages to and from his principal. It is often the case that charters are concluded by exchanges between brokers who are each purporting only to pass on messages that originate from their principals.

2.23 As a general rule, a shipbroker does not have usual authority to conclude a charter on his principal's behalf. In *The Suwalki* [1989] 1 Lloyd's Rep. 511, at page 514, Steyn, J., held: "A broker, or even an exclusive broker, is not in the shipping trade regarded as having authority to commit his principals without reference back to them. In other words, there is no usual authority vesting in a broker to commit his principals to a contract."

An agent's apparent authority

2.24 In a case where a person does not have actual authority to act as another's agent, he may still have apparent or ostensible authority to act. Apparent authority arises where the principal, by words or conduct, has represented to the party dealing with the agent that the agent has authority to act on his behalf: see Lord Keith, in *Armagas* v. *Mundogas* (*The Ocean Frost*) [1986] 2 Lloyd's Rep. 109 (H.L.), at page 112, and Diplock, L.J., in *Freeman & Lockyer* v. *Buckhurst Park Properties* [1964] 2 Q.B. 480, at pages 505 and 506. It is, thus, based on estoppel. The principal is liable as if the agent had been authorised and may sue on the contract if he ratifies it.

2.25 In *The Ocean Frost*, above, Lord Keith said, at page 112: "In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter

into transactions of the kind in question". So, for example, the managing director of a company normally has ostensible authority to make contracts of a kind that come within the ordinary business of that company. So, too, does a person who is acting as the company's managing director with the consent of the board, whether or not he has been properly appointed: see *Freeman & Lockyer* v. *Buckhurst Park Properties* [1964] 2 Q.B. 480. In these cases, the principal's "representation" arises from its conduct in permitting the agent to carry on business on its behalf.

2.26 Apparent authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it: see Lord Keith in *The Ocean Frost* [1986] 2 Lloyd's Rep. 109 (H.L.), at page 112. However, the mere fact that one or even several previous transactions have been concluded through a particular agent does not of itself invest the agent with apparent authority to conclude a fresh transaction: see *The Ocean Frost* [1985] 1 Lloyd's Rep. 1 (C.A.), at page 67, where Robert Goff, L.J., *obiter*, discussed the position of a shipbroker who is retained in a series of transactions, and *The Nefeli* [1986] 1 Lloyd's Rep. 339, *per* Bingham, J., at page 345.

2.27 In every case where it is said that an agent has apparent authority, that authority must be founded on a representation made, or at least authorised, by the principal. That is, the agent's apparent authority can only be created by the principal's own statements or conduct or by those of someone authorised to make such representations on the principal's behalf: see *British Bank of the Middle East* v. *Sun Life* [1983] 2 Lloyd's Rep. 9.

2.28 Questions of apparent authority may arise not just in relation to an agent's authority to conclude a contract, but also in relation to his authority to communicate or make representations on behalf of his principal in relation to the contract. On such questions, the general rule is that where an agent has ostensible authority to make a contract, his ostensible authority includes an authority to make representations concerning the subject matter of the contract: see *The Ocean Frost* [1985] 1 Lloyd's Rep. 1 (C.A.), *per* Robert Goff, L.J., at page 67.

How a messenger can bind his principal to a contract

2.29 In cases of apparent authority, it is important to distinguish between two types of authority: authority to enter into a contract on the principal's behalf and authority to communicate the principal's contractual intentions. Even where an agent has no authority to contract on his principal's behalf, he may still bind his principal to a contract if he has apparent authority to communicate his principal's assent to a contract.

2.30 In *First Energy* v. *Hungarian International Bank* [1993] 2 Lloyd's Rep. 194 (C.A.), the Court of Appeal held that an employee, who had no authority to conclude a particular contract, nevertheless had authority to report – and did report – that his superiors at the company had agreed to make the contract. As a result, the company was held bound to the contract in question.

2.31 However, this is an area of the law which requires very careful distinctions. The above decision must be contrasted with *The Ocean Frost* [1986] 2 Lloyd's Rep. 109 (H.L.), where the House of Lords held that an employee could not give himself apparent authority to conclude a contract by reporting to the other party that his employer had authorised him to conclude that particular contract: see *per* Lord Keith at pages 113 and 114.

The Privy Council in *Kelly* v. *Fraser* [2013] 1 A.C. 450, at [15], confirmed that the Court of Appeal's decision in the *First Energy* case, above, is consistent with *The Ocean Frost*. Lord Keith's speech in *The Ocean Frost* is "the classic statement of the relevant legal principles. An agent cannot be said to have authority *solely* on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of a company (or, for that matter, any principal) to organise its affairs in such a way that subordinates who would not have authority

to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised. . ." (original emphasis, *per* Lord Sumption, at [15]).

A shipbroker's apparent authority to contract

2.32 A shipbroker, even an exclusive broker, is not regarded as having usual authority to commit his principals without reference back to them: Steyn, J., so held in *The Suwalki* [1989] 1 Lloyd's Rep. 511, at page 514 rhc. It follows that the mere fact of being appointed as a shipbroker does not confer apparent authority to contract.

2.33 The shipbroker's position may be different, however, where he has been held out as having authority to negotiate a particular charter on his principal's behalf. In such a case, the broker may have apparent authority to conclude the fixture (unless the principal informs his counterparty that his broker's authority is limited or it is obvious from the manner in which the negotiation has been carried on that there is some such limitation). In *The Wave* [1981] 1 Lloyd's Rep. 521, at page 531, Mustill, J., held that a shipbroker had ostensible authority to conclude a fixture, saying, "Throughout the transaction [the owners' broker] was the chosen method of communication of negotiation on behalf of the owners. There was nothing in the conduct of either [the owners' managing agent] or [the owners' broker] to lead [the charterers' broker] to suppose that there was any limitation on the authority of [the owners' broker] to agree the terms which he did agree. [The owners' broker] was, with the knowledge and consent of [the owners' managing agent], presenting himself to [the charterers' broker], acting for the charterers, as someone empowered to contract on their behalf." See also *The Samah and Lina V* [1981] 1 Lloyd's Rep. 40, where a shipbroker sent to Greece to discuss terms for a charter was held to have had ostensible authority to conclude and sign the fixture.

2.34 By contrast, in *Lukoil* v. *Tata* [1999] 2 Lloyd's Rep. 129, the Court of Appeal held that, on the facts of that case, the owner of a ship had not made any representation to any third party about the authority of his agent merely by asking the agent to make towage arrangements on his behalf: *per* Tuckey, L.J., at page 138.

A shipbroker's apparent authority to communicate his principal's contractual intentions

2.35 Where a broker has been appointed to act, and is acting, as a channel of communications, it is suggested that he has apparent authority to report that his principal has agreed (or, in the case of an intermediate broker, to report to either party that the other party has agreed). In such cases, the communication of the principal's intentions is the essence of the role a broker is engaged to perform; accordingly, the way in which the broker performs that role ought to bind his principal.

2.36 However, this analysis was rejected by Mance, J., in *The Mercedes Envoy* [1995] 2 Lloyd's Rep. 559, a case dealing with the ostensible authority of an intermediate broker. In that case, negotiations were carried on between brokers representing each party through the medium of an intermediate broker. It was argued by the charterers that the intermediate broker had apparent authority to communicate on each party's behalf, so either party could treat messages from the intermediate broker as having come from the other party even if they did not do so, or did not do so accurately. Mance, J., rejected this argument, holding that the intermediate broker's only actual or apparent authority was to transmit accurately messages coming from other party: see page 560. This reasoning sits uneasily with the general principle that, if you appoint a person to perform a class of acts, you are responsible for the manner in which that person performs those acts, whether he performs them properly or not. It is suggested that the result in this case is not transferable to the case of misstatement by one or other party's broker and may be doubtful even on its own facts.

Disclosed principals

2.37 The basic rule is that a contract made by an agent on behalf of his principal is the principal's contract and not the agent's. So where a duly or apparently authorised agent makes a contract expressly on behalf of his principal and where, if he signs the contract at all, he does so in such a way as to show that he is acting only as agent for his principal, the principal is liable, and entitled to sue, on the contract, but the agent is not. See, for an example of the failure of an action brought by an agent in such circumstances, *Fairlie* v. *Fenton* (1870) L.R. 5 Ex. 169.

2.38 However, this basic rule applies only where it is apparent that the agent is acting *as an agent only*; that is, without having any intention to make himself a party to the contract. The mere fact that a person who makes a contract is acting as an agent for another does not entail that he made the contract *as an agent only*. It is a fallacy to suppose that a person cannot make a contract in two capacities, both as principal and as agent: see *The Sun Happiness* [1984] 1 Lloyd's Rep. 381, *per* Lloyd, J., at page 384, and, as an example, *The Ijaola* [1979] 1 Lloyd's Rep. 103. Even where an agent is known to be acting as such, the terms of the contract may impose liability on him as a principal: see *Higgins* v. *Senior* (1841) 8 M. & W. 834, and *Basma* v. *Weekes* [1950] A.C. 441 (P.C.). Indeed it may be held that the agent intends to bind himself by a contract even in a case where the terms of the contract expressly record that he is acting as an agent for another: see *The Frost Express* [1996] 2 Lloyd's Rep. 375 (C.A.), *per* Evans, L.J., at pages 379 to 381.

2.39 Whether an agent is or is not liable on a contract that he makes depends upon the objective intentions of the parties.

The owner of a motor boat, the *Swan*, hired it to a company of which he was a director. He placed a repair order for the boat which was written on the company's paper and signed by him with the word "Director" after his name. The repairers knew that he was the owner of the boat. It was held by Brandon, J., that the owner had made the resulting contract as agent for the company, but that he could also be sued personally under the contract (which was partly oral and partly in writing) as he had failed to displace the reasonable assumption of the repairers that as the owner of the boat he would pay for the repairs to it.

Brandon, J., said: "Where A contracts with B on behalf of a disclosed principal C, the question whether both A and C are liable on the contract or only C depends on the intention of the parties. That intention is to be gathered from (1) the nature of the contract, (2) its terms and (3) the surrounding circumstances. . . ."

The Swan [1968] 1 Lloyd's Rep. 5.

Principles for determining whether an agent has contracted as an agent only

2.40 The principles that the court will apply to determine the parties' objective intentions are the same as those that apply more generally to issues of construction.

2.41 The parties' objective intentions have to be determined by construing as a whole the document or documents said to constitute the contract, or, where the contract is made orally in part or in whole, by considering the whole course of the parties' negotiations constituting the contract.

In a charter of the *Virgo* the charterers were stated in Line 7 to be "Tradax Export S.A." and the charter was signed by "Greenwich Marine Incorporated As Agents for: Tradax Export S.A." However, Clause 31, in the "Rider" to the charter, provided: "This vessel was chartered on behalf and for account of General Organisation for Supply Goods Cairo." Tradax Export S.A. sought to rely on the words of Clause 31 to establish that they themselves were agents only and not charterers.

The Court of Appeal held that the overall sense of the charter was that Tradax Export S.A. were principals and had the liabilities of charterers and that Clause 31 did not show a sufficiently clear intention to the contrary to alter that position.

Megaw, L.J., said: ". . . the law requires that all relevant contractual provisions, wherever they may appear in the written contractual documents, shall be looked at and taken into account when a question arises whether a person named in a contract – charterparty or otherwise – is a principal party to the contract, or is an agent; and, if an agent, whether he also has in law liabilities under the contract. You do not look at one part

of the contract only: for example, the signature. You weigh anything that may be relevant in any part of the contractual provisions and documents."

Tudor Marine v. *Tradax Export* (*The Virgo*) [1976] 2 Lloyd's Rep. 135 (C.A.).

(The facts of *The Sun Happiness* [1984] 1 Lloyd's Rep. 381 are nearly identical.)

Negotiations for a part charter of the owners' ship *Rab* were conducted, through brokers, with prospective charterers described as B. & S. "on account of Indonesian Government". Subsequently the business for the *Rab* lapsed but the owners offered their ship *Primorje* for the same cargo subject to the terms being negotiated afresh. A fixture was concluded and a charter was drawn up naming B. & S. as charterers, which was signed by the owners, but never signed by B. & S. There was no mention of B. & S. acting as agents for any principal, either in the fresh negotiations or in the drawn-up charter. After the charter had been performed, B. & S. contended that they had acted only as intermediaries. The court examined the negotiation of the *Primorje* fixture and held that B. & S. contracted as principals, despite the reference in the original negotiations to them chartering "on account of" the Indonesian Government.

The Primorje [1980] 2 Lloyd's Rep. 74.

The *Scaplake* was chartered to C.D.M. "as charterers". Clause 29 of the charter provided: "Freight and demurrage will be guaranteed by actual charterers D. & K. . . . or personally by their director." The charter was signed by C.D.M. and also by D. & K. in two places. One of the addenda was signed by both C.D.M. and D. & K., the other addenda being signed by C.D.M. alone.

It was argued by the owners that D. & K. were liable under the charter as principals of C.D.M.

Mocatta, J., held that as D. & K. had signed both the charter and an important addendum and were described as "actual charterers" they could not be regarded only as guarantors of freight and demurrage. These features and the surrounding commercial circumstances showed that both C.D.M. and D. & K. were parties to the charter and liable under it.

The Scaplake [1978] 2 Lloyd's Rep. 380.

2.42 The court will take into account the relevant factual background. Indeed, in some cases, the factual background by itself may make it obvious that a person is acting as agent only, even if there has been no express statement to that effect. In *The Santa Carina* [1977] 1 Lloyd's Rep. 478 (C.A.), the Court of Appeal held that a firm of Baltic Exchange brokers were not personally liable on a bunker supply contract made by telephone with other Baltic brokers. This was despite the fact that they had neither expressly stated that they were acting as agents only, nor identified their principals. Baltic Exchange brokers customarily acted only as agents and, in the circumstances of the case, the brokers with whom they dealt knew that they would be acting only as agents for the ship's charterers.

The form of the agent's signature

2.43 Where a contract has been signed by the agent in his own name, the manner in which it has been signed is of special importance.

2.44 Where a contract is signed by the agent "for and on behalf of" or "on account of" a principal, or where it is signed "as agent only", these are very strong indications that he intends to contract as agent only.

A charter was entered into by T.H.S. & Co., agents for owners of the *Ariadne Irene*, and "J. McK. & Co., Charterers". The charter was signed "For and on behalf of J. McK. & Co. (as Agents), J. A. McK". The owners were aware at the time the charter was signed that J. McK. & Co. were acting for others.

The owners brought a claim under the charter against J. McK. & Co. who pleaded that they were not principals. It was held by the House of Lords that by signing "as Agents" J. McK. & Co. were relieved of personal liability under the charter. Lord Shaw said: ". . . in my opinion the appending of the word 'agents' to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, apart from that, the appending of the word 'agent' to the signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal. . .".

Universal Steam Navigation v. *McKelvie* [1923] A.C. 492 (H.L.).

2.45 Other words added after the agent's signature may be less effective to indicate that a person intends to contract as agent only: see *The Swan* [1968] 1 Lloyd's Rep. 5, paragraph 2.39 above. But compare the Canadian case of *Chartwell Shipping* v. *Q.N.S. Paper* (1989) 62 D.L.R. (4th) 36, where a company were held to have contracted as agents only where they had qualified their signature on a contract for stevedoring services with the words "As Managing Operators only". Although the word "agent" was not used, the words they did use were inconsistent with the idea that they intended to bind themselves by the contract.

2.46 Where a person signs a contract in his own name and without any qualification, there is a "strong *prima facie* presumption" that that person intends to make himself a party to the contract: see Scrutton, L.J., in *Brandt* v. *Morris* [1917] 2 K.B. 784, at page 797.

The *Frost Express* was time chartered on the Baltime form to Geest Industries. Box 3 of the time charter read "*Owners/place of business* Seatrade Groningen B.V. . . . as Agents to Owners or as Disponent Owners". The charter was signed by the managing director of Seatrade unqualified by any mention of agency or by any reference to Seatrade or to disponent owners, Lawin Maritime. Under a separate contract, Seatrade, as managers of a pool, contracted as principals to provide pool ships for Geest's trade and the *Frost Express* was the first such ship to be chartered by Geest from Seatrade's pool. Geest contended that although Seatrade were neither the owners nor the disponent owners of the *Frost Express*, they were nevertheless personally liable under the time charter. The Court of Appeal agreed, holding that the description of Seatrade "as Agents" in the body of the time charter did not preclude their personal liability as principals, bearing in mind that the signature itself was unqualified and the two main time charter obligations (period and payment of hire) were undertaken by reference to the separate contract to which Seatrade were unarguably principals.

The Frost Express [1996] 2 Lloyd's Rep. 375 (C.A.).

2.47 However, this presumption can be rebutted by clear words in the body of the contract: *Gadd* v. *Houghton* (1876) 1 Ex.D. 357, at page 361. Moreover this presumption does not apply to impose personal liability on company officers who sign on behalf of their company, but in their own name: see *The Frost Express*, above, *per* Evans, L.J., at page 380.

Contracts made by agents for a principal who is acknowledged but unnamed

2.48 The principles set out above apply equally in the case where a duly authorised agent professedly makes a contract for a principal, but without identifying him by name: see, for example, *The Cape Hatteras* [1982] 1 Lloyd's Rep. 518. In that case, a contract for repairs to a ship was made on behalf of "Cape Hatteras". Staughton, J., said that designation "prima facie referred to the vessel and to her registered owners, whoever they might be" (see page 521).

Contracts made on behalf of a foreign principal

2.49 Formerly there was a presumption that where an English agent contracted on behalf of a foreign principal, the agent was personally liable under the contract and the principal was not. No such presumption exists today: see *Teheran-Europe* v. *Belton* (*Tractors*) [1968] 2 Lloyd's Rep. 37 (C.A.).

The legal position of an agent who makes himself liable on the contract

2.50 The general rule is that an agent who is liable to the other party is also entitled to sue; "the existence of the liability on the one hand involves the existence of the correlative right on the other": *Repetto* v. *Millar's Karri & Jarrah Forests* [1901] 2 K.B. 306, *per* Bigham, J., at page 310. However, this general rule is, of course, subject to the terms of the particular contract.

2.51 Ordinarily, where an agent is liable on a contract, he is liable in addition to his principal: see, for example, *The Swan* [1968] 1 Lloyd's Rep. 5 and paragraph 2.39 above. However, there is doubtful authority to the effect that once the counterparty has got judgment against either the principal or the agent, he cannot afterwards get judgment against the other: see the discussion of this principle in *Bowstead & Reynolds*, Articles 82 and 104.

Undisclosed principals

2.52 An agent may make a contract in his own name and without revealing the fact that he is making the contract on behalf of his principal. The principal is here said to be 'undisclosed'. In such cases, always provided that the agent has actual authority from his principal, the principal and the agent are both parties to the contract. At least until the principal intervenes, either of them may sue on the contract. Likewise, either of them may be sued under it. (However, it may be the case that when the counterparty obtains judgment against one of them, he loses his right to sue the other: see *Priestly* v. *Fernie* (1863) 3 H. & C. 977 and, generally, *Bowstead & Reynolds*, Articles 82 and 104.)

2.53 The main limitation on this principle is that the counterparty must not have been unwilling, judged objectively, to contract with the undisclosed principal. Diplock, L.J., said in *Teheran-Europe* v. *Belton* (*Tractors*) [1968] 2 Lloyd's Rep. 37, at page 41: "Where an agent has such actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorized to contract. In the case of an ordinary commercial contract, such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realize that the other party was not so willing."

2.54 The courts are slow to construe a contract as excluding the right of an undisclosed principal to intervene, being unwilling to whittle down the "beneficial assumption in commercial cases" to which Diplock, L.J., referred: see *Siu Yin Kwan* v. *Eastern Insurance* [1994] 1 Lloyd's Rep. 616 (H.L.), *per* Lloyd, L.J., at page 621.

2.55 However, construing the parties' agreement as a whole against the relevant factual background, it may sometimes be clear that one party has contracted on the basis that he, and not the person subsequently identified as his principal, is undertaking to perform the contract: see *The Astyanax* [1985] 2 Lloyd's Rep. 109 (C.A.), *per* Kerr, L.J., at page 114 (and paragraph 2.58 below).

Agent describes himself as "owner"

2.56 It was held in *Humble* v. *Hunter*, below, that an undisclosed principal could not sue on a charter where the agent who had made the contract had described himself in the charter as the "owner". The rationale for this was that a person cannot be, at the same time, the owner and an agent for the owner. This represents a strict and unsatisfactory application of the rule that parole evidence cannot be used to contradict or vary the terms of a written contract. It is unsatisfactory because the description of C. J. Humble as "owner" could have been understood as intended to show which side of the bargain Humble was undertaking, rather than as a statement that he (and no other) was the owner of the ship. The decision is of doubtful validity (see, for example, the judgment of Scott, L.J., in *Epps* v. *Rothnie* [1945] K.B. 562).

A charter was made between "C. J. Humble, Esq. owner of the good ship or vessel called the *Ann*" and Hunter as charterer. C. J. Humble was in fact the son of the real owner. It was held that evidence was not admissible

to show that the person who described himself as owner contracted merely as agent, because such evidence would contradict an express statement in the charter, namely that C. J. Humble was the owner. The expression "owner" was not, it was held, capable of bearing the connotation of agency.

Humble v. *Hunter* (1848) 12 Q.B. 310.

Agent describes himself as "charterer" or "disponent"

2.57 Even if the above decision is correct, so that being described as a ship's "owner" excludes any possibility of agency, the epithets "charterers" and "disponents" do not have the same effect.

A time charter was entered into between "Messrs. Fred. Drughorn, Ltd., Owners of the screw steamship called the *England*" and "Wilh. R. Lundgren, of Gothenburg, Charterer". The charter was headed "Swedish South African Line. Wilh. R. Lundgren, Manager" and signed by agents "by telegraphic authority of and as agents for Wilh. R. Lundgren". Lundgren was in fact chartering as agent for Red. Transatlantic. It was held by the House of Lords that evidence of the agency was admissible because the description of a party as "charterer" does not exclude the possibility that they are chartering as agents for others.

Drughorn v. *Red. A/B Transatlantic* [1919] A.C. 203 (H.L.).

A charter was entered into by N.V. Stoomschip "Hannah" as "disponent owners of the good steamer called the *Elle*" and was signed by brokers "under telephonic authority from and as agents for disponents". The charter referred in various clauses to "owners". It was held by Morris, J., that, construing the charter as a whole, the phrase "disponent owners" indicated someone other than the owners of the ship. Evidence that O/Y Wasa Steamship Co. were the owners of the ship and the real principals was not inconsistent with the terms of the charter and was admissible.

O/Y Wasa Steamship v. *Newspaper Pulp & Wood Export* (1949) 82 Ll.L.Rep. 936.

2.58 But in the case which follows it was held that, where one party to a charter had been described as the "disponent owner", the registered owners of the ship could not enforce the charter as the undisclosed principals. The way in which the "disponent owner" had been described to the charterers in the course of the negotiations made it clear that he, and not the registered owners, was intended to be bound by the charter.

A voyage charter of the *Astyanax* was negotiated in an exchange of telexes between brokers. It was agreed that for the purposes of avoiding an Argentinean tax on freight, the owner named in the charter should not be the registered owners, but should instead be Mr P.S. of Piraeus "as disponent owner". Mr P.S. was an employee of the registered owners' managers. It was also agreed in the exchanges between the brokers that there should then be a head time charter between the registered owners, who were a Cypriot company, and Mr P.S. Subsequently, the registered owners sought to enforce the voyage charter, saying that they contracted with the charterers as Mr P.S.'s undisclosed principals. It was held by the Court of Appeal, reversing Leggatt, J., that this contention failed on two grounds. First, the parties had contracted on the basis that Mr P.S. was a "disponent owner" under a time charter from the registered owners. That was inconsistent with his acting as the registered owners' agent in concluding the voyage charter. Second, since the registered owners had genuinely intended to enter into a time charter with Mr P.S., it was not possible that they could at the same time have given him authority to act as their agent in concluding the voyage charter with the charterers.

The Astyanax [1985] 2 Lloyd's Rep. 109 (C.A.).

Contracts made by agents acting without authority

2.59 Where an agent purports to conclude a contract, but does so without authority (actual or apparent), the purported principal is not bound by the agreement. However, the purported principal may choose to adopt the contract and, if he does so, the contract is said to have been ratified.

Ratification

2.60 A principal may cure any lack of authority in the agent by subsequently ratifying what the agent has done. Where the principal ratifies, he makes himself liable on the contract as if it had originally been made with his authority. In other words, the effect of the ratification is retrospective: see *The Borvigilant* [2003] 2 Lloyd's Rep. 520, *per* Clarke, L.J., at page 531. However, the power to ratify is not possessed by the 'undisclosed' principal, discussed above: see *Keighley*, *Maxsted* v. *Durant* [1901] A.C. 240 (H.L.). It is also subject to certain limits to prevent the power being used unfairly to the prejudice of third parties: see *Smith* v. *Henniker-Major* [2003] Ch. 182 and v *The Borvigilant*, above, *per* Clarke, L.J., at page 531. Ratification does not of itself release the agent from liability to his principal for exceeding his instructions: see *Suncorp* v. *Milano* [1993] 2 Lloyd's Rep. 225, *per* Waller, J., at pages 234 and 235.

Estoppel

2.61 Where an agreement has been made by an agent without authority, the purported principal may sometimes be estopped by his subsequent conduct from alleging that a transaction was unauthorised: see *Spiro* v. *Lintern* [1973] 1 W.L.R. 1002.

Breach of warranty of authority

2.62 An agent who purports to make a charter on behalf of a principal is said to give a 'warranty of authority'. That is, he is deemed to give a contractual undertaking to the counterparty with whom he is dealing that he has proper authority from his principal. If subsequently it appears that the agent was not properly authorised, he may be sued for breach of that warranty: see, for a summary of the principles, *Golden Ocean* v. *Salgaocar Mining* [2012] 1 Lloyd's Rep. 542 (C.A.), at [46] and, as an example, *V/O Rasnoimport* v. *Guthrie* [1966] 1 Lloyd's Rep. 1 (liability of loading broker signing bill of lading). The warranty is absolute in nature, so honest belief that he had authority does not give the agent a defence to such a claim. The normal measure of damages is the sum that could have been recovered in damages from the supposed principal if the supposed principal had authorised the contract but then repudiated it: see *Bowstead & Reynolds*, Article 106.

2.63 An agent may, however, make it clear that he does not warrant authority. It has been held that an agent signing "by telegraphic authority" of the principal warrants no more than that he has a telegram seemingly authorising him to sign the relevant charter.

Brokers signed as agents for charterers a charter for the *Pocklington*, preceding their signature by the words "by telegraphic authority" of the charterers. The rate of freight in the charter was in accordance with that authorised in the telegram from the charterers but that telegram had been wrongly transmitted by the telegraph company and stated a rate higher than the charterers were actually offering. On being sued by the shipowners for warranting an authority they did not possess, the brokers produced evidence which was accepted by Denman, J., that the words "by telegraphic authority" were "well understood in the trade as meaning to negative the implication of a warranty by the charterer's agent, at all events, to a greater extent than warranting that he has had a telegram which, if correct, authorises such a charter as that which he is signing". It was accordingly held that the absolute warranty of authority had been effectively displaced by the use of these words.

Lilly, *Wilson* v. *Smales*, *Eeles* [1892] 1 Q.B. 456.

2.64 This, however, should be contrasted with a decision of the House of Lords in the following year.

A London broker received from a Bombay firm a telegram apparently authorising him to sign a charter for the *Eastbourne* on behalf of Colombo charterers. He accordingly made a charter, showing as charterers the Bombay firm as agents for the Colombo charterers, and signed it as agent "By telegraphic authority

of" the Bombay firm. In fact the Colombo charterers had not authorised the Bombay firm to act as they had. The shipowners brought an action for breach of warranty against the broker, who argued that the particular words they had used made it clear that there was to be no contract unless the Colombo firm had in fact given authority. The House of Lords rejected this argument and held the broker liable. Lord Watson said: "I am of opinion that the words upon which the appellants rely are not sufficient to indicate that the validity of the contract between the shipowners and the charterers was to be dependent upon an unascertained condition. Taken in their natural sense they appear to me to do no more than describe the source from which the appellants derived their authority to represent the charterers."

Suart v. *Haigh* (1893) 9 T.L.R. 488 (H.L.).

2.65 In the present days of improved communications, the third party may well be justified in assuming that the agent has taken appropriate steps to clarify the position and hence warrants his authority even though he refers in some manner to the fact that his principal is a distance away.

Contracts made by persons purporting to act as agents

Liability of supposed agents for contracts made on behalf of non-existent persons

2.66 Sometimes a charter is made by a person who describes himself as an agent, when in fact the supposed principal does not exist. Such a person is liable for breach of warranty of authority. Where the non-existent principal is a company, the agent may also be made liable on the contract by operation of statute (see paragraph 2.67 below). Statute aside, it requires exceptional facts to render the agent liable on the contract. For example, in *Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174, it was held that a contract signed by agents on behalf of a non-existent company bound the agents, but in that case the parties to the agreement all knew that the company, which was going to be formed, did not exist when the contract was made.

2.67 Section 51 of the Companies Act 2006 is titled "Pre-incorporation Contracts" and provides: "A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly". Section 51 applies to as-yet-unformed English companies and also to as-yet-unformed foreign companies, by reason of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, S.I. 2009/1917.

2.68 The scope of Section 51 is not entirely clear. It is plainly intended to apply to cases in which a contract is made on behalf of a company which has not yet been incorporated, but is going to be incorporated. In such a case, Section 51 applies even if no steps have been taken to form the company in question: *Phonogram* v. *Lane* [1981] 3 All E.R. 182, *per* Lord Denning, M.R. at page 186. It has been held, however, that it does not apply where a contract is made on behalf of a company that did exist, but has ceased to exist: *Cotronic* v. *Dezonie* [1991] B.C.L.C. 721. It is not clear, therefore, whether Section 51 applies to companies which have not been incorporated and which in fact no one intends to incorporate.

Contracts where the agent claims to be the real principal

2.69 In some cases, a person concludes a contract, purporting to act as agent for a principal, but then seeks to enforce the contract himself. Whether he can do so may depend on whether or not the supposed principal has been named.

2.70 Where the person making the contract intends to be the principal, but describes himself in the contract as agent for a named principal, he cannot sue under the contract as principal if the other

party entered into the contract in reliance on the characteristics, status or reputation of the named principal. In fact, it is doubtful whether he can ever sue where the principal is named, unless the other party becomes aware of the truth and nevertheless affirms the contract.

Afrab, a subsidiary of Librekcem, entered into a charter with Gewa for shipment of a cargo of bitumen on the basis of a named ship or substitute. The named ship was not available at the required time and Gewa therefore negotiated for a charter of the *Remco* to meet their commitment to Afrab. It was found as a fact that Gewa represented to the owners' brokers that Gewa were chartering as agents for Afrab or another subsidiary of Librekcem, whereas in fact Gewa were chartering on their own account. It was held that Gewa could not enforce the charter with the owners of the *Remco* since the owners of the *Remco* had shown that the identity of the party they believed to be the principal was material; they knew the Librekcem group was a large group to whom they were happy to charter, whereas they would have required some sort of guarantee for the freight had they known that Gewa were the charterers.

The Remco [1984] 2 Lloyd's Rep. 205.

2.71 However, in such a case, the counterparty may choose to continue performing the contract after he becomes aware that the purported agent now claims to be a party to the agreement. If he does so, he may be regarded as having agreed to be bound to the contract, now with the pretended agent as his counterparty: *Rayner* v. *Grote* (1846) 15 M. & W. 359.

2.72 Where, on the other hand, the purported principal is not named, it has been held that the person making the contract as agent can sue upon it as principal. This is on the ground that, if the other party was willing to deal with an unnamed person, he cannot have attached any importance to the identity of his counterparty.

G. Schmaltz & Co. chartered a ship as "agents of the freighter" and stipulated as follows: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." In an action by them against the owners, Schmaltz & Co. were allowed to prove that they were in fact the freighters in their own right, and were held to be entitled to sue as principals under the contract. Patterson, J., cited with approval a passage from the judgment delivered by Alderson, B., in *Rayner* v. *Grote* (1846) 15 M. & W. 359, at page 365, reading in part: "In many such cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then shew himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule." He then continued: "With this passage we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract: if he be not named, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested."

Schmaltz v. *Avery* (1851) 16 Q.B. 655.

Harper & Co. entered into a charter "as agents for owners" of a ship to be nominated and signed the charter "By authority of and as agents for owners". In fact they were not acting for any principals but entered into the charter on a speculative basis on their own account. The charterers gave evidence that, had they been aware of this fact at the time, they would not have entered into the charter. It was nevertheless held by Pickford, J., following *Schmaltz* v. *Avery*, that, there being no principals other than Harper & Co. themselves, Harper & Co. could sue the charterers under the charter.

Harper v. *Vigers* [1909] 2 K.B. 549.

2.73 These decisions have been criticised: see *Hill Steam Shipping* v. *Stinnes*, 1941 S.C. 324, and *Bowstead and Reynolds*, paragraphs 9–095 and 9–096. However, they were treated as good law by Arden, L.J., in *Braymist* v. *Wise Finance* [2002] Ch. 273.

Conflict of laws and agency

2.74 The above propositions are propositions of English law. Where the case has an international dimension, difficult questions of applicable law may arise. The usual view is that questions of the power of the agent to bind and entitle the principal by contract are governed by the law governing the contract in question, but that the obligations owed by the principal and the agent to each other are governed by the law applicable to the contract (if any) between them. The matter can, however, be an extremely difficult one, in particular because the law of the place where the agent acted may also be relevant: see *Dicey*, *Morris & Collins*, paragraphs 33–407 *et seq*.

2.75 Where the agent has purported to make a contract for his principal which is governed by English law, the law applicable to the agent's warranty of authority is English law: see *Golden Ocean* v. *Salgaocar Mining* [2012] 1 Lloyd's Rep. 542 (C.A.), at [49] and [52] .

Other parties bound by or having rights under the charter

Guarantors

2.76 It is common to find that one or other party's obligations under a charter have been guaranteed, whether by an associated company or by someone else.

2.77 It is usually the case that the guarantor agrees, during negotiation of the fixture, that it will provide a guarantee. The guarantee may then be incorporated in the drawn-up charter (for example as an appendix, signed by the guarantor, or simply by language in the description of the parties or in the place for signatures), or it may be provided as a separate document. However, in either case, it is presumed that the parties intend the guarantor to be bound as soon as the charter becomes binding (as opposed to when any separate written guarantee is executed): see *The Anemone* [1987] 1 Lloyd's Rep. 546, at page 551 and *Golden Ocean* v. *Salgaocar Mining* [2012] 1 Lloyd's Rep. 542 (C.A.), at [30].

2.78 On the other hand, there are cases where one party merely undertakes to the other that it will procure a guarantee of its obligations from a particular guarantor. In those circumstances, the guarantor is not bound unless and until it does then provide its guarantee: see, for example, *The Anangel Express* [1996] 2 Lloyd's Rep. 299.

2.79 A guarantee governed by English law is enforceable only if it satisfies the requirements of Section 4 of the Statute of Frauds 1677. This ancient Act provides that no claim may be brought on a guarantee unless either (i) the guarantee is in writing and signed by the guarantor or (ii) there is a written note or memorandum of the guarantee signed by the guarantor. The Act has been interpreted so as to be congruent with modern business practices: for example, it has been held that a guarantee is given in writing if it has been agreed in the course of a series of email exchanges (see *Golden Ocean*, above, at [29]); and that a typescript name appended to an email is a sufficient signature (see *Golden Ocean*, above, at [32]).

2.80 Where a guarantee has not been given in writing, it may be possible to find a sufficient note or memorandum of the guarantee in the parties' subsequent correspondence: see, for example, *The Anemone*, above, at 556. In order to satisfy the Act, a memorandum must state the terms of the guarantee (either explicitly or by reference) or must contain an express or implied recognition that the guarantee was entered into: see *The Anemone*, again at 556. Where a sufficient memorandum has been produced and signed by the guarantor, it is irrelevant in what capacity or for what purpose the guarantor has signed it: see *Elpis Maritime* v. *Marti Chartering* (*The Maria D*) [1992] 1 A.C. 21 and *Golden Ocean*, above, at [38].

2.81 A guarantee will often include a term that the guarantor's obligations are not to be affected

by any variation of the terms of the charter. However, such clauses do not have unlimited scope. They do not apply to variations of the underlying contract which are outside the general scope of the original guarantee: see *Trade Indemnity* v. *Workington Harbour & Dock Board* [1937] A.C. 1, at page 21. For example, where the parties to a trip charter agreed a variation by which they added a second trip, the guarantor was not liable in respect of the additional trip: see *The Kalma* [1999] 2 Lloyd's Rep. 374.

2.82 Similarly, in the *The Nefeli* [1986] 1 Lloyd's Rep. 339, Bingham, J., considered the case where a guarantee was given in respect of a period charter of 12 months. The parties to the charter agreed to a variation, extending the charter by a further 12 months. Although no clause of the kind just mentioned was included, the variation was made with the knowledge and assent of the guarantor. Nevertheless, the judge held, the guarantor would not have been bound: the further 12 months were outside the scope of the original guarantee: see pages 345–346.

Brokers

2.83 In many cases, the Contracts (Rights of Third Parties) Act 1999 gives a broker a direct right to sue for the commission which, under the terms of the charter, the parties have agreed to pay him. Previously the the same result was obtained indirectly by saying the charterers held the owner's promise to pay commission on trust for the broker: see Chapter 36.

Purchasers of the ship and persons taking a charge over the ship

2.84 Where a person purchases a ship either expressly on terms that he is to acquire the ship subject to a current time charter or merely with actual knowledge that the ship is currently subject to a time charter, he may be prohibited by injunction from using the ship otherwise than in accordance with the charter. The Privy Council so decided in *Lord Strathcona* v. *Dominion Coal* (1925) 23 Ll.L.Rep. 145. This decision was said to be wrong by Diplock, J., in *Port Line* v. *Ben Line* [1958] 2 Q.B. 146. But in a more recent case, *Swiss Bank* v. *Lloyds Bank* [1979] Ch. 548, Browne-Wilkinson, J., expressed the view that the Privy Council had been correct. (His decision was reversed on other grounds, [1982] A.C. 584 (C.A. and H.L.)). It was suggested in *Swiss Bank* that, where a ship is sold subject to a charter, the purchaser is bound by the charter as a constructive trustee. (Since 1999, it may also be the case that the "subject to" confers a right on the charterers under the Contracts (Rights and Third Parties) Act.) In the case that the purchaser acquires the ship merely with actual knowledge of the charter, he may be restrained from committing the tort of knowing inducement of a breach of contract.

2.85 The same principle probably applies where a person takes a security interest in the ship. In *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276, an injunction was granted to restrain interference with a charter by a person having a charge over the ship. Knight Bruce, L.J., said, at page 282: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

2.86 In such cases, any injunction that is granted will be in negative form, restraining the purchaser from using the ship for employment other than under the charter. The courts will not make a mandatory order requiring a person to perform a contract for the provision of services: see the discussion at paragraphs 4.95 *et seq*., below.

Beneficial owners or directors of companies

2.87 In rare circumstances, a remedy may be granted against both a company and its beneficial owner or controller where otherwise a remedy would lie against only one or other of them. This is called 'piercing the corporate veil'. So, for example, where an individual was under a restrictive covenant prohibiting him from carrying on a particular business but used a company that he controlled to carry on that business, an injunction was granted against both the individual and the company: see *Gilford Motor Co. Ltd*. v. *Horne* [1933] 1 Ch. 935.

2.88 The 'corporate veil' is a phrase expressing the general rule that a limited company under English law has a legal existence and personality independent of its shareholders: *Salomon* v. *A. Salomon and Co. Ltd*. [1897] A.C. 22 (H.L.). The company is not the agent of its shareholders or of its directors. (However, a contract may of course be made on terms that bind both the company and its directors or shareholders: see, for example, *The Swan* [1968] 1 Lloyd's Rep. 5, summarised at paragraph 2.39, above.)

2.89 It is not open to the courts to disregard this general rule merely because it appears that justice so requires or because the company is the creature or *alter ego* of its controller or because the company is being used to shield another person from liability: see *Adams* v. *Cape Industries* [1990] Ch. 433 (C.A.), *per* Slade L.J., at page 544. (Contrast the wide powers of courts and arbitrators to pierce the corporate veil under American law, discussed at paragraphs 2A.25 *et seq*., below.)

2.90 The courts have however 'pierced the corporate veil' – that is, granted a remedy against both company and shareholder – in two kinds of case. The first is where wrongful receipt of monies by the company is treated in equity as receipt also by the controller of the company, with the result that both controller and company are held liable to account for the monies received: see for example *Trustor* v. *Smallbone* [2001] 3 All E.R. 987. The second is where the controller has used the company to evade his personal contractual obligations, with the result that those obligations are enforced against both controller and company: see for example *Gilford*, above. The applicable principles were restated by the Supreme Court in *Prest* v. *Petrodel Resources* [2013] 2 A.C. 415.

2.91 In the latter case, however, the company is not treated as liable on the controller's contract. The order made against the company is made because it is just and convenient to extend the remedy to the company. The doctrine of 'piercing the corporate veil' does not permit the controller to be treated as a party to a contract made by the company, nor *vice versa*: see *VTB Capital* v. *Nutritek* [2012] 2 CLC 431 (C.A.), at [91]–[92], *per* Lloyd, L.J., and [2013] 1 Lloyd's Rep. 466 (S.C.), at [132] – [145]. Burton, J.'s decision to the contrary in *Antonio Gramsci* v. *Stepanovs* [2011] 1 Lloyd's Rep. 647 was disapproved by both the Court of Appeal and the Supreme Court.

2.92 It follows that the controller of a company will not be liable on the company's contract because the controller has – after the repudiation of the relevant contract – been involved in an attempt to put the company's assets beyond the reach of its contractual counterparty, even if that attempt involves impropriety and abuse of the corporate structure: see *The Rialto* (*No. 2*) [1998] 1 Lloyd's Rep. 322, *per* Toulson, J., at page 331, and *Linsen* v. *Humpuss* [2011] 2 Lloyd's Rep. 663, at [142].

2.93 On the other hand, where a judgment debtor enters into sham transactions designed to strip it of assets or hide its assets and make it 'judgment-proof', the court can and will disregard those transactions: see *The Tjaskemolen* (*No.1*) [1997] 2 Lloyd's Rep. 465 and *Linsen* v. *Humpuss*, above, at [102] *et seq*. However this is not, in a strict sense, 'piercing the corporate veil'.

U.S. Law

2A.1 The parties to a time charter are the owner and charterer. It is not unusual, however, for the party described in the charter as "owner" to be someone other than the registered owner of the ship. A bareboat charterer, time charterer or even a voyage charterer may choose to enter into a sub-charter and, if so, its relationship with the sub-charterer will be that of a "disponent owner" of the ship. It is common practice in the shipping industry to describe a disponent owner in a sub-charter merely as "owner." Thus, it is not uncommon for a party to be both the "owner" and "charterer" under separate charters for the same ship.

2A.2 Ordinary contract principles as applied under the general maritime law determine who is a party to a charter. The general maritime law embraces agency principles. *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., 523 F.2d 527, 539 (2d Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976); *Kirno Hill Corp* v. *Holt*, 618 F.2d 982, 985 (2d Cir. 1980).

Identification of owner or charterer

2A.3 It often happens that a broker or other person will sign the charter "as agents for Owners of the good ship [Victory]," without further identifying the name of the owner. It has been held that this is sufficient to identify the principal. *Getty Oil Co*. v. *Norse Management Co*. (*Pte.*) *Ltd*., 711 F. Supp. 175, 177 (S.D.N.Y. 1989); *Instituto Cubano de Estab*. v. *The Theotokos*, 153 F. Supp. 85 (S.D.N.Y. 1957) (before trial), 155 F. Supp. 945 (S.D.N.Y.) (after trial); *Tubos de Acero de Mexico* v. *Dynamic Shipping Inc*., 249 F. Supp. 583, 1966 AMC 1903 (S.D.N.Y. 1966); *Hudson Trading Co*. v. *Hasler & Co. Inc*., 11 F.2d 666, 667 (S.D.N.Y. 1926). It is essential in this context, however, that the ship be clearly named. For example, if the broker were to sign "as agents for owners of vessels to be named," there would not be a sufficient identification of a principal and the broker would be deemed a party to the charter as the agent for an undisclosed principal. See *Hidrocarburos y Derivados C.A*. v. *Lemos*, 453 F. Supp. 160, 171 (S.D.N.Y. 1978). As Judge Haight noted in that case, there is no recognition in the law of agency of the "potential principal." In the example cited, of course, the principal would become sufficiently disclosed once the ship is nominated and thus identified.

Agents

2A.4 A person acting as agent for a disclosed principal is not himself a party to the charter. *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., above. The crucial test in determining whether an agent can be bound to the contract is not whether a principal is named, but whether a principal is identified. The question whether a person is in fact an authorized agent often can be far from simple. An agency may be created by either actual or apparent authority. In certain circumstances, a principal will be estopped from denying the existence of an agency relationship. See *American Bureau of Shipping* v. *Tencara Shipyard S.P.A*., 170 F.3d 349, 1999 AMC 1858 (2d Cir. 1999) and *Deloitte Noraudit Als* v. *Deloitte Haskins & Sells*, *U.S.* 9 F.3d 1060 (2d Cir. 1993).

2A.5 In *The Olympic Sponsor*, SMA 3711 (Arb. at N.Y. 2001), in an interim award, the panel considered which party was the charterer. The owner contended that Venfleet Asphalt, a non-signatory to the charter, was nevertheless estopped from denying that it was a party along with the named charterer. The owner contended, among other things, that Venfleet Asphalt had received a direct economic benefit in the form of a commission for negotiating the charter as agent for the named charterer. The panel rejected this argument and found that any economic benefit Venfleet

Asphalt received was "incidental" and "not the kind of economic benefit sufficient under Second Circuit law. . ." to obligate Venfleet Asphalt to arbitrate owner's unsafe port claims.

Actual authority

2A.6 Actual authority will exist only if there has been a manifestation by the principal to the agent that the agent may act on his behalf, and consent by the agent so to act. An agency relationship need not be contractual; however, it is always consensual. *Restatement* (*Third*) *of Agency* (2006), § 2.01. Thus, the principal must either expressly delegate power to the agent to act on its behalf or the principal's written or spoken words or other conduct must be reasonably interpreted by the agent as giving him the power to act for the principal.

2A.7 A broker who is authorized by the owner or charterer to negotiate and fix a charter will be deemed an agent of that party. In *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., above, the Court of Appeals for the Second Circuit held that a broker through whom the charter terms were negotiated by both parties, and who sent telexes to both parties confirming the fixture, was an agent for the owner and charterer, even though he viewed himself solely as a broker, and the charterer did not intend to make him an agent. According to the court: "Agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done." 523 F.2d at 537.

2A.8 No special form of words is necessary to create an agency relationship. Authority to act for a principal "can be created by written or spoken words or by other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *Re Arbitration between Herlofson Mgmt A/S and Ministry of Supply, Kingdom of Jordan*, 765 F. Supp. 78, 1991 AMC 2959, 2968 (S.D.N.Y. 1991).

2A.9 Officers of corporations normally have limited authority to bind the company and this will depend on the corporation's by-laws. In dealing with a corporation, therefore, third parties should always exercise care to ensure that contracts are signed by duly authorized officers.

2A.10 In *Gardner* v. *The Calvert*, 253 F.2d 395, 398 (3d Cir. 1958), the charterer brought an action against the owner, its president and the ship *in rem* for breach of an oral charter entered into by the president. In upholding the liability of the corporation for breach of contract and dismissing the claim against the president personally, the court stated:

> Furthermore, it is normal for the president of a corporation to act as its chief executive officer and agent, and contracts made by a corporation's authorized agent within the scope of its legitimate purposes are binding on it.

At the same time, it is common for corporate articles of incorporation or by-laws to require that the board of directors approve certain types of transactions. Even the president or chief executive officer of a corporation may not be authorized to bind the company in the absence of board approval.

2A.11 In *The Independence*, SMA 3049 (Arb. at N.Y. 1994), arbitrators ruled that the president of the company had actual authority to commit to a five-year time charter. Similarly, in *The Gulf Pacific*, SMA 3036 (Arb. at N.Y. 1993), it was held that an agent had actual authority to exercise options to extend the period of a bareboat charter by four years. The agent had been given a blanket authority to make decisions concerning the charter and the panel found that authority remained intact notwithstanding a corporate restructuring which occurred before the options were exercised. As this case illustrates, a principal who fails to police his agent's activities does so at his own peril.

2A.12 Unless express limiting instructions are given to the agent, a grant of actual authority will carry with it the power to take such actions as the agent considers are reasonably necessary to carry

out his duties. This includes the power to enter into contracts on behalf of the principal which are incidental to accomplishing the original assigned task. Thus, where the agent of the cargo owner was authorized to arrange for the delivery of the cargo by barge, it was inferred from the nature of the agency relationship that the agent was also invested with the authority to enter into a barge charterparty, the making of which was a necessary incident to the fulfillment by the agent of his delegated task. *Alamo Chemical Transportation Co*. v. *The Overseas Valdes*, 469 F.Supp. 203, 1979 AMC 2033 (E.D.La. 1979).

Apparent authority

2A.13 Apparent authority rests on a different foundation and will be found to exist where the principal's actions are reasonably perceived by the third party as indicating that the agent has authority to bind the principal. Apparent authority was succinctly defined in *Dr. Beck & Co*. v. *General Electric Co*., 210 F. Supp. 86, 90 (S.D.N.Y. 1962), as follows:

> Apparent authority results from a manifestation by a principal that another is his agent, the manifestation being made to a third person and not, as when actual authority is created, to the agent . . . Where apparent authority exists, the third person has the same rights with reference to the principal as where the agent is actually authorized. . . The appearance of authority must be created by the principal. While agents are often successful in creating an appearance of authority by their own acts and statements, such an appearance does not create apparent authority. . .
>
> It remains. . . a basic proposition of the law of agency that the third party takes the risk of being misled by the unauthorized misrepresentations of the agent and that the principal is only liable where he has either authorized the representations or done something from which reasonable people would draw the inference that the agent had authority. [210 F.Supp. at 90.]

2A.14 Reliance on the perceived authority of the agent must be reasonable in light of all the circumstances. A good illustration of the problems which can arise is *Karavos Compania Naviera S.A*. v. *Atlantica Export Corp*., 588 F.2d 1, 1978 AMC 2634 (2d Cir. 1978). The owner claimed that the named charterer, Atlantica, breached an alleged agreement to charter the ship when it declined to take delivery. The owner argued that Atlantica was bound by the agreement of its alleged agent, Alfred Repetti, who purportedly had negotiated and fixed the charter on Atlantica's behalf. Repetti carried out the charter negotiations from Atlantica's offices, and, at times, received telephone calls and telexes concerning the proposed charter while he was in those offices. Repetti did not have actual authority to bind Atlantica, however, and the court found that nothing Atlantica had done gave the owner sufficient reason to believe that he had authority to fix a charter on its behalf. According to the court, the fact that Atlantica permitted Repetti to work in its office and use its communication facilities did *not* justify the owner in believing that he had authority to commit Atlantica to a charter to relieve it of the duty to make reasonable inquiry as to Repetti's status. The court further stated that, even if the owner had been justified in believing that Repetti was an Atlantica employee, it was bound to inquire what his authority was. As the court noted, "not every employee of a trading company has authority to fix a time charter, let alone a series of such charters." 588 F.2d at 10.

2A.15 See *P. D. Marchessini & Co* (*New York*) *Inc*. v. *H. W. Robinson & Co*., 287 F. Supp. 728, 1968 AMC 2084 (S.D.N.Y. 1967), where the court held that a shipowner was not justified in relying on the apparent authority of an employee of a shipping concern to sign a contract for the shipment of cargo. See also *Keystone Shipping* v. *Cie Marocaine*, 1990 AMC 2971, 2974–2976 (S.D.N.Y 1990). But see *The Independence*, above, and *The Gulf Pacific*, above, where in both cases an agent was held to have apparent authority to bind the charterer. In *The Maruka*, SMA 2609 (Arb. at N.Y. 1989), a broker who had worked with the charterer for many years was deemed to have apparent authority to negotiate an addendum to a charter.

2A.16 A party may be estopped from denying an agent's authority when third persons have changed their positions because they believed there was an agency if the principal intentionally or carelessly caused such a belief, or failed to take reasonable steps to notify the third parties of the true facts even though he knew the others believed he was a principal to the transaction and might change their positions because of it: *Restatement* (*Third*) *of Agency 2006* (2006) § 3.03. See generally *Karavos Compania Naviera S.A*. v. *Atlantica Export Corp*., above, 588 F.2d at 11.

2A.17 It was stated in *Golden Chase Steamship Inc*. v. *Valmar de Navegacion S.A*., 724 F.2d 129, 1984 AMC 2040 (5th Cir. 1984) (*per curiam*), however, that persons dealing with agents are presumed to know the customs of the industry, and therefore cannot hold the principal liable for unauthorized acts not customarily permitted to agents in the industry. The court reasoned: "By custom among New York ship brokers, each broker must have a separate and express grant of authority from the principal each time a firm offer is made or confirmed on behalf of the principal. . . The very limited nature of the authority to fix the charter is inconsistent with the creation of apparent authority." 1984 AMC at 2042.

2A.18 In *Sunskar Ltd*. v. *CDII Trading*, *Inc*., 828 F. Supp. 2d 604 (S.D.N.Y. 2011), petitioner contended a charter party had been formed and sought to compel arbitration thereunder. Respondent disputed this contention and argued, inter alia, that the person negotiating the charter on its behalf did not have authority to bind the company. The court held for petitioner and found charterer created an appearance of authority, either intentionally or through lack of care. Either way, it was bound.

Ratification

2A.19 A person may elect to become a party to an act or transaction which was done or purported to be done for him without prior authorization. Thus, an unauthorized act performed by an agent may be ratified by the principal, with the result that the act will be deemed to have been authorized when it was carried out. See *Restatement* (*Third*) *of Agency* (2006), Chapter 4. In *The Trinity Navigator*, SMA 2609 (Arb. at N.Y. 1989), a charter entered into by a broker was held to have been ratified by charterer.

Undisclosed principals

2A.20 An undisclosed principal may enforce its rights under a charter, or may be the subject of an action by the other party to the charter to enforce its rights. *Kirno Hill Corp*. v. *Holt*, 618 F.2d 982, 984 (2d Cir. 1980); *Philippine Bulk Shipping Inc*. v. *International Minerals & Chemical Corp*., 376 F. Supp. 654 (S.D.N.Y. 1973). At the same time, an agent acting for an undisclosed principal is a party to the charter, and will thus have all the rights and liabilities of its principal. See, e.g., *Hidrocarburos y Derivados C.A*. v. *Lemos*, 453 F. Supp. 160, 168 (S.D.N.Y. 1978); *Overseas Oil* v. *The Phibro Energy*, 1989 AMC 847, 849 (S.D.N.Y 1989); *Ariel Maritime* v. *Zust Bachmeier*, 762 F. Supp. 55, 1991 AMC 2048 (S.D.N.Y. 1991); *The California*, SMA 2736 (Arb. at N.Y. 1990).

2A.21 An action against either the agent or the undisclosed principal will not be deemed an election of remedies which precludes an action against the other unless, of course, a judgment has been satisfied. Under New York law, this principle is embodied in CPLR, § 3002(b).

Agent's liability to principal

2A.22 An agent is under a duty to act competently and carefully, and may be subject to liability to the principal for errors or omissions resulting from his failure to have the standard knowledge

or to use the standard care required of one in his position. *Restatement* (*Third*) *of Agency* (2006) § 8.08. For example, if a broker were to prepare and sign a charter which varied from the language authorized by the principal, he could be subject to liability to the principal for any damages which might result. Agents are by no means expected to perform according to a standard of perfection, and minor errors or carelessness ordinarily will not expose them to liability to the principal. They are obliged, however, to act in accordance with the standard of care one can reasonably expect of a charter broker.

2A.23 Agents are also required to act within the scope of authority given by the principal. An agent may be liable to his principal for acts in excess of his authority which nonetheless bind the principal. As indicated above, an agent need not have each and every act he is to perform spelled out precisely. Indeed, unless specific instructions to the contrary are given, the agent is expected to exercise his discretion in carrying out his duties and is entitled to take the steps he considers appropriate to fulfill his task.

2A.24 There is a broad range of remedies available to a principal whose agent has violated or threatens to violate his duty. The most important remedies include an action in contract for failure to carry out contract obligations; an action in tort for negligence in carrying out agency duties; an action for restitution; an action for an accounting; and an action for an injunction.

"Piercing corporate veils"

2A.25 Ordinarily, incorporation insulates shareholders from personal liability for claims arising out of a corporation's business activities. In an appropriate case, however, the "corporate veil" may be pierced such that a parent or sister company or even an individual may be held to be a party to the charter as the signatory's alter ego. See *Fisser* v. *International Bank*, 282 F.2d 231, 233–234 (2d Cir. 1960).

2A.26 Because the shipping industry has seen more than its fair share of shell corporations which quickly vanish in the night when bills have to be paid, the importance of being able to pierce corporate veils in maritime cases cannot be overstated. See, e.g., *The Janus and Atlantis*, SMA 2952 (1993) (Arnold, Cederholm, Jacobson).

2A.27 It has long been the rule in the United States that courts sitting with admiralty jurisdiction have the power to pierce corporate veils. In *Swift & Company Packers* v. *Compania Colombiana Del Caribe*, *S.A*., the Supreme Court stated that "the jurisdiction of a court of admiralty to determine the question of alter ego is undoubted." 339 U.S. 684, 689 n.4 (1950). The general maritime law allows piercing of the corporate veil where individual shareholders or a parent company either (*a*) use a corporation to perpetrate a fraud or (*b*) where they so dominate and disregard its corporate form that it was actually carrying out their personal business or the parent company's business rather than that of the corporation. The leading cases include *Kirno Hill Corp*. v. *Holt*, 618 F.2d 982, 985, 1980 AMC 254 (2d Cir. 1980); *Dow Chemical Pacific Ltd*. v. *Rascator Maritime S.A*., 782 F.2d 329, 342 (2d Cir. 1986); and *Itel Containers* v. *Atlanttrafik Ex. Service Ltd*., 909 F.2d 698, 703–704 (2d Cir. 1990). This basic rule has been followed in a number of lower court cases, including, e.g., *Status Int'l S.A*. v. *M&D Maritime Ltd*., 994 F. Supp. 182, 186 n.4 (S.D.N.Y. 1998); *Matter of Arbitration between Holborn Oil Trading Ltd. and Interpetrol Bermuda Ltd*., 774 F. Supp. 840, 844 (S.D.N.Y. 1991); and *Northern Tankers* (*Cyprus*) *Ltd*. v. *Backstrom*, 967 F. Supp. 1391, 1997 AMC 2620 (D. Conn. 1997).

2A.28 In *Blue Whale Corp*. v. *Grand China Shipping Dev. Co*., *Ltd*., 722 F.3d 488 (2d Cir. 2013), the Second Circuit ruled that where the court is conducting an alter ego analysis in respect of claims under a charter party, the charter's choice of law provision is irrelevant in determining what law governs the alter ego claim. Rather, the court must conduct a choice of law analysis

under *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953). In the case of a maritime attachment, unless the contacts point strongly to another jurisdiction, U.S. maritime law will generally govern the alter ego analysis based on the location of the attached property.

2A.29 New York State law is somewhat different from federal maritime law and requires a showing of both domination and control and use of the domination and control to commit a fraud or wrong injuring the party which is seeking to pierce the corporate veil. See *Morris* v. *N.Y.S. Dept. of Taxation and Finance*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993); *American Fuel Corp*. v. *Utah Energy Dev. Co*., 122 F.3d 130, 134 (2d Cir. 1997); and *Status Int'l S.A*. v. *M&D Maritime Ltd*., *supra* at 994 F. Supp. 182, 186 n. 4.

2A.30 The origins of the corporate veil piercing the doctrine were closely examined in *Wm. Passalacqua Builders* v. *Resnick Developers South Inc*., 933 F.2d 131 (2d Cir. 1991). *Passalacqua Builders* involved an action to enforce a judgment for unpaid labor and services provided in connection with a real estate development. The developer against whom judgment was entered was unable or unwilling to pay and plaintiffs therefore brought a suit in which they attempted to prove that the developer was a "shell" corporation and the mere alter ego of a group of family-owned corporations and individual shareholders. The district court had ruled in favor of the defendants and, in reversing that decision, the Court of Appeals for the Second Circuit provided an extensive ruling on the requirements for piercing corporate veils.

2A.31 In reviewing the historic origins of this doctrine, the court found that it has both equitable and legal components. This is significant for those concerned with maritime cases because of a traditional reluctance on the part of district courts with admiralty and maritime jurisdiction to grant merely equitable relief. See, e.g., *China Trade & Devel. Corp*. v. *The Choong Yong*, 837 F.2d 33, 1988 AMC 880 (2d Cir. 1987). The court in *Passalacqua Builders* stressed that corporate veil piercing is an appropriate form of relief for an action at law just as it is for a proceeding in equity. This distinction was significant in *Passalacqua Builders* insofar as it related to whether or not the veil piercing issue should be decided by a jury, a concern usually not present in maritime cases where there ordinarily is no right to a jury trial.

2A.32 The court proceeded to set down dual tests for piercing corporate veils. First, the corporate structure may be disregarded where the parent corporation or individual shareholders "(1) have exercised such control that the subsidiary 'has become a mere instrumentality' of the parent, which is the real actor; (2) such control has been used to commit fraud or other wrong; and (3) the fraud or wrong results in an unjust loss or injury to the plaintiff." See 933 F.2d at 138. Alternatively, the corporate veil may be ignored when the corporation is so controlled by individuals or a parent corporation that it is used to accomplish the purposes of the latter rather than any business of its own.

2A.33 As stated by the court: "Liability therefore may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to wrong against third parties." *Id*.

2A.34 While not limiting the scope of a trial court's inquiry to just these factors, the court listed 10 indicators which it said would tend to show that corporate veil piercing is an appropriate form of relief:

> (1) The absence of formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the

dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own. [*Id* at 139].

Piercing the corporate veil in arbitration

2A.35 Arbitrators have ruled that they have the power to pierce the corporate veil in appropriate cases. In *The Zeynap K*, SMA 3360 (1997) (Jacobson, Wolmar, Bulow), for example, the arbitrators decided not "to use our equitable discretion to assess personal liability" against a broker who had communicated with both parties concerning charterer's cancellation of the charterparty. Although the panel did not actually pierce the corporate veil in that case, the key point is that the arbitrators concluded that they had the equitable power to do so. See also *The Wood Pioneer*, SMA 3221 (1995), holding that a group of companies was liable for demurrage and other charges. It is submitted that these arbitration awards are incorrect and that, in the absence of agreement among the parties conferring this power upon them, arbitrators do not have authority to decide whether a party or individual person is bound by an arbitration agreement or the contract of which it may be a part.

2A.36 In order to enter an award against a party, the arbitrators must have jurisdiction over it. The question whether a person is bound by an arbitration clause is for the court to decide. See *Kaplan* v. *First Options of Chicago*, *Inc*., 19 F.3d 1503, 1520 (3d Cir. 1994). See, e.g., *The Allison*, SMA 3410 (Arb. at N.Y. 1998), where the arbitration panel properly declined to consider whether an individual was responsible for charterer's liabilities under the charter. The panel stated that its power was limited to deciding disputes under the charter and that the question whether the individual was responsible for charterer's liabilities was for the court to decide.

2A.37 Similarly, in *The Bright Gulf*, SMA 3757 (Arb. at N.Y. 2002), the panel concluded that it only had the power to adjudicate claims against the parties named in the charterparty, and that it thus could not hear a claim that sought to pierce the corporate veil and impose liability on persons not named in the charterparty.

2A.38 Whether arbitrators have jurisdiction over a person in a corporate veil piercing case may be unclear until the proceeding is over and it has been determined whether the corporate veil will be disregarded. For example, if an owner asserts a claim against a charterer under a charter which contains an arbitration clause, and also alleges that the beneficial owner of charterer is personally liable for the debt, there are alternative ways to proceed. The owner may simply demand arbitration of the charterer, obtain its award, and then sue the beneficial owners in a separate corporate veil piercing action. This procedure was successfully used in *Northern Tankers* v. *Backstrom*, 967 F. Supp. 1391 (D. Conn. 1997). Alternatively, the owner may attempt to make the beneficial owner of charterer a party to the arbitration by raising the veil piercing contention in a petition to compel arbitration. Tactical considerations would determine which procedure may be best to follow in a given case. See *Limonium Maritime S.A*. v. *Mizushima Marinera S.A*., 2000 AMC 343 (S.D.N.Y. 1999), *aff'd w/o opin*. 201 F.3d 431, 2000 AMC 343 (2d Cir. 1999), where the court entered an order compelling arbitration against a corporate party. The court declined to conduct a hearing on the arbitrability of claims against the corporation's alleged alter egos. The court ruled that it would conduct a hearing concerning the alter ego claims only after the underlying arbitration against the corporate party was completed. See also *Stevedoring Services of America* v. *Ancora Transport*, *N.V*., 59 F.3d 879, 1995 AMC 2688 (9th Cir. 1995), where the court declined to pierce the corporate veil in connection with a stevedore's claim for services rendered in unloading cargo.

2A.39 There are a number of arbitration awards in which, contrary to well-settled law, commercial arbitrators have permitted a company to pierce its own corporate veil in order to assert a claim that belongs to an affiliate. In *The Baron Venture*, SMA 2138 (Arb. at N.Y. 1985), the panel

allowed a parent company which had chartered the ship to prosecute a cargo loss claim which belonged to a subsidiary. The subsidiary was not a party to the charter or any arbitration agreement. Similar decisions were rendered in *The Volere*, SMA 1885 (Arb. at N.Y. 1983); *The Trade Greece*, SMA 1643 (Arb. at N.Y. 1982); and *The Velma*, SMA 958 (Arb. at N.Y. 1975). While some arbitrators apparently see commercial equity in allowing such short-cuts, it is submitted that these decisions are manifestly in error as a matter of law.

2A.40 A motion to vacate the award in *The Baron Venture* was brought by the charterer who was held liable for the cargo loss. The district court agreed with the charterer that the award was legally incorrect, but concluded that it was not manifest disregard of the law since "the arbitrators explicitly understood their outcome to be grounded in established precedent and practice." *Fried. Krupp G.m.b.H.* v. *Solidarity Carriers Inc*., 674 F. Supp. 1022, 1027, 1988 AMC 1383 (S.D.N.Y. 1987), *aff'd without opinion*, 838 F.2d 1202 (2d Cir. 1987). See discussion below at paragraph 2A.43 concerning participation of non-signatories in arbitration.

Piercing corporate veils in tort cases

2A.41 It is generally easier to pierce corporate veils in tort cases than in contract disputes. There is no clear rule, however, on whether the claimant must prove a causal relationship between the corporate domination and the injury in order to have the corporate form disregarded. Cases requiring such a showing include *Craig* v. *Lake Asbestos of Quebec, Ltd*., 843 F.2d 145 (3d Cir. 1988). No such showing was required in *United States* v. *Jon. T. Chemicals*, *Inc*., 768 F.2d 686 (5th Cir. 1985), or *United States* v. *Ira S. Bushey & Sons Inc*., 363 F. Supp. 110, 115 (D.Vt. 1973), *aff'd w/o opinion*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974). Similarly, in *The Amoco Cadiz*, 1984 AMC 2124 (N.D. Ill. 1984), the court pierced the corporate veil of Standard Oil Company (Indiana) and its Delaware and Liberian corporate subsidiaries to find the parent company liable for damages resulting from the grounding of the *Amoco Cadiz* and the oil spill which followed. The court found that the extent of control exercised by Standard over its subsidiaries was such that those entities were "mere instrumentalities" of Standard. Although this issue rarely arises in disputes between owner and charterer, it has become an important concern for both parties with respect to third-party claims which may arise from the operation of the ship, especially in oil spill cases.

2A.42 See also *United States* v. *Best Foods*, 524 U.S. 51, 141 L. Ed. 2d 43 (1998), holding that a corporate parent may be charged with derivative liability under the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9601 *et seq*., for its subsidiary's action under corporate veil piercing principles. (The Supreme Court did not decide, however, the ground rules for piercing the corporate veil in CERCLA cases and specifically declined to decide whether state law or federal law principles should apply.)

Participation of non-signatories in arbitration

2A.43 Although arbitrations generally involve two or more parties who have entered into an arbitration agreement, there are circumstances in which a non-signatory to the arbitration agreement can become a party to the arbitration. It is reasonably well established that a non-party to an agreement containing an arbitration clause can require a signatory to arbitrate if the latter asserts claims against the non-signatory that necessarily rely on the agreement. The same is true if the signatory asserts claims against both the non-signatory and another signatory, which allege interdependent and concerted misconduct. See *MS Dealer Serv. Corp*. v. *Franklin*, 177 F.3d 942, 947–948 (11th Cir. 1999); *Grigson* v. *Creative Artists Ag'y*, *L.L.C*., 210 F.3d 524, 527–528 (5th Cir.

2000); and *Hughes Masonry Co*. v. *Greater Clark County Sch*. *Bldg. Corp*., 659 F.2d 836, 838–839 (7th Cir. 1981). In such circumstances, the courts consider the signatory equitably estopped from denying the existence of its agreement to arbitrate. See *MS Dealer*, 177 F.3d at 948.

2A.44 A related question is whether a signatory can be required to arbitrate when a non-signatory asserts claims that are intertwined with the signatory's obligations under the contract, even though the signatory has not itself asserted claims against the non-signatory demanding arbitration. The key decision involving the joining of a non-signatory in an arbitration is *Astra Oil Co*. v. *Rover Navigation*, *Ltd*., 344 F.3d 276, 2003 AMC 2514 (2d Cir. 2003).

Astra involved back-to-back claims by two trading affiliates, AOT and Astra. Their cargo was transported under a voyage charter between shipowner Rover and AOT providing for New York arbitration. Astra acted as seller of the cargo to a third-party. The ship was seriously delayed, and Astra threatened arrest at her first U.S. port of call. Rover's P. & I. Club posted a Letter of Undertaking in favor of AOT and Astra as security for their claims and Rover agreed to appear in a law suit or arbitration in accordance with the charterparty's provision. Astra sought to join in the arbitration and Rover contested its standing to do so. The Second Circuit framed the standard that must be met in order for a non-signatory to be joined in an arbitration: *Was Astra's claim as a non-signatory closely intertwined with the charterparty to which Rover was a party?* The court reviewed the facts and circumstances, particularly noting the close corporate and operational relationship between Astra and AOT, that Astra's claims against Rover were brought directly under the charterparty signed by Rover and AOT, and that Rover treated Astra as if it were a signatory to the charterparty. The court concluded that its standard was satisfied since Astra's claims arose under duties allegedly created by the contract containing the arbitration clause signed by Rover. It ordered the lower court to grant Astra's petition to compel Rover to arbitrate.

See also *Dun Shipping Ltd*. v. *Amerada Hess Shipping Corp*., No. 01 Civ. 2088, 2005 U.S. Dist. LEXIS 23114, *45–46 (S.D.N.Y. Oct. 5, 2005), adopted by 2006 U.S. Dist. LEXIS 55820 (S.D.N.Y. Aug. 3, 2006).

2A.45 The Second Circuit also has compelled non-signatories to arbitrate on the basis of equitable estoppel where they have derived benefits directly from the contract containing the arbitration provision, or have sought to enforce provisions of the contract. See *Thomson-CSF*, *S.A*. v. *Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

2A.46 Some other federal appeals courts have not followed the Second Circuit's broad approach. In *Price Plaintiffs* v. *Humana Ins*. *Co*., 285 F.3d 971, 976 (11th Cir. 2002), *rev'd on other grounds Pacificare Health Systems*, *Inc*. v. *Book*, 538 U.S. 401 (2003), the Court of Appeals for the Eleventh Circuit ruled that equitable estoppel is unavailable unless the signatory resisting arbitration has *asserted* claims that actually rely upon the contract containing the arbitration clause. The Court of Appeals for the Fifth Circuit has ruled similarly. See *Grigson* v. *Creative Artists Ag'y*, *L.L.C*., 210 F.3d 524, 528 (5th Cir. 2000); see also *Sapic* v. *Government of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003). Other similar cases include *Affymax, Inc*. v. *Johnson & Johnson*, 420 F. Supp. 2d 876, 881–882 (N.D. Ill. 2006), and *Brantley* v. *Republic Mortg*. *Ins*. *Co*., No. 24–0805, 2004 U.S. Dist. LEXIS 28831, *21 (D.S.C. 2004).

2A.47 Notwithstanding the Second Circuit's ruling in *Astra*, lower courts within the circuit have rejected non-signatories' attempts to compel signatories to arbitrate when the non-signatory has *no* close relationship with a signatory. In one case, *Astra* was distinguished where the receivers of the cargo had no corporate relationship with either charterer or owner, but sought to compel owner to arbitrate under the charter. The court ruled:

> Although this litigation arose out of a fire on the *San Sebastian*'s May 2003 voyage, and Carbon Black and Lloyd's/Thai Tokai base their claims on the warranty of seaworthiness set forth in the Oilmar/ETL Charter Party, those factors are outweighed by the lack of any corporate or operational relationship between the parties

such as was present in *Astra Oil*. Neither Carbon Black nor Thai Tokai has a corporate affiliation with ETL or Oilmar. Also, unlike the situation in *Astra Oil*, neither Oilmar nor ETL treated Carbon Black or Thai Tokai as a party to the Charter Party by, for example, accepting direction from them during the voyage. Although the claims relate to the warranty of seaworthiness in the Charter Party, that is not sufficient.

Oilmar Co. v. *Energy Transp*., *Ltd*., 2006 U.S. Dist. LEXIS 35352, *9 (D. Conn. May 31, 2006), *aff'd,* 259 Fed.Appx. 364, 2008 U.S. App. LEXIS 63 (2d Cir. Jan. 3, 2008).

2A.48 The issue of requiring or permitting non-signatories to participate in an arbitration has been addressed by New York arbitrators. In *The Olympic Sponsor*, SMA 3771 (2001) (Berg, Brown, Sheinbaum) (Appendix A—Interim Award), decided before *Astra*, a non-signatory agent was held not to be a party to the charterparty. It played no role in its performance, and its commission was only an "incidental" benefit, rather than a "direct economic benefit" sufficient to obligate it as a non-signatory to arbitrate owner's claim for grounding damage.

2A.49 In *The Goldmar*, SMA 3902 (2005) (Berg, Arnold, Martowski), the ship struck a fender at PDVSA's Lake Maracaibo terminal while performing under a time charter between head owner Stelmar and Stena, and under a sub-voyage charter between Stena and Citgo. Stelmar and Stena were entirely separate and unrelated entities, while Citgo was a PDVSA subsidiary. PDVSA asserted its claim for dock damage against the vessel and Stelmar. Stelmar's P. & I. Club posted a letter of undertaking in favor of PDVSA on behalf of the ship and Stelmar, and the latter agreed to appear in an arbitration or proceedings before a Venezuelan court. Stena commenced New York arbitration against Citgo to recover demurrage arising from delays caused by the *Goldmar*'s collision with PDVSA's terminal. Citgo counterclaimed for demurrage it paid to other ships delayed by the incident and indemnity for PDVSA's potential claims. PDVSA sought to be included in the proceedings between Stena and Citgo as a non-signatory to their charterparty and sought consolidation of all claims. The majority held that PDVSA satisfied the *Astra* standard, citing the close corporate and operational relationship between PDVSA and Citgo, and concluding that PDVSA's claim was intertwined with Stena's demurrage claim and Citgo's counterclaim arising from the ship's berthing at PDVSA's terminal. The dissenting arbitrator noted that although there was a corporate relationship between PDVSA and Citgo, PDVSA's claim against the ship and head owner Stelmar for dock damage was not closely intertwined with the charterparty between Stena and Citgo.

2A.50 In *The Hyde Park*, SMA 3934 (Arb. at N.Y. 2006), the panel relied on *Astra* to go one step further: the non-signatory affiliates of the signatory charterer could require the owner to arbitrate because the affiliates sought to enforce rights and obligations that arose under the head time charter.

2A.51 There are other circumstances in which one who is not party to a charter may still be able to invoke the arbitration provisions of that charter to compel arbitration. These include the situation in which the bill of lading incorporates the terms of the charterparty, see paragraphs 29A.11–29A.19, the situation in which the non-party can show that the charter was executed by its agent, see paragraphs 2A.4–2A.12, the situation in which the party demanding arbitration can show that the other party assumed the contract containing the arbitration provision, and the situation in which the party demanding arbitration can show that the other party should be bound to the contract on veil piercing or alter ego theories, see paragraphs 2A.25–2A.34. See generally *Thomson-CSF*, *S.A*. v. *Am*. *Arb*. *Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

Class action arbitrations

2A.52 In *Stolt-Nielsen S.A*. v. *AnimalFeeds Intl*. *Corp*., 559 U.S. 662 (2010), the Supreme Court vacated an arbitration award which ordered class action arbitration of anti-trust claims against owners operating in the parcel chemical trade. The court noted that "instead of identifying

and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers." The Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*. (emphasis in original). The Supreme Court expressly declined to decide "whether 'manifest disregard' survives. . . as an independent ground for review or as a judicial gloss on the enumerated grounds for *vacatur* set forth [in the FAA]." *Id*. at 671 n.3. See discussion below at paragraphs 29A.191 e*t seq*. concerning the viability of the doctrine of manifest disregard of the law.

Guarantors

2A.53 A guarantor of one party's obligations under a charter is not a party to the contract. *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., above. Unless the charter provides otherwise, a guarantor may be looked to only after there has been a default in the performance of the obligations he has undertaken to guarantee.

2A.54 Ordinarily, the guarantor will not be deemed to be bound by the arbitration clause in the charter. See, e.g., *Cordoba Shipping Co. Ltd*. v. *Maro Shipping Ltd*., 494 F. Supp. 1183, 1980 AMC 1945 (D.Conn. 1980), holding that a guarantor was not bound by the arbitration clause where its performance contract was silent as to how disputes were to be resolved and the charter provided for arbitration of disputes between "owners and charterers." A similar result was reached in *Taiwan Navigation Co. Ltd*. v. *Seven Seas Merchants Corp*., 172 F. Supp. 721 (S.D.N.Y. 1959). See also *The Independence*, SMA 3049 (Arb. at N.Y. 1994), where arbitrators found that a guarantee was not enforceable because its terms and conditions were too indefinite to be enforced.

2A.55 There have been instances, however, where a guarantor was held to be bound by the arbitration clause. In *Compania Espanola de Petroleos S.A*. v. *Nereus Shipping S.A*., 527 F.2d 966, 973 (2d Cir. 1975), *cert. denied,* 426 U.S. 936 (1976), overruled on other grounds, *Gov't of the United Kingdom* v. *Boeing Co*., 998 F.2d 68 (2d Cir. 1993), the court stated:

> . . . Where an arbitration clause is applicable by its own terms to all disputes and not limited to those arising between the owner and charterer, the agreement to arbitrate binds not only the original parties, but also all those who subsequently consent to be bound.

2A.56 In *Coastal States Gas Corp*. v. *Atlantic Tankers Ltd*., 546 F.2d 15, 1976 AMC 2337 (2d Cir. 1976), the charterer's guarantor was held to be bound by the arbitration clause. There the charter provided that "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration." According to the court, the guarantor "could have protected itself by coupling its guarantee . . . with a clause limiting arbitration to disputes between the original owner and [charterer]. . . Not having bargained for such protection, [it] cannot now obtain it from this court." 1976 AMC at 2340. See also *Merrill Lynch Commodities Inc*. v. *Richal Shipping Corp*., 581 F. Supp. 933, 940 (S.D.N.Y. 1984); *Antco Shipping Co. Ltd*. v. *Sidemar S.p.A*., 417 F. Supp. 207 (S.D.N.Y. 1976).

2A.57 The fact that the guarantor was bound into the arbitration provided the owner with substantial procedural advantages. The reason for this is that an agreement to act as a surety for obligations under a charter ordinarily is not a maritime contract and will, for example, be subject to state statutes of frauds. See *Interocean Shipping Co*. v. *National Shipping & Trading Corp*., 462 F.2d 673, 678 (2d Cir. 1972). But see *Eagle Transport Ltd*. v. *O'Connor*, 449 F.Supp. 58 (S.D.N.Y. 1978) for an example of a guarantee that was held to be a maritime contract. In addition, the issuance of an award against a guarantor would save the owner from the necessity of bringing a separate action to establish its liability.

Arbitration agreements

2A.58 The issue of whether a person is a party to an arbitration agreement in a charter is determinable by the court under the Federal Arbitration Act, by an action to compel arbitration or for a stay pending arbitration. 9 U.S.C. §§ 3 or 4. See *AT&T Techs*., *Inc*. v. *Communications Workers*, 475 U.S. 643, 648–649 (1986), holding that the question whether the parties have submitted a particular dispute to arbitration "is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." See also *Interocean Shipping Co*. v. *National Shipping and Trading Corp*., 462 F.2d 673, 676–677 (2d Cir. 1972); *Re Kinoshita & Co*., 287 F.2d 951, 953 (2d Cir. 1961); *Almacenes Fernandez S.A*. v. *Golodetz*, 148 F.2d 625, 1961 AMC 1974 (2d Cir. 1945). Ordinarily, the question whether a person is bound by the arbitration clause is outside the power of the arbitrators to decide. The district court ruled in *First American Bulk Carrier Corp*. v. *Van Ommeren Shipping* (*USA*) *LLC*, No. 04 Civ. 9922, 2008 U.S. Dist. LEXIS 21816, *2–3 (S.D.N.Y. Mar. 19, 2008), that it is the role of the court to determine the parties to an arbitration agreement. The court noted that the arbitration agreement did not cover that question, but specifically limited arbitration to "disputes between the Owners and Charterers." According to the court, this wording made the issue of who is the charterer one to be decided by the court rather than the arbitrators. See also *The Allison*, SMA 3410 (Arb. at N.Y. 1998), where the panel ruled that its powers were limited to deciding disputes under the charter and the question of which of several different persons were bound by the arbitration clause was for the court to decide. The parties can give arbitrators the power to decide whether there is a binding arbitration agreement and who is bound by it, either by express agreement or by agreeing to be bound by arbitration rules which so provide. *First Options of Chicago*, *Inc*. v. *Kaplan*, 514 U.S. 938, 944 (1995)("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.").

2A.59 In *U.S. Titan*, *Inc*. v. *Guangzhou Zhen Hua Shipping Co*., 241 F.3d 135, 149 (2d Cir. 2001), the court held that the parties' fixture recap was sufficient to form a time charter on the Shelltime 4 form and ordered arbitration in London. The parties had later discussed an *ad hoc* agreement to arbitrate the limited question of whether they had formed a binding charterparty, but the court held that the parties had never reached a binding *ad hoc* arbitration agreement, and that the arbitration provisions of the charter controlled. Thereafter, the charterer filed an action in the English High Court to declare that there was no valid agreement to arbitrate. The United States District Court for the Southern District of New York held the charterer in contempt and directed the charterer to proceed with London arbitration at the risk of sanctions. See *U.S. Titan*, *Inc*. v. *Guangzhou Zhen Hua Shipping Co*., 2003 AMC 2773, 2778 (S.D.N.Y. 2003).

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CHAPTER 3

The Ship

"3. .....the good .....{Steamship / Motorship}..... of.....

4. of ..... tons gross register, and .....tons net register, having engines of ..... indicated horse power
5. and with hull, machinery and equipment in a thoroughly efficient state, and classed.....
6. at.....of about.....cubic feet bale capacity, and about .....tons of 2240 lbs.
7. deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding one and one-half percent of ship's deadweight capacity,
8. allowing a minimum of fifty tons) on a draft of..... feet..... inches on.....Summer freeboard, inclusive of permanent bunkers,
9. which are of the capacity of about.....tons of fuel, and capable of steaming, fully laden, under good weather
10. conditions about ..... knots on a consumption of about ..... tons of best Welsh coal—best grade fuel oil—best grade Diesel oil,
11. now ..... ."

Introduction

3.1 Lines 3 to 11 of the New York Produce form identify the chartered ship and describe her important features. The parties will usually add a much fuller description of the ship in the additional clauses of the charter. Often they will also supplement the description of the ship with additional undertakings that apply during the charter period – for example, an undertaking that the ship will maintain the capacity to perform at a particular speed and consumption throughout the charter.

The chartered ship

3.2 The charter is a contract for the provision of the services of the named ship and only that ship. The charterers cannot be required to accept delivery of any other ship, even another ship with identical characteristics, unless the parties have agreed that the owners may deliver a substitute. Consistent with this principle, if something happens to the chartered ship so that she cannot again be used for the purposes of the charter, the charter cannot be performed and comes to an end: see *The Badagry* [1985] 1 Lloyd's Rep. 395 (C.A.), *per* Sir John Donaldson, M.R., at page 399 rhc (discussed further at paragraph 3.6, below) and chapter 26, below.

Identifying the chartered ship

3.3 Normally, there is no difficulty in identifying the ship which is the subject of the charter. In the rare case that there is uncertainty, identifying the ship is an issue of construction, to be answered by reference to the language of the charter and the relevant factual background: see *The Diana Prosperity* [1976] 2 Lloyd's Rep. 60 (C.A.), at page 71, *per* Lord Denning, M.R., and [1976] 2 Lloyd's Rep. 621 (H.L.).

Substitution

3.4 It is open to the parties to agree that another ship may be (or will be) substituted for the originally named ship. The parties may even agree to allow more than one substitution.

The tanker *Driade* was chartered for as many consecutive voyages as could be performed over a period of about 13 months, the owners having the liberty of "substituting a coiled vessel of similar size and position at any time before or during this charterparty. . .". The owners substituted a similar sistership, the *Nayade*, for the *Driade* before the beginning of the first voyage. Subsequently during the currency of the charter the *Nayade* had to undertake repairs and the owners proposed to substitute the *Driade* for her. The charterers refused to accept the substitution, contending that the liberty clause allowed only one substitution. It was held by Devlin, J., and the Court of Appeal that, although the liberty clause taken by itself could be construed either way, having regard to the length of the charter and the commercial purpose of the clause, the intention was clear that the owners should be entitled to substitute whenever it might become convenient to do so.

Société Anonyme Maritime et Commerciale v. *Anglo-Iranian Oil* [1953] 2 Lloyd's Rep. 466 and [1954] 1 Lloyd's Rep. 1 (C.A.).

3.5 The parties are also free to agree that a substitution may be made at any time, whether before the start of the charter period, during it, or after the loss of the named or any substituted ship. However, in *Société Navale de L'Ouest* v. *Sutherland* (1920) 4 Ll.L.Rep. 58, Bailhache, J., held that a clause which permitted the owner to substitute a similar ship for the chartered ship "at any time throughout the charter" did not permit the owners to deliver a substitute ship at the beginning of the charter period: the chartered ship had to start the charter service. (For a case as to where, rather than when, substitution was allowed under a particular clause, see *The Khannur* [2010] 1 Lloyd's Rep. 610.)

3.6 Likewise, if it is intended to give the owners the right to substitute after the loss of the original ship, clear words must be used, for normally the loss of the original ship terminates the charter and after termination, it is too late to substitute.

The *Badagry* was chartered for a period of eight years, the charter providing by Clause 33: "Owners have the option to substitute the vessel with a similar vessel type/size during the period of this charter-party." The charter further provided, by Clause 3(*d*): ". . . If the Vessel should become a constructive total loss, hire shall cease at the time of the casualty resulting in such loss. . .". The *Badagry* became a constructive total loss on or about 27 September. On 17 October the owners purported to substitute the *Bonny* for the *Badagry*. It was held by the Court of Appeal that the charter was terminated before 17 October by the loss of the *Badagry* and that with the termination of the charter the right to substitute had perished.

The Badagry [1985] 1 Lloyd's Rep. 395 (C.A.).

3.7 This decision is consistent with a decision of McNair, J., in *Niarchos* v. *Shell Tankers* [1961] 2 Lloyd's Rep. 496, that a clause conferring on the owners a *liberty* to substitute did not impose on them a *duty* to do so in the event that the original ship was lost: see particularly pages 504 to 505. However, in so deciding, the judge disagreed with a contrary view tentatively expressed by Devlin, J., in *Société Anonyme Maritime et Commerciale* v. *Anglo-Iranian Oil* [1953] 2 Lloyd's Rep. 466, at page 469.

3.8 Sometimes the owners' right to substitute is made subject to the charterers' approval of the proposed substitute. In such cases, the question may arise whether the charterers must exercise their discretion to approve or not reasonably or merely in good faith. The answer must depend on the wording of the clause in question. However, it is usually sufficient that the charterers act in good faith: see *Niarchos* v. *Shell Tankers* [1961] 2 Lloyd's Rep. 496, *per* McNair, J., at page 509 (where the owners' right to substitute was subject to the charterers' approval of the substitute ship's dimensions and draft). If the owners want more than this, for example, a requirement that charterers' approval will not be unreasonably withheld, they must agree an express term to that effect.

Ownership of the ship

3.9 It is very often the case that a person who contracts as owner under a time charter is neither the registered owner nor the operator of the ship, but is himself a time charterer under another charter. Such a person is properly referred to as a disponent owner. In such cases, the charter often expressly states that the owners are such. However, where the word "disponent" is not added, are "the owners" warranting that they own the ship? In a series of decisions at the beginning of the last century, it was held that a party described as "the owner" does not undertake that he is the registered owner of the ship, but that he must *personally* provide the ship's services. That is, he or his servants must perform the charter services. A disponent owner who uses the head owner's ship and crew to perform the charter is not performing personally in this sense: see *Alquife Mines* v. *Miller* (1919) 1 Ll.L.Rep 321 (H.L.), *Sorrentino* v. *Buerger* [1915] 3 K.B. 367 (C.A.), *Omnium* v. *Sutherland* [1919] 1 K.B. 622.

3.10 However, in *Société Navale de L'Ouest* v. *Sutherland* (1920) 4 Ll.L.Rep. 58, a charter provided that "Owners [might] substitute a reasonably similar steamer for the chartered steamer at any time throughout the charter". Bailhache, J., rejected the charterers' submission that the substituted ship must belong to the owners, saying, at page 59, "It was sufficient if the substituted steamer was one of which [the owners] had control, so that they could tender her for service under this Charter-party." In modern shipping, sub-chartering is very common and disponent owners are an important part of the market. In such circumstances, it is suggested that Bailhache, J.'s view is preferable to the approach taken in the earlier cases.

3.11 Obviously, however, in any case where "the owners" under the charter are in fact disponent owners, and so are not personally providing the services of a ship as discussed above, they remain responsible to the charterers for the performance of all the obligations assumed by them under the charter, just as if they were using their own ship to perform the charter.

3.12 On the other hand, it does not follow from this that the contracting owners are responsible for everything that their sub-contractors do. In *The Hermosa* [1982] 1 Lloyd's Rep. 570 (C.A.), 'the owners' under a time charter were a company called M.T.C. They were in fact disponent owners, providing the charterers, Nitrates, with the services of a ship which they had themselves chartered from her registered owners. The question arose whether M.T.C. had renounced the charter by conduct which demonstrated that they had no intention of performing their obligation to make the ship seaworthy before putting her into the charter service. Donaldson, L.J., said, at page 581, "We have considered the appeal on the basis that the [registered] owners were M.T.C.'s agents or delegates and that the owners' conduct has to be considered as M.T.C.'s conduct. We wish, however, to make it clear that in our judgment this is erroneous in law. What Nitrates had to consider was M.T.C.'s conduct. . . The question, and the only question, was whether M.T.C. were evincing an intention not to repair the vessel and put her in a fully seaworthy state before returning her to the chartered service. Whatever may be said about the owners, this could never be said of M.T.C. They had rights against the owners under the head charter and there was no reason to believe that if it had proved necessary they would not have used those rights to force the owners to repair."

Sale of the ship

3.13 It is thought that the owners are entitled to sell the ship during the charter period. However, they remain responsible for performing the charter. In *Sorrentino* v. *Buerger* [1915] 3 K.B. 367 (C.A.), the owners under a charter had sold their ship during the charter period. It was held that the owners had not disabled themselves from performing the charter because, as a matter of

fact, they remained in possession of the ship and able to perform the charter personally (and not merely through the purchasers). It is thought that, in the present era, the law is not so exacting (cf. paragraph 3.10 above) and that owners who sell their ship are entitled to perform an existing charter through their purchasers. As regards the effect of an existing charter on the purchasers, see paragraph 2.84.

Owners' implied obligations in relation to the description of the ship

3.14 As discussed below, the description of the ship constitutes a series of contractual undertakings by the owners that, at the time of contracting, or perhaps at the time of delivery, the ship has the described features or qualities. Those express undertakings may be supported by two implied terms.

3.15 First, it is usually an implied term of the charter that the owners will not, at any stage of the charter, alter the ship so as to prejudice the services that they are to provide (or possibly so as *potentially* to prejudice the services they are to provide): see *Isaacs* v. *McAllum* (1921) 6 Ll.L.Rep 289, *per* Rowlatt, J., at page 291. This is a general undertaking that applies to all the features of the ship, not just to those which are specifically described in the charter.

The *City of Hamburg* was time chartered for 12 months. She was a British ship, but this fact was not set out in the charter. Shortly after the time charter period began, the owners sold her and her new owners changed her name and her flag. The charterers objected but continued to use the ship. Rowlatt, J., held that a term was to be implied into the charter that the ship should not be so altered during the period of the charter as to render services to the charterers substantially less valuable or different from those contracted for; and that the change of flag was a breach of such implied term.

Isaacs v. *McAllum* (1921) 6 L1.L.Rep. 289.

In that case, the charterers performed the charter and afterwards sought damages. If the feature of the ship which was altered was of fundamental importance, or if the alteration was extremely prejudicial, the charterers might be entitled to terminate.

3.16 Second, the owners may also give an implied undertaking that the ship is suitable for carrying out the charterers' reasonable orders as to the ship's employment: see *Stanton* v. *Richardson* (1875) 45 L.J.Q.B. 78, where it was implied in a voyage charter that the ship was reasonably suitable for carrying wet sugar, the cargo for which she had been chartered. On the general question of the ship's fitness or suitability for the chartered service, see Chapter 8.

The contractual description of the ship

3.17 The owners promise that the description of the ship contained in the charter is accurate; it is not merely a representation. See, for example, *French* v. *Newgass* (1877–78) L.R. 3 C.P.D. 163 (ship's class); *Rederiaktiebolaget Urania* v. *Zachariades* (1931) 41 Ll.L.Rep. 145, *per* Bateson, J., at page 147 (cargo capacity); *Behn* v. *Burness* (1863) 3 B. & S. 751, *per* Williams, J., at page 759 (location of the ship); and *Bentsen* v. *Taylor* [1893] 2 Q.B. 274, *per* Lord Esher, M.R., at page 279 (state of readiness of the ship). (However, contrast the position where an item of description is said to be "without guarantee": see below at paragraph 3.37.)

3.18 What are the consequences of the ship being misdescribed in the charter by the owners? Any material misdescription is a breach of contract, so that the charterers may be entitled to claim damages. However, where there has been a misdescription, two other issues may arise. First, there may be a question whether the charterers may terminate the charter. The answer to that question is discussed below. A second issue, however, may arise if the misdescription is rectifiable. That is whether the charterers may refuse to accept the delivery of the ship until the ship complies with her

description. The answer to this question depends on whether the ship, as she actually is, is not fully fit for the charter service. The issue of when a failure to match her description may render the ship not fully fit is discussed at paragraphs 8.69 *et seq*. and the consequences of tendering for delivery a ship that is not fully fit are discussed at paragraphs 7.47 *et seq*., below.

Items of description which are intermediate terms

3.19 The general rule is that each element of the ship's description constitutes an intermediate term. So, for example, the undertaking that the ship is in "a thoroughly efficient state" is an intermediate term: see *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.). So too is a description of the ship's cargo capacity: see *Cargo Ships El-Yam* v. *Invotra* [1958] 1 Lloyd's Rep. 39, *per* Devlin, J., at page 52. And likewise a promise as to the speed which the ship is capable of maintaining: *The Aegean Dolphin* [1992] 2 Lloyd's Rep. 178, *per* Hobhouse, J., at page 184.

3.20 Where an item of description is an intermediate term, the charterers are entitled to terminate the charter only if the consequences of the misdescription are very serious. It is usually said that a breach is sufficiently serious to justify termination if it "goes to the root of the contract" or deprives the charterers of substantially the whole remaining benefit of the contract. So, for example, in *The Aegean Dolphin*, the owners had committed a repudiatory breach of the charter when it was found that the ship's speed had been misdescribed and that in fact she was not capable of the speed necessary to perform the contemplated charter service as cruise ship. Similarly, in *Pennsylvania Shipping* v. *Compagnie Nationale de Navigation* (1936) 55 Ll.L.Rep. 271, both parties envisaged that the ship would be used for carrying molasses. The owners misdescribed the ship's pipes and coils. As described, the ship was suitable for carrying molasses. As presented, she was not. It was held that the owners' breach was repudiatory and the charterers were entitled to terminate.

Items of description which are conditions

3.21 Some parts of the ship's description, however, are conditions of the contract. That means that if the ship does not match its description in that respect, the charterers can terminate the charter, no matter how serious or trivial the consequences of the misdescription may be.

3.22 There is a general discussion of the principles applicable to determining whether a term is a condition of a contract in paragraphs G.2 *et seq*., below. As there discussed, in deciding whether a term is a condition, the starting point is the language the parties have used, although this by itself is usually not conclusive. Where the parties have specifically said that a particular element of description is "a condition" of the charter, that is a strong indication that it is indeed a condition. Where the parties have said the owners "guarantee" a particular element of description, that may amount to a weaker indication that the term in question is intended to be a condition: see *The Seaflower* (*No. 2*) [2001] 1 Lloyd's Rep. 341, *per* Rix, L.J., at [61] and *per* Jonathan Parker, L.J., at [102(6)].

3.23 Where the language of the charter is by itself not conclusive, the considerations relevant to deciding what the parties' intentions must have been are: (*a*) previous judicial decisions; (*b*) the importance of the matter in issue; (*c*) the practical consequences of treating the term as a condition; and (*d*) whether there is a real need for the certainty which a condition provides: see *The Seaflower* (*No. 2*) [2001] 1 Lloyd's Rep. 341, *per* Waller, L.J., at [42] and *per* Rix, L.J., at [77] – [79]. In the specific context of the description of a chartered ship, Devlin, J., said, in *Cargo Ships El-Yam* v. *Invotra* [1958] 1 Lloyd's Rep. 39, at page 52, that a misdescription amounts to a breach of condition only "if it is sufficient to make a fundamental difference to that which the party had contracted to take".

3.24 Those parts of the description of the ship bearing on the time at which she is expected to be ready to start the charter service have been held to be conditions: see *The Mihalis Angelos* [1970] 2 Lloyd's Rep. 43, at page 47 (expected date of readiness to load), *Behn* v. *Burness*, (1863) 3 B. & S. 751, at page 759 (location of the ship). (This last case, however, was described by Lord Wilberforce in *The Diana Prosperity* [1976] 2 Lloyd's Rep. 621 (H.L.), at page 626, as "excessively technical and due for fresh examination in this House".)

3.25 Similarly, elements of the ship's description relating to her status have been held to be conditions. The owners' undertaking as to the ship's class is probably a condition: see *Routh* v. *MacMillan* (1863) 9 L.T. 541 and *The Apollonius* [1978] 1 Lloyd's Rep. 53, *per* Mocatta, J., at page 61 and *The Seaflower* (*No. 2*) [2001] 1 Lloyd's Rep. 341 (C.A.), *per* Rix, L.J., [63]. Likewise Longmore, L.J said in *The Rowan* [2012] 1 Lloyd's Rep. 564, at [16], that an owner's description of his ship as approved by an oil major would 'normally' be a condition; and an undertaking that the ship would obtain approval for use from a particular major oil company was held to be a condition of the charter in *The Seaflower* (*No. 2*) [2001] 1 Lloyd's Rep. 341 (C.A.).

When must the ship comply?

3.26 The question sometimes arises as to *when* the ship must comply with its description. On its face, the owners' undertaking in Lines 4 to 11 of the New York Produce form is an undertaking that the ship meets its description on the date that the charter is made. It is suggested that that is the correct understanding of the effect of Lines 4 to 11 and of similar provisions in other charters. So, for example, in a case concerned with the owners' warranty as to the ship's class, it was held that the warranty applied at the time of making the charter: *French* v. *Newgass* (1877–78) L.R. 3 C.P.D. 163.

3.27 However, in a case concerned with the owners' description of a ship's speed, Mocatta, J., said that, except in the case of the ship's class, the ship must accord with her description at the time of delivery (although he left open the question whether the owners' undertakings with respect to the ship's description might also apply at the date of the charter): see *The Apollonius* [1978] 1 Lloyd's Rep. 53, at page 64. In so saying, he declined to follow the view expressed *obiter* by Atkinson, J., in *Lorentzen* v. *White* (1942) 74 Ll.L.Rep. 161, that the undertaking as to the ship's speed applied at the date of the contract.

The *Adderstone* was time chartered for a period of seven to nine months and was described in the charter as being capable of steaming fully laden in good weather conditions at about 10 knots on a consumption of about 13 tons of best grade fuel oil. A month after the commencement of the charter, the owners sold the ship. The charterers claimed against the buyers for poor speed and excessive consumption. On the trial of a preliminary point of law in a dispute between the original owners and the buyers, the question arose whether, assuming the ship was not capable of the performance described, the original owners were liable under the charterparty. It was said by Atkinson, J., (*obiter*), at page 163, that the warranty as to speed and consumption was a warranty that at the date of the charter the ship was capable of the described performance and not that the ship should continue to be so capable.

Lorentzen v. *White* (1942) 74 Ll.L.Rep. 161.

The *Apollonius* was time chartered for a trip on the Baltime form. In the charter she was described as " . . . fully loaded capable of steaming about 1412 knots in good weather and smooth water on a consumption of about 38 tons oil fuel". The time charter was entered into on 28 August and the ship was to be delivered not before 25 September, the cancelling date being 15 October. By a subsequent addendum, the cancelling date was extended to 31 October. Among a large number of additional clauses was Clause 50, reading, "Owners to have the option of dry-docking vessel prior to delivery". Between 7 September and 26 October the ship was discharging at Whampoa. While there her bottom became badly fouled. Consequently she was able to average

only 10.61 knots on the charter voyage, which was from Japan to Argentina. The owners did not dispute that upon delivery the ship was not capable of the described speed, but they argued that their obligation related not to the time of delivery but only to the time the charter was made.

Mocatta, J., disagreeing with what had been said by Atkinson, J., in *Lorentzen* v. *White*, considered that there were "overwhelming commercial considerations" favouring the charterers' contention that the obligation as to speed applied at the time of delivery. He left open whether it might also apply at any earlier date.

The Apollonius [1978] 1 Lloyd's Rep. 53.

3.28 Subsequent decisions do not take the matter much further. In *The Didymi* [1988] 2 Lloyd's Rep. 108, at page 110, Bingham, L.J., said that the description of the ship's speed and consumption contained in the preamble "refers to the vessel's capacity at the date of the charterparty" (although the question whether the warranty applied at delivery or at the date of contract was not in issue). Conversely, in *The Al Bida* [1986] 1 Lloyd's Rep. 142, Evans, J., at page 150, and Parker, L.J., at [1987] 1 Lloyd's Rep. 124 (C.A.), at page 129, seem to have assumed that Mocatta, J.'s approach was correct, at least with respect to the warranted description of speed and consumption (although, again, the relevant question was not in issue).

3.29 Which is the better view? The view expressed in *Lorentzen* v. *White* seems more consistent with the wording of the preamble to the charter. Furthermore the commercial considerations relied upon by Mocatta, J., in *The Apollonius*, above, would largely be met by the express obligation to deliver the ship "in every way fitted" for the service and by implying a term that subsequent to the date of the charter the owners will not alter the ship to the detriment of the services that the ship is to provide to the charterers: see *Isaacs* v. *McAllum* (1921) 6 Ll.L.Rep. 289.

3.30 In the particular case of the owners' undertaking in Line 5 that the ship is in "a thoroughly efficient state", there are practical reasons why this undertaking should be understood as applying as at the date that the charter is concluded (see the discussion in paragraph 3.41, below).

3.31 Whether the particular items of description in Lines 4 to 11 attach at the time of the contract or only at delivery, it is clear that they do not constitute continuing obligations. That is to say they do not amount to promises that, for example, the ship will remain in class after the charter is concluded: see *French* v. *Newgass* (1877–78) L.R. 3 C.P.D. 163. See also *The Al Bida* [1986] 1 Lloyd's Rep. 142, *per* Evans, J., at page 150.

3.32 After the date of the charter, or, as it may be, after the date of delivery, the charterers are instead protected by: (*a*) the owners' obligation to maintain the ship; (*b*) the owners' implied obligation not to alter the ship in such a way as to prejudice the services provided to the charterers (see paragraph 3.15 above); and (*c*) any undertakings given by the owners that certain described features of the ship will be maintained. Undertakings of this last kind include, for example, the owners' promise to maintain the ship's class in Line 37 of the New York Produce form, or (as is now common) a speed and consumption warranty expressed to apply for the duration of the charter.

How strictly must the ship comply?

3.33 In considering whether any contractual obligation in a commercial contract has been broken, any negligible shortcoming will be disregarded: *Margaronis Navigation* v. *Peabody* [1964] 2 Lloyd's Rep. 153. In that case, Sellers, L.J., said, at page 157: "It seems to me that in all cases the Court is called upon to consider the substance of the matter and will not regard or give effect to what are undoubtedly, in the view of the Court, trivialities, matters of little moment, of a trifling and negligible nature." In the same case, Diplock, L.J., said, at page 159, that the law regards a contract as satisfied if the performance given is sufficiently close to what the contract called for as to be "within the margin of error which it is not commercially practicable to avoid. . ."

"About"

3.34 Particular items of description are often qualified by the word "about". No simple rule can be laid down as to the tolerance allowed by this qualification. In *The Resolven* (1892) 9 T.L.R. 75, Sir Francis Jeune commented, "I take it that words of elasticity are elastic", meaning that the margin they import will depend on the subject matter to which they refer. In particular, the extent of the margin will depend on: (*a*) what is regarded as reasonable in the particular trade or according to any recognised commercial practice (see *The Al Bida* [1986] 1 Lloyd's Rep. 142, *per* Evans, J., at page 148 and *Cargo Ships El-Yam* v. *Invotra* [1958] 1 Lloyd's Rep. 39, below); and (*b*) the accuracy with which the relevant feature of the ship can reasonably be measured.

The *Tel Aviv* was time chartered on the New York Produce form and was described as "of about 478,000 cubic feet bale capacity . . .". In fact, her total bale capacity was 484,000 cubic feet or 1.2 per cent. in excess of the figure described. Dealing with the meaning to be given to the word "about", Devlin, J., said at p.52, col 2: "If I had to determine whether the margin of 1.2 per cent. was within the phrase 'about', it might be a point on the evidence that I have had which would require some careful consideration. [counsel for the charterers] rightly relies upon the evidence on this point. . . as showing that 1000 cu. ft. or thereabouts would be the sort of margin as a matter of business so contemplated within the meaning of the word 'about'. . .".

Cargo Ships El-Yam v. *Invotra* [1958] 1 Lloyd's Rep. 39.

3.35 The court in this case did not, in the event, have to decide finally what the margin should be, but the passage quoted demonstrates that in trades involving large modern ships, the percentage likely to be allowed by "about" will be lower than the percentages allowed in the older cases. Contrast the above case with *The Resolven* (1892) 9 T.L.R. 75 (5 per cent allowance on a contracted cargo of "2,000 tons or thereabouts"); *Morris* v. *Levison* (1876) 1 C.P.D. 155 (3 per cent allowed for a cargo of "say about" 1,100 tons); and *Rederiaktiebolaget Urania* v. *Zachariades* (1931) 41 L1.L.Rep. 145 (3 per cent allowed on "about 80,000 grain cubic ft." capacity).

3.36 The extent of the tolerance allowed by the word "about" is primarily a question of fact and degree. In *The Al Bida* [1987] 1 Lloyd's Rep. 124 (C.A.), Parker, L.J. said, "The margin imported in the word 'about' cannot be fixed as a matter of law. The margin must, as the arbitrators have rightly held, 'be tailored to the ship's configuration, size, draft and trim etc.'." This is the kind of question that is often referred to as a mixed question of fact and law, as Evans, J., concluded at first instance in same case, [1986] 1 Lloyd's Rep. 142, at pages 147 and 148.

"Without guarantee"

3.37 Where an item of description is qualified by the words "without guarantee", the owners give no contractual undertaking as to the matter described. The description is a representation only: see *The Lipa* [2001] 2 Lloyd's Rep. 17, *per* Andrew Smith, J., at page 21. Nevertheless, the owners are bound by an implied promise that their representation is made in good faith, that is to say with a genuine belief in its accuracy: see *The Lendoudis Evangelos II* [1997] 1 Lloyd's Rep. 404. In that case the court was required to construe a charter for "duration about 70/80 days without guarantee". Longmore, J., at page 406, rejected the submission that where an estimate was given "without guarantee", the charterers impliedly undertook that the estimate was based on reasonable grounds.

Measure of damages for misdescription of the ship

3.38 In some cases, the misdescription of a ship may not cause a specific loss, or the charterers may not be able to show that they have suffered any specific loss. Nevertheless, the ship's failure to match its description may still amount to a real impairment of the ship's value to the charterers. In

such cases, the charterers are entitled to claim damages measured as the difference between the hire agreed and the hire that would have been payable for the ship if accurately described. This measure of loss has been applied, for example, in a case of misdescription of the ship's cubic capacity.

The *Tibermede* was described in a time charter as having a certain deadweight capacity and a certain cubic capacity. In fact, her deadweight capacity was greater and her cubic capacity less. The charterers claimed damages for the deficiency in cubic capacity on the difference between the agreed hire and the hire they would have paid for a ship of the actual cubic capacity. This method of assessing damages was disputed by the owners who contended that the charterers should prove their actual losses. In upholding the charterers' contention, Shearman, J., said: "If you buy a ship of a certain cubic capacity, and one of less cubic capacity is tendered, you can deduct the difference in value from the price. I am unable to see that there is a difference in the case of a hiring."

Tibermede v. *Graham* (1921) 7 Ll.L.Rep. 250.

(See also *Sterns* v. *Salterns* (1922) 12 Ll.L.Rep. 385.)

Particular items of description

Flag

3.39 It is suggested that the statement as to the ship's flag will usually be an intermediate term. But where, at the date of the charter, the flag of the ship has or is likely to have a vital bearing on her safety or on her trading opportunities – as in wartime, when the flag of the ship may determine her neutrality or otherwise – the statement may be treated as a condition, so that any breach will allow the charterers to treat the contract as discharged. A change of flag is likely to constitute a breach of the owners' obligation not to alter the ship to the detriment of the services provided under the charter: see paragraph 3.15, above, and *Isaacs* v. *McAllum* (1921) 6 Ll.L.Rep. 291.

"with hull, machinery and equipment in a thoroughly efficient state"

3.40 This is an undertaking that the ship is in good order and condition. It is implicitly an undertaking that the ship is seaworthy. What seaworthiness means and what it requires of the owners are discussed in Chapter 8.

3.41 There is some uncertainty as to when precisely the ship is required to match the description (see paragraph 3.26, above). However, it is suggested that the description of the ship as "in a thoroughly efficient state" in Line 5 of the New York Produce form is intended to apply at the time that the charter is made. If that is right, then the owners make a double undertaking with respect to the ship's seaworthiness: by Line 5, they undertake that the ship is seaworthy when the charter is concluded, and, by Lines 21 and 22, they also undertake that she will be seaworthy when delivered into the charter service.

3.42 This double undertaking serves a practical purpose. In some cases, the ship is never delivered into the charter service because the charterers cancel the charter. In such cases, the warranty that the ship will be seaworthy *on delivery* never operates because delivery has never taken place. However, if the ship was not delivered before the cancelling date because she was in poor repair, the charterers may still be able to recover damages for breach of the owners' undertaking that the ship was seaworthy at the time of contracting.

3.43 The owners' undertakings that the ship is seaworthy are not conditions of the contract but intermediate terms: see *The Hongkong Fir* [1961] 1 Lloyd's Rep. 159 and [1961] 2 Lloyd's Rep. 478 (C.A.). For a discussion of the owners' obligation to make the ship seaworthy at the time of delivery, see chapter 8.

NYPE 93

3.44 It should be noted that the NYPE 93 form does not contain an undertaking that the ship is seaworthy at the time of contracting.

Thoroughly efficient: absolute or due diligence obligation?

3.45 On its face, the description of the ship as being in "a thoroughly efficient state" is an 'absolute' undertaking that the ship is seaworthy. So due diligence to make the ship seaworthy will not suffice. However, where the charter incorporates either the U.S. Carriage of Goods By Sea Act (U.S. COGSA) (as a charter on the New York Produce form will, unless Clause 24 is amended) or the Hague or Hague-Visby Rules, the owners' promise that the ship is seaworthy at the time of contracting is qualified and becomes an undertaking by the owners that they have exercised due diligence to make the ship seaworthy: see *The Fjord Wind* [2000] 2 Lloyd's Rep. 191 (C.A.), summarised below. For a discussion of what it means to exercise due diligence to make the ship seaworthy, see paragraphs 8.26 *et seq*.

The *Fjord Wind* was voyage chartered on the Norgrain form to lift a cargo on the River Plate. Clause 1 of the charter provided that the ship should be "tight, staunch and strong and in every way fit for the voyage" at the time of commencing its approach voyage. Clause 35 provided, in words echoing the terms of Article 3(1) of Hague Rules, that the "Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy". The question arose whether clause 1 contained an absolute warranty that the ship was seaworthy when it commenced the approach voyage. It was held that, but for clause 35, clause 1 would have imposed an absolute duty. However, read together with clause 35, its meaning was different. Clarke, L.J., said, at page 196, "The expression 'before and at the beginning of the voyage' is apt to include the whole period before the beginning of a voyage". The owners' obligation under clause 1 was therefore to exercise due diligence to make the ship seaworthy.

The Fjord Wind [1999] 1 Lloyd's Rep. 307 and [2000] 2 Lloyd's Rep. 191 (C.A.).

Statement as to class

3.46 A statement that the ship is classed will usually be a condition, so that the charterers will be entitled to treat the charter as discharged if the ship was not classed as stated at the date of the charter: see *Routh* v. *MacMillan* (1863) 9 L.T. 541, *The Apollonius* [1978] 1 Lloyd's Rep. 53, *per* Mocatta, J., at page 61, and *The Seaflower* (*No. 2*) [2001] 1 Lloyd's Rep. 341, *per* Rix, L.J., at [63].

3.47 There is no misdescription so long as the class stated in the charter is the class assigned to the ship in the register of the classification society at the date of the charter. The description of the ship's class does not import any undertaking that the ship is rightly classed; nor that the ship will remain so classed.

The *William Jackson* was chartered on 4 September to load a cargo of cotton at New Orleans, the ship being described in the charter as "A112, Record of American and Foreign Shipping Book". At the date of the charter the ship was so classed. After the ship arrived at New Orleans in November her class was cancelled because it was discovered that when the ship had been surveyed for class in August, it had been thought, wrongly, that she had recently been remetalled. The charterers refused to perform the charter, but it was held by the Court of Appeal that since the ship was classed as described at the time the charter was entered into, the charterers' refusal was wrongful.

French v. *Newgass* (1878) 3 C.P.D. 163 (C.A.).

3.48 Furthermore, the owners do not warrant, by stating the ship's class, that they will do everything necessary to retain her class. In *Hurst* v. *Usborne* (1856) 18 C.B. 144, Crowder, J., said: "The statement in the charterparty that the *Elizabeth* was A.1., applied, I apprehend, only to the time of entering into the contract. It clearly does not amount to a warranty that the vessel should

continue A.1. during the whole time covered by the charterparty, or that the owners would omit no act necessary to be done to retain her in that class."

3.49 However, most time charters (including the New York Produce form by Line 37) impose on the owners an obligation to maintain the class of the ship. Furthermore, it is suggested that, in the absence of an express provision, a term will be implied that the owners should not alter the ship after the date of the charter so that she loses or is liable to lose her class: see, by way of analogy, *Isaacs* v. *McAllum* (1921) 6 L1.L.Rep. 289.

Bale and deadweight capacity

3.50 Statements of bale and deadweight capacity usually constitute intermediate terms: see *Cargo Ships El-Yam* v. *Invotra* [1958] 1 Lloyd's Rep. 39, *per* Devlin, J., at page 52. Thus a misdescription of the ship's cargo capacity will probably give the charterers the right to terminate the charter only if the misdescription is so serious as to make the ship fundamentally different from that described in the charter.

3.51 The deadweight figure is ordinarily an abstract measurement of lifting capacity, rather than a statement of the ship's capacity to lift that number of tons of any particular cargo.

The *Freden* was voyage chartered to load a full cargo of maize. The charter provided: "The owners guarantee the ship's dead-weight capacity to be 3,200 tons and freight to be paid on this quantity". The clause was construed by the Court of Appeal as referring to the ship's abstract lifting capacity and it was held that there was no breach in her inability to lift more than 3,081 tons of maize because of insufficient cubic capacity.

Millar v. *Freden* [1918] 1 K.B. 611 (C.A.).

3.52 If, as might occasionally happen, a ship were time chartered for a trip to carry one particularly described cargo, the deadweight capacity figure in the charter might, as a matter of construction, be held to relate to the particular cargo. But it is unlikely that the deadweight capacity would be so construed in time charter forms such as the New York Produce and Baltime, where the cubic capacity and the deadweight capacity are separately described.

3.53 In the New York Produce form, the deadweight capacity is defined as "cargo and bunkers, including fresh water and stores not exceeding one and one-half per cent of ship's deadweight capacity, allowing a minimum of fifty tons". It is suggested that this means that the fresh water and stores together are not to exceed either 50 tons or 1.5 per cent of the deadweight capacity, whichever is the larger.

3.54 It was held in a voyage charter case that a deadweight cargo capacity guarantee included the weight of dunnage which the owners were obliged to use in proper stowage of the cargo.

The *Benledi* was chartered to load "a full and complete cargo of unobjectionable merchandise". The charter provided "Owners guarantee to place 5,600 tons dead-weight cargo capacity and 300,000 cubic feet (bale space), as per builders' plan, at disposal of charterers". It was held by Atkin, J., that there was no breach of the deadweight cargo capacity guarantee when the cargo actually lifted was less than the weight guaranteed by reason of the dunnage that the owners were obliged to use in proper stowage of the cargo.

Thomson v. *Brocklebank* [1918] 1 K.B. 655.

3.55 Both the New York Produce form and Baltime form qualify the deadweight capacity figure by the word "about". This allows the owners a margin of accuracy: see the discussion above at paragraph 3.34. If the ship's actual measurements are within this margin there will be no breach of the term as to deadweight capacity. For the use of "about" in relation to speed, see also paragraphs 3.78–3.80 below.

3.56 For measure of damages, see above at paragraph 3.38.

Present position of ship

3.57 It is this statement which should follow the word "now" in Line 11 of the New York Produce form and box 13 of the Baltime form. It seems that this statement may amount to a condition: see *Bentsen* v. *Taylor* [1893] 2 Q.B. 274. In *Behn* v. *Burness* (1863) 3 B. & S. 751, it was held by the Exchequer Chamber that charterers were entitled to refuse to load when a ship, described as "now in the port of Amsterdam", did not in fact reach Amsterdam until four days later. Comments in *The Diana Prosperity*, by Lord Denning in the Court of Appeal and by Lord Wilberforce in the House of Lords perhaps cast doubt on these authorities: see [1976] 2 Lloyd's Rep. at pages 73 and 626 (see paragraph 3.24, above). On the other hand, the approach taken by the Court of Appeal in *The Mihalis Angelos*, below, suggests they are still good law.

"Expected ready to load"

3.58 In some charters, the owners state that the ship is "expected ready to load" on or about a certain date or that it has a particular estimated time of arrival at the delivery port. In such cases, the owners impliedly promise that their expectation or estimation is stated in good faith and that the ship is in a position such that she can reasonably be expected to be ready to load on that date: *The Mihalis Angelos* [1970] 2 Lloyd's Rep. 43 (C.A.), *per* Lord Denning, M.R., at page 47. These implied undertakings are usually regarded as conditions of the contract – so that, if the owners' expectation is not stated honestly or is not based on reasonable grounds, the charterers may treat the contract as discharged. This sort of provision is, of course, more common in voyage than in time charters, but its effect is likely to be the same in both.

The *Mihalis Angelos* was described in a voyage charter as "now trading and expected ready to load under this Charter about 1st July 1965". In fact, at the time the charter was made on 25 May of that year, there was no reason to expect that the ship would be ready to load about 1 July. The Court of Appeal held, following previous authority in sale of goods cases, that the term was a condition so that breach of it entitled the charterers to treat the charter as discharged.

The Mihalis Angelos [1970] 2 Lloyd's Rep. 43 (C.A.).

3.59 The owners may also have further obligations arising from an expected date of readiness or ETA. Where an "expected ready to load" date has been agreed, it is thought that the owners will, as a minimum, undertake to use reasonable diligence from the date of the conclusion of the charter to ensure that the ship is delivered, ready for the charter service, by the stated readiness date. That obligation would arise for the same reasons that owners must use reasonable diligence to ensure that the ship is delivered by the cancelling date: see paragraph 7.6, below. If they fail to use reasonable diligence to meet the stated readiness date, the owners are liable in damages if loss results.

3.60 However the owners' obligation, for breach of which they can be liable in damages, may be a more onerous one. They may impliedly promise that the ship will set sail for the port (or other place) at which the ship is to be delivered at a time when it is reasonably certain that she will arrive, ready to begin the charter service, by the stated ETA. The effect of such an obligation (were it to be implied) would be that, where an ETA is agreed, the risk that the ship's previous trading commitments will interfere with the owners' ability to deliver the ship by the ETA is a risk that the owners assume. An implied obligation of this kind has been recognised in a series of cases about voyage charters: *Monroe Brothers* v. *Ryan* (1935) 51 Ll.L.Rep. 179 (C.A.); *Louis Dreyfus* v. *Lauro* (1938) 60 Ll.L.Rep. 94; *Evera* v. *North Shipping* [1956] 2 Lloyd's Rep. 369; *The Baleares* [1993] 1 Lloyd's Rep. 215 (C.A.). It has not been decided whether such an obligation arises in a time charter. The reasoning in the cases referred to depends on the wording used in those charters requiring the ship to proceed to the loading port "with all convenient speed". There is usually no

equivalent wording in a time charter. It may be, however, that a similar term is nevertheless to be implied.

Speed and fuel consumption

3.61 Lines 9 and 10 of the New York Produce form contain a promise that the ship is capable of sailing at a certain speed on a certain consumption. Normally an undertaking of this kind applies only in specified weather conditions. For example, in the New York Produce form, the ship is said to be capable of a certain performance under good weather conditions. The owners' undertaking in Lines 9 and 10 applies at the start of the charter, and not throughout the charter service. (Whether this means at the date of the charter or at the date of delivery is discussed above at paragraphs 3.26 *et seq*.

3.62 However, this undertaking is very often supplemented or replaced by a continuing undertaking as to the ship's capacity: that is, by a promise that the ship will throughout the charter continue to be capable of a certain performance. See, for example, *The Pamphilos* [2002] 2 Lloyd's Rep. 681.

3.63 In some cases, the owners go further and undertake not merely that the ship will be capable of a certain performance, but will actually achieve a certain performance: see, for example, *The Al Bida* [1986] 1 Lloyd's Rep. 142 and [1987] 1 Lloyd's Rep. 124 (C.A.), where the owners "Guaranteed sea speed on a year period abt. 15.5 knots".

The effect of the "good weather" qualification

3.64 As stated above, the ship's capacity is usually described as a capacity to provide a certain performance in good weather. It is then very common to find that the parties have expressly agreed what is to count as good weather. For example, Lines 18 and 19 of the NYPE 93 form describe the ship's capacity "in good weather conditions up to and including maximum Force. . . on the Beaufort wind scale".

3.65 What, however, does "good weather" mean if that term has not been defined, as is the case, for example, in the New York Produce form? It is suggested that it means wind conditions of Beaufort Force 4 or below. This reflects a widely accepted commercial standard: see London Maritime Arbitration 15/06, LMLN 699. There is no similar consensus on the issue of currents: see London Maritime Arbitration 4/12, LMLN 854. That is, there is no widely accepted answer to the question whether a description of the ship's capacity in good weather is supposed to be its capacity irrespective of currents, or only its capacity in the absence of materially adverse currents: see the contrasting views expressed in London Maritime Arbitrations 15/05 and 21/04, respectively LMLN 670 and LMLN 648.

3.66 Where the charter contains a promise that the ship will be capable of a certain performance in good weather, the practical question then arises: how do you assess whether the ship is capable of that performance, if in fact she has operated in bad weather as well as good? The usual approach is to determine the ship's capacity by looking at her actual performance during periods of good weather only: see *The Didymi* [1987] 2 Lloyd's Rep. 166, *per* Hobhouse, J., at pages 168 and 169 and [1988] 2 Lloyd's Rep. 108 (C.A.).

3.67 Once it has been shown, by reference to the ship's performance in good conditions, that the ship did not have the promised capacity, the charterers are then entitled to damages in respect of both good weather and bad weather periods. That is because if the ship under-performed in good weather, she will have under-performed in bad weather too: see *The Didymi* [1987] 2 Lloyd's Rep. 166, *per* Hobhouse, J., at page 171. The losses caused by the ship's lack of capacity during bad weather periods will have to be estimated and this is usually done by an expert: see

The Didymi [1987] 2 Lloyd's Rep. 166, *per* Hobhouse, J., at page 171, and another application of the same approach in *The Gas Enterprise* [1993] 2 Lloyd's Rep. 352, *per* Lloyd, L.J., at page 366.

The *Didymi* was time-chartered on the New York Produce form for five years. An additional clause provided that the ship was capable of maintaining and should maintain throughout the period of the charter "a guaranteed average speed of 15.5 knots in good weather conditions (smooth seas, wind less than 3 on the Beaufort scale) on a guaranteed daily consumption of 35 long tons . . .". The clause also provided that, should the ship fail to perform in accordance with these guarantees, the charterers should be entitled to a decrease in hire and that if the ship maintained a better speed and/or consumption, the owners should be indemnified in like manner.

Hobhouse, J., held that it was necessary first to assess average performance. For this purpose one should look at the ship's performance only during periods of good weather as defined; over a five-year charter there would be a sufficient number and spread of such periods to allow average performance to be assessed. The average performance thus arrived at was then to be applied appropriately over the total time spent on all sea passages, not only to periods of good weather, to determine the amount of the decrease or the increase in hire. The decision and reasoning of Hobhouse, J., were approved and adopted by the Court of Appeal.

Didymi Corporation v. *Atlantic Lines and Navigation* (*The Didymi*) [1987] 2 Lloyd's Rep. 166 and [1988] 2 Lloyd's Rep. 108 (C.A.).

3.68 It is suggested, however, that this approach – assessing breach only by reference to performance in good weather – may owe more to pragmatism than principle. As weather data and performance modelling become more sophisticated and accurate, it may become possible for experts to undertake a single, reliable analysis, comparing the performance in fact achieved in the conditions in fact experienced against the performance that ought to have been achieved by a ship capable of the promised performance. Such an analysis would, in effect, both test for breach and assess the measure of the loss if there has been one.

3.69 Where a charter included duplicative undertakings as to the ship's performance capabilities, one qualified by a good weather limitation and the other not, Evans, J., construed the charter as a whole, treating both warranties as subject to the good weather qualification: *The Al Bida* [1986] 1 Lloyd's Rep. 142, at page 150; see also *The Gaz Energy* [2012], Lloyd's Rep. 211.

Simple capacity description clauses

3.70 The New York Produce form contains a promise that the ship is capable of a certain performance. As discussed above at paragraph 3.26, there is a divergence of view on the question whether the ship has to comply with this description at the date of the charter or at the date of delivery.

3.71 Since the owners' promise is as to the capacity of the ship at or around the start of the charter, the charterers are entitled to rely on the performance of the ship before delivery as well as after delivery, as evidence of lack of capacity: see *The Al Bida* [1987] 1 Lloyd's Rep. 124 (C.A.), at pages 129 and 130.

3.72 In practice, the principal cause of underperformance is often hull fouling. However, there is some uncertainty as to how the effect of hull fouling should be analysed. Suppose that a ship has a fouled hull and, for that reason only, its performance on delivery fails to achieve what is promised in the charter. Has there been a misdescription of the speed and consumption of which the ship is capable? Or should one say that the ship is capable of the performance described, but that she has been prevented from achieving the performance of which she is capable because her hull is not in a thoroughly efficient condition? *The Apollonius* [1978] 1 Lloyd's Rep. 53 suggests the former analysis; *The Al Bida* [1986] 1 Lloyd's Rep. 142, *per* Evans, J., at pages 150–151, suggests the latter. In *The Ionna* [1985] 2 Lloyd's Rep. 164, a case in which the ship was delivered with a fouled hull, the parties agreed that the owners were in breach of *both* the capacity description *and* the obligation to deliver the ship in good condition. The issue might possibly have a practical impact on the owners' liabilities where the charter incorporates U.S. COGSA or the Hague-Visby Rules,

which modify the owners' undertaking as to the seaworthy condition of the ship: see paragraph 3.45, above.

3.73 A promise that the ship is capable of a certain performance at the start of the charter does not contain any kind of implied promise that she will remain capable of that level of performance after the date of delivery: *The Al Bida* [1986] 1 Lloyd's Rep. 142, *per* Evans, J., at page 150. However, under almost all time charters the owners are obliged to maintain the ship and, so far as concerns speed and consumption, the standard of efficiency to which the ship is to be maintained is the level of speed and consumption described in Lines 9 and 10.

3.74 Consequently, where, during the course of the charter service, the ship has failed to achieve the level of performance of which the owners promised she was capable at the start of the charter, the charterers may have two possible claims against the owners. It may be that, at the start of the charter, the ship was not capable of the performance promised. Alternatively, it may be that the owners have failed to exercise due diligence to maintain the ship's hull or machinery, so as to ensure that her performance remains as described. The claim in *The Al Bida*, above, was advanced on the latter basis.

Continuing capacity and level-of-performance clauses

3.75 Where the owners give a continuing undertaking as to performance of the ship, and the ship has in fact underperformed, it is a defence for the owners to prove that the underperformance resulted from their compliance with the charterers' orders: see *The Pamphilos* [2002] 2 Lloyd's Rep. 681, *per* Colman, J., at page 690. In that case, the ship's failure to achieve the promised performance resulted from marine fouling, which was in turn the result of the owners' complying with the charterers' order to wait for 21 days at a tropical port.

3.76 Where the parties agree that the ship will maintain a certain level of performance (and not merely that it will remain capable of a particular performance), the owners may still be protected from liability arising from causes beyond their control if the charter incorporates the U.S. COGSA or the Hague/Hague-Visby Rules. For a voyage charter case in which an undertaking that "vessel will perform a laden passage at 11 knots weather and safe navigation permitting" was construed as being subject to owners' clause paramount defences, see *The Leonidas* [2001] 1 Lloyd's Rep. 533.

Speed/consumption is an intermediate term

3.77 It seems that terms as to speed and consumption will usually constitute intermediate terms. Usually a lack of speed or an excess of consumption can be compensated by damages alone. However, a serious discrepancy in either respect may be so fundamental to the charter as to entitle the charterers to treat it as being discharged. This could be the case where speed is obviously an essential attribute for the service contemplated by the parties as, for example, where the ship is being chartered expressly to perform a particular service. In *The Aegean Dolphin* [1992] 2 Lloyd's Rep. 178, it was held that the time charterers could have terminated a charter where the ship lacked the speed necessary to perform specific types of cruise for which she was being chartered.

"About"

3.78 The word "about" when qualifying the warranty as to speed allows a margin either side of the stated speed; the extent of the margin is primarily a matter of fact: *The Al Bida* [1987] 1 Lloyd's Rep. 124 (C.A.), *per* Parker, L.J., at page 129. The margin applies to detemine both whether there has been underperformance and whether there has been overperformance; see *The Gaz Energy* (N.2) [2012] 852 LMLN 2.

3.79 It was argued in *The Al Bida*, in which the warranted speed was "about 15.5 knots", that only two possible margins could be allowed for the word "about": half a knot or 5 per cent. The Court of Appeal rejected this contention, agreeing with the arbitrators that it "must be tailored to the ship's configuration, size, draft and trim, etc.". In practice, where parties are in dispute, the time and cost of debating the precise limits of the allowance often lead parties to agree a figure for the purposes of that dispute, and half a knot is commonly agreed. This was the allowance fixed by arbitrators with sea-going experience where the wording was "ABT 13 KNOTS" in *The Pearl C* [2012] 2 Lloyd's Rep. 533 at [36]. Likewise a 5 per cent allowance on consumption is almost invariably applied: London Maritime Arbitration 20/07, LMLN 723.

3.80 Where a charter states that a ship is capable of "about" a certain allowance speed on "about" a certain consumption, there is no consensus as to whether the "about" should be taken into account once or twice: see the contrasting views expressed in London Maritime Arbitrations 12/85 and 6/88, respectively LMLN 158 and LMLN 233, and 15/07, LMLN 720.

"Average'"

3.81 Speed and consumption clauses very often refer to "average" speed or "average" consumption. In such cases, one usually finds that the period over which the average is to be taken is defined, for example, as the period of the charter or the period of a year. Where, however, the clause refers to average performance, but the period over which the average is to be taken is not defined, the average must be taken over a reasonable period, sufficient to provide a fair assessment of the engine's capacity at any particular time: see *The Al Bida* [1986] 1 Lloyd's Rep. 142, *per* Evans, J., at page 149 and *per* Parker, L.J., at [1987] 1 Lloyd's Rep. 124 (C.A.), page 129. In that case, the arbitrators had taken the averages over the course of individual voyages and that was considered a proper approach. See also *The Gaz Energy* (No.2) [2012] 852 LMLN 2.

Clause 15

3.82 In addition to the undertakings discussed above, Clause 15 of the New York Produce form contains a provision allowing the charterers to make deductions from hire where the ship's speed is reduced by mechanical defects or breakdowns. This provision is discussed in paragraphs 25.78 *et seq*.

U.S. Law

3A.1 There has been in the U.S. decisions a struggle to give the appropriate legal label to the various statements of a ship's characteristics in the preamble of the charter. Thus, such statements may be called "representations", "warranties" or "conditions," although the term invoked may well not dispose of the underlying issue of whether the ship's failure to comply entitles the charterer to treat the contract as terminated or merely to recover damages resulting from the breach. Rather than focus on the proper terminology, it is more useful to consider the inherent materiality of the representation or undertaking in question, the point in time at which a breach or default occurs, and the consequences thereof to the charter.

3A.2 Under the U.S. precedents, it is important to distinguish between cases involving a misdescription determined prior to delivery of the ship and one occurring after delivery. In the former a refusal to accept the ship has been held justified even where the deviation from the represented characteristic is relatively small. In *The Maria Lemos*, SMA 74 (Arb. at N.Y. 1963), it was held that charterer had the right to reject the ship because the amount of fuel oil on board did not comply with the minimum stipulated in the charter and there was water ballast in the No. 3 deeptank when the ship was tendered as being ready. See also *The Augvald*, 1965 AMC 1614 (Arb. at N.Y. 1965) and *The Grand Explorer*, SMA 551 (Arb. at N.Y. 1963).

3A.3 Once delivery of the ship has been accepted, however, the charterer is entitled to refuse to perform the charter only if there is a material breach on the part of the owner which frustrates the essential purpose of the contract. See *Aaby* v. *States Marine Corp*. (*The Tendo*), 181 F.2d 383, 1950 AMC 947 (2d Cir. 1950), *cert*. *denied*, 340 U.S. 829 (1950); *United States* v. *The Marilena P*, 433 F.2d 164, 1969 AMC 1155 (4th Cir. 1969); *Petroleum Export Corp*. v. *Kerr S.S. Co*., 32 F.2d 969, 1929 AMC 905 (9th Cir. 1929); *Massari* v. *Forest Lumber Co*., 290 F. 470, 1923 AMC 1111 (S.D.Fla. 1923); *Davison* v. *Von Lingen*, 113 U.S. 40 (1885); *Romano* v. *West India Fruit and S.S. Co*., 151 F.2d 727, 1946 AMC 90 (5th Cir. 1945); *The Leslie*, SMA 1341 (Arb. at N.Y. 1979); and *The Eastern Street*, SMA 1352 (Arb. at N.Y. 1979).

3A.4 Two arbitrations illustrate some of these points. In *The Fu Chiao*, SMA 1089 (Arb. at N.Y. 1977), the panel unanimously held that charterer was justified in cancelling the charter because the owner had misdescribed the ship's characteristics. Although the charter did not contain an express requirement that the ship be vertically ventilated, the charterer had received assurances to this effect during the negotiations that led to the fixture, and would not otherwise have entered into the charter. According to the panel:

> The Panel is unanimous in its opinion that where there has been misrepresentation of the ship's characteristics, innocent or otherwise, which induces a charterer to enter into a contract and this misrepresentation strikes down or otherwise seriously prejudices the very purpose of charterers' intended use of the ship then charterers are within their rights to cancel the contract and claim damages if any are sustained.

3A.5 In *The Tordenskjold*, SMA 1091 (Arb. at N.Y. 1977), the charter provided that the ship "shall be maintained according to U.S. Coast Guard regulations and always maintain and carry valid U.S. Coast Guard letter of compliance." The ship had completed three voyages when the owner was advised by the Coast Guard that three sets of flanges had to be replaced if he intended to load propylene at Houston. The ship went off-hire for three days while the repairs were accomplished. Coast Guard approval was received upon completion of the repairs, but the charterer then decided to cancel the charter and declared it commercially frustrated because the ship had not been ready to load. In addition, the ship had been without a Coast Guard letter of compliance since the outset of the charter. The panel held, however, that these circumstances did not justify cancellation and were

not "such a fundamental and pervasive breach of the charter party as to destroy the commercial purpose of the contract." According to the panel:

> The law, in our opinion, is relatively clear and convincing in a line of decisions which declare that the charterer must sustain a different burden if it wishes to cancel a charter party once a ship is delivered and has performed in part than it would have at the time of delivery.

3A.6 See, generally, *The Ficus*, SMA 2473 (Arb. at N.Y. 1988), where the panel found that the fact that tank coatings were about 30 per cent deteriorated did not justify the charterer's rejection of the ship because tank coatings are subject to wear and tear and can be repaired; and *The China Trident*, SMA 2756 (Arb. at N.Y. 1991), where the ship was found to be not ". . . in every way fitted for ordinary cargo service" and the owner was held in breach of the charter.

Name of the ship

3A.7 Owner is required to deliver the ship named in the charter. In *Compania Naviera Asiatic* v. *Burmah Oil*, 1977 AMC 1538 (S.D.N.Y. 1977), the court construed a charter for "Hull #2283" as requiring delivery of that precise ship, and owner's obligation could not be satisfied by the delivery of a sister ship designated as "Hull #2284." *Cf. The Christina Pezas*, 149 F. Supp. 678, 1958 AMC 240 (S.D.N.Y. 1957), concerning an arbitration award holding that under a consecutive voyage charter for the "vessel CHRISTINA PEZAS, or at owner's option Liberty substitute in same position on any voyage," the owner had the right to freely substitute other Liberty type ships.

Flag

3A.8 It is probable that U.S. courts and arbitrators would follow the test of materiality in determining whether a misdescription of the ship's flag constitutes a breach of the charter which gives charterer a right to terminate or claim for damages.

3A.9 In *The Penta*, 1981 AMC 532 (Arb. at N.Y. 1980), the panel unanimously ruled that the owner was in breach of the charter by changing the ship's registry from Liberia to the Republic of Philippines without the charterer's consent. The change of registry occurred some months after the ship had been delivered to the charterer. The panel also ruled, however, that the breach was not so substantial that it gave the charterer the right to cancel the charter.

3A.10 In *The Syra*, SMA 297 (Arb. at N.Y. 1968), the ship was initially represented as flying the Greek flag. When the charter was signed by the owner, it changed the flag of the ship from Greek to Liberian. The charter was then sent on to the charterer, who executed it without protesting the change of flag. Subsequently, however, when extra grain fittings were required because of the Liberian flag, the charterer deducted the cost from hire, and alleged that the owner should be liable because it misrepresented the ship's flag. The panel held for the owner, finding that since the change was known to the charterer before it executed the charter, there was no misrepresentation. *Cf. The Stolt Pam*, SMA 1026 (Arb. at N.Y. 1976), where the owner was held entitled to change the ship's flag in accordance with an express provision of the charter.

With hull, machinery and equipment in a thoroughly efficient state

3A.11 U.S. authorities view this statement in the charter as an express warranty of seaworthiness which must be satisfied both at the time of the making of the charter and delivery of the ship to the charterer. *The Caledonia*, 157 U.S. 124 (1895); *The Carib Prince*, 170 U.S. 655 (1898); *The Toledo*, 30 F. Supp. 93 (E.D.N.Y. 1939), *aff'd,* 122 F.2d 255 (2d Cir. 1941), *cert. denied,* 314 U.S.

689. The additional language in Lines 22 and 38 constitute further express undertakings as to the seaworthiness of the ship and are discussed in detail below. Where there is no express warranty of seaworthiness, the U.S. decisions hold that there is an implied warranty of seaworthiness, unless the charter provides otherwise. *Work* v. *Leathers*, 97 U.S. 379 (1878); *The Edwin I. Morrison*, 153 U.S. 199, 210 (1893); and *The Caledonia*, above.

3A.12 In order to be seaworthy, the ship must be fit for the purpose intended under the charterparty. *Nichimen Co*. v. *M.V. Farland*, 1972 AMC 1573, 1591, 462 F.2d 319, 332 (2d Cir. 1972). See also *Mobil Shipping and Transportation Company* v. *Wonsild Liquid Carriers Ltd*., 190 F.3d 64, 1999 AMC 2705 (2d Cir. 1999), and cases cited therein for a general discussion of the definition of unseaworthiness.

3A.13 It has been held that the owner gives an implied warranty of seaworthiness of the chartered ship at the commencement of every voyage. *Coca-Cola Co*. v. *The Norholt*, 333 F. Supp. 946, 1972 AMC 388 (S.D.N.Y. 1971).

3A.14 In the absence of qualifying language in the charter, or the incorporation of the Carriage of Goods by Sea Act, the implied warranty of seaworthiness is an absolute one. The Supreme Court made this clear in *The Caledonia*:

> In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects. [157 U.S. at 131.]

3A.15 An implied warranty may be found even where the charterer has accepted the ship as being in good condition. In *Thomas Jordan Inc*. v. *Mayronne Drilling Mud Chem. & Eng'r Serv*., 214 F.2d 410 (5th Cir. 1954), for example, it was held that a provision in the charter that the ship had been inspected by the charterer and found to be in "first class condition" was not a waiver of the implied warranty of seaworthiness. In that case, a loaded barge sank due to an underwater defect that could not have been detected during the inspection conducted by the charterer.

3A.16 In *The Carib Eve*, SMA 2749 (Arb. at N.Y. 1991), it was held that the ship was not in compliance with the warranty because the single-band radio was not working and the Safety Radiotelegraphy Certificate had not been renewed.

3A.17 In *The Caribbean Sun*, SMA 3545 (Arb. at N.Y. 1999), arbitrators rejected charterer's contention that an unseaworthy condition caused loss of and damage to containers which were stowed on deck. The panel found the cause of the loss was improper securing of the containers chargeable to charterer.

Consequence of breach of warranty of seaworthiness

3A.18 A breach of the warranty of seaworthiness must be a material one to entitle the charterer to treat the contract as repudiated. See *Aaby* v. *States Marine Corp*., above, where the Court of Appeals for the Second Circuit held that unseaworthiness alone does not entitle the charterer to cancel and that repudiation is justified only where the unseaworthiness frustrates the essential purpose of the contract. In that case, the court held that the charterer was not justified in repudiating a 12-month charter because of a two-day delay at the outset of the charter period.

3A.19 In *The Pacsea and The Pacsun*, SMA 746 (Arb. at N.Y. 1972), the arbitrators held that the charterer was not justified in terminating the charter because of apparent deficiencies in the ship and her crew, and the owner's failure to repair. The panel found that the defects were not of "sufficient importance to warrant the termination of the charter party." According to the panel:

The Panel realize from the testimony given, both convincingly in oral form and subsequently by documentation, that Charterers were under terrific pressures from their cargo receivers to make sure that the ships arrived at fixed times, and in June when both ships were delayed by weather conditions causing them both to lose their berths to other ships, this apparently caused Charterers to feel that the weight of problems they had encountered and the number of various small items which had been allowed to weigh heavily in their minds, all were the cause of their difficulties with their customers. As stated, however, no one single item—nor the continuity of the small annoyances that Charterers were indeed suffering—was in the opinion of the Panel sufficient to permit Charterers to terminate their commitment to Owners ahead of the contracted period.

Charterers maintained that they were able to anticipate a continuation of non-performance by the ships' crews and the ships' performance and also non-cooperation from Owners and that this would have made their working arrangement with their own clients absolutely unworkable. This was also put forward by Charterers as a prime reason for termination of the ships' Charters, but once again the majority of the Panel view this position as conjectural resulting in anticipatory breach of contract.

3A.20 In *The Serena*, SMA 1159 (Arb. at N.Y. 1977), the charterer claimed that it was justified in cancelling a five-year time charter after one voyage during which the ship was delayed because of boiler problems caused primarily by crew negligence. The charterer contended that any breach of the performance warranties contained in the charter justified cancellation. The panel rejected this argument, however, and held that in view of the charter provisions concerning delays and ship deficiencies, the cancellation was wrongful:

Charterers have requested us to consider that performance was a fundamental commitment by Owners and that it was agreed to be the very essence of the Contract and that any breach thereof permitted cancellation. We find it hard to believe that either party contemplated that a ship almost 17 years old upon delivery would not breach a warranted condition. The Contract itself provided an elaborate and comprehensive formula to deal with such breaches when and if they occurred. . . We did not consider the non-performance Charterers demonstrated occurred during ship's actual performance under the Contract or would have occurred had they continued performance, substantial enough to be considered fundamental breaches of this Contract, permitting cancellation.

3A.21 See also *Hildebrand* v. *Geneva Mill Co*. (*The Edward R. Smith*), 32 F.2d 343, 348, 1929 AMC 962, 972–973 (M.D. Ala. 1929), holding that "the right of cancellation of a charter party does not arise out of any breach. In order to justify the rescission of a charter party, the character of the breach must be such as to defeat the purpose of the contract; otherwise recovery is confined to damages sustained." *The Navigator*, SMA 287 (Arb. at N.Y. 1968), holding that "unseaworthiness as such does not entitle the charterers to repudiate the charter." *The Angelica*, SMA 504 (Arb. at N.Y. 1970), holding that while the ship did not conform to the charter, "the discrepancies, percentagewise, are not sufficient to make the continuation of the venture commercially impracticable." *Tug Diane*, SMA 819 (Arb. at N.Y. 1973), holding that the owner's failure to repair the tug's engines justified cancellation by the charterer; and *The Warm Springs*, SMA 134 (Arb. at N.Y. 1966), holding that the charterer was not entitled to cancel the charter because the owner refused to follow its voyage directions to undertake a deviation.

The Carriage of Goods by Sea Act, the Harter Act and Hague-Visby Rules

3A.22 The incorporation by reference of COGSA, the Harter Act or the Hague-Visby Rules in the charter constitutes an agreement by the owner and charterer to have their respective rights and duties controlled by these Acts to the extent they are applicable by their own terms, except insofar as the charter expressly modifies them. *Hartford Fire Insurance Co*. v. *Calmar S.S. Corp*., 404 F. Supp. 442, 1976 AMC 2636 (W.D.Wash. 1975). As the court held in that case, where the charter incorporates COGSA, "the applicable COGSA provisions become a part of the parties' contract with the same force and effect as ordinary contract terms". 1976 AMC at 2639. See also *Mobil Shipping and Transportation Company* v. *Wonsild Liquid Carriers Ltd*., 190 F.3d 64, 1999 AMC

2705, 2712 (2d Cir. 1999) (charter subject to Hague-Visby Rules) and *The Westmoreland*, 86 F.2d 96, 1936 AMC 1680 (2d Cir. 1936). In *United States* v. *M/V Marilena P*, 433 F.2d 164, 170 (4th Cir. 1969), the Court of Appeals for the Fourth Circuit likewise ruled that the provisions of COGSA become applicable as contractual terms when the charterparty incorporates COGSA. The Courts of Appeal for the Fifth and Ninth Circuits have also ruled that in such a case, COGSA applies with the force of a contract term. See *Institute of London Underwriters* v. *Sea-Land Serv*., *Inc*., 881 F.2d 761, 765–766, 1989 AMC 2516 (9th Cir. 1989); *Croft & Scully Co*. v. *M/V Skulptor Vuchetich*, 664 F.2d 1277, 1280, 1982 AMC 1042 (5th Cir. 1982).

3A.23 In contrast, in *Groupe Chegaray/V. De Chalus* v. *P&O Containers*, 251 F.3d 1359, 1364, 2001 AMC 1858 (11th Cir. 2001), the Court of Appeals for the Eleventh Circuit concluded that incorporation of COGSA in the bills of lading made COGSA applicable *ex proprio vigore*, rather than as a mere term of the contract. In *Nippon Express U.S.A*. (*Illinois*), *Inc*. v. *Mitsui Sumitomo Ins. Co*., 2004 AMC 2031, 2034–2035 (N.D. Ill. 2004), the court followed *Groupe Chegaray* to conclude that the incorporated COGSA terms applied with the force of law. See also *Bunge Corp*. v. *Republic of Brazil*, 353 F. Supp. 64, 1973 AMC 1219 (E.D. La. 1972), holding that in the event of a conflict between a provision of the charter and COGSA, the latter would prevail.

3A.24 The most important effect of incorporating COGSA in the charter is that the implied warranty of seaworthiness is modified and reduced from an absolute warranty to an undertaking by the owner to exercise due diligence to render the ship seaworthy. *Horn* v. *Cia de Navegacion Fruco S.A*. (*The Heinz Horn*), 404 F.2d 412 (5th Cir. 1968), *cert. denied,* 394 U.S. 943 (1969); *Iligan International Corp*. v. *John Weyerhaeuser*, 372 F. Supp. 859, 1974 AMC 1719 (S.D.N.Y. 1974), *aff'd,* 507 F.2d 68 (2d Cir. 1974), *cert. denied,* 421 U.S. 956.

3A.25 It has been held, however, that where the charter contains an express absolute warranty of seaworthiness, the incorporation of COGSA in the charter will not abrogate it. In *John Weyerhaeuser*, above, the ship was chartered by Weyerhaeuser to New York Navigation on the New York Produce form. New York Navigation, in turn, entered into an agreement with Iligan whereby it agreed to provide ships for the transport of machinery and parts of a steel mill. Cargo was damaged on the voyage, and Iligan commenced an action against New York Navigation and Weyerhaeuser for the loss.

3A.26 The agreement between Iligan and New York Navigation contained both an express warranty of seaworthiness and incorporated by reference the provisions of COGSA. The court held that, as between New York Navigation and Iligan, there were two obligations in force: first, the absolute duty under the express warranty to provide seaworthy ships, and, second, an implied warranty of seaworthiness modified by COGSA to a duty to exercise due diligence. The court held that New York Navigation was liable to cargo under the express warranty, but not liable for the alleged breach of its duty to exercise due diligence.

3A.27 The same analysis was applied to the charter between Weyerhaeuser and New York Navigation. The court held that Weyerhaeuser's express agreement to furnish a ship "tight, staunch, strong and in every way fitted for service" was an absolute warranty of seaworthiness which was not modified by COGSA. This express warranty superseded the implied warranty so far as it extended, the express warranty remaining in force only until the time of delivery in the absence of charter language imposing a continuing absolute obligation to maintain the ship in seaworthy condition. The court noted that where the charter does not provide for a continuing obligation to maintain the ship in seaworthy condition, the express warranty having lapsed upon delivery, the implied warranty would then operate at the time of sailing.

3A.28 In *John Weyerhaeuser*, the court found that Weyerhaeuser breached its express warranty as well as the implied warranty, which, as modified by COGSA, constituted a duty only to exercise due diligence before the loading of the cargo.

3A.29 In *Mobil Shipping and Transportation Company* v. *Wonsild Liquid Carriers Ltd*., 190 F.3d 64, 1999 AMC 2705 (2d Cir. 1999), the court ruled that the risk to the environment could properly be considered as a factor in determining whether the ship was seaworthy. The ship was chartered to transport lube oil from Europe to Hong Kong via Singapore. The charter required that the ship "shall be in good working order and condition and in every way seaworthy and fit for the carriage of the cargo." The court held that a heightened standard of seaworthiness applied because the ship was carrying lube oil, a hazardous substance. As stated by the court:

> In this environmentally-sensitive era, consideration of the potential environmental impact of a disaster comports with modern notions of what goes into the "seaworthiness" calculus.
> [1999 AMC at 2710.]

Statement as to class

3A.30 There do not appear to be any U.S. cases on the question whether a statement in the charter as to the ship's class constitutes a warranty. In view of the importance of class in terms of the charterer's ability to use the ship, it seems likely the statement would be held to constitute a warranty, the breach of which would entitle the charterer to recover damages and possibly to cancel the charter if the consequences were serious enough to frustrate its purposes.

Bale and deadweight capacity

3A.31 Statements in the charter as to the ship's deadweight and cubic capacity are generally held to be warranties, although this depends on the circumstances of the case. As the court stated in *Romano* v. *West India Fruit & Steamship Co*., 151 F.2d 727, 731 (5th Cir. 1945):

> What is important is whether the warranty was positively and unequivocally made as a statement of fact and whether the natural tendency of its making was to induce the chartering of the ship.

3A.32 A warranty with respect to deadweight capacity does not necessarily constitute a warranty that the ship will actually lift that particular tonnage. Thus, where the charter provided that the ship merely be capable of "loading 5500 MT" cargo, and where the ship demonstrated such capacity by loading 5,500 metric tons on its third voyage, the panel denied the charterer's deadweight deficiency claim for two earlier voyages. *The Robertina*, SMA 1151 (Arb. at N.Y. 1977).

3A.33 It is well established, however, that the charter need not expressly refer to the description as a "warranty" or "guaranty" if the intent of the parties that the statement be so understood is clear. *Denholm Shipping Co*. v. *W. E. Hedger Co*., 47 F.2d 213, 1931 AMC 297 (2d Cir. 1931); *Metropolitan Coal Co*. v. *Howard*, 155 F.2d 780, 783 (2d Cir. 1946).

3A.34 Breach of the warranty may give the charterer the option of cancellation prior to acceptance of the ship. In the alternative, he may accept the ship and claim damages resulting from the misdescription. See, e.g., *Dominica Mining Co*. v. *Port Everglades Towing Co*., 318 F. Supp. 500, 1970 AMC 123 (S.D. Fla. 1969); *The Aghia Marina*, SMA 1236 (Arb. at N.Y. 1978). In *The Atlantic Glory*, SMA 76 (Arb. at N.Y. 1962), the panel held that since the ship's deadweight tonnage was less than that described in the charter, the charterer was penalized by having to pay hire on a deadweight that was not available to them. Once the charterer accepts the ship, however, he has no right to repudiate the charter unless the misrepresentation is material in the context of the intended trading of the ship.

3A.35 In *Watts* v. *Camors*, 115 U.S. 353 (1885), the ship was described as "of the burthen of 1,100 tons, or thereabouts, registered measurement." The charter provided that the charterer would provide "a full and complete cargo, say about 11,500 quarters of wheat in bulk. . . ." When the

ship was delivered to the charterer, it refused to accept her or to furnish cargo, for the reason that her tonnage exceeded 1,100 tons, and was in fact about 1,203 tons. Her actual carrying capacity, however, was 11,500 quarters of wheat. The owner commenced an action to recover its damages resulting from the rejection of the ship. The court held for the owner, concluding that the charterer had bargained for a ship that could carry 11,500 quarters of wheat, and had got what it bargained for. Since the ship was capable of loading this amount, the misdescription of her registered tonnage was not material and would not justify termination of the charter.

3A.36 In *The Neptune Kiku*, SMA 2102 (Arb. at N.Y. 1985), the charterer was held entitled to recover damages caused by the owner's failure to make a complete description of the ship, including "any and all obstructions that existed to prevent the full reach of the holds and decks being available." There were car decks on the ship which reduced the deck capacity for containers. The containers which could not be loaded on deck had to be shipped by ground transport to an alternative port and shipped on another ship to the discharge port. In the charter description of the ship, nothing was said about the presence of the car decks. The panel found that the owner was in breach of the charter by having obstructions on deck which were not described in the negotiations or referred to in the charter.

3A.37 See *The Treasure Island*, SMA 1898 (Arb. at N.Y. 1983), where it was held that hire should be reduced proportionally with the reduction in carrying capacity compared with the owner's description of the ship; and *The Coastal Corpus Christi*, SMA 2828 (Arb. at N.Y. 1992), to the same effect. See also *The Danita*, SMA 2514 (Arb. at N.Y. 1988), which involved a voyage charter for a ship which was designed as both a product tanker and to carry crude oil, such that her deadweight capacity would vary substantially depending upon the type of cargo carried. The panel ruled that the charterer's cancellation of the charter for an alleged misdescription of the ship was wrongful.

Gross/net tonnage

3A.38 A misdescription of the ship's registered tonnage does not give the charterer the right to reject the ship, except in a case where there is a very large discrepancy, although it could give rise to a claim for damages by the charterer. *Watts* v. *Camors*, 115 U.S. 353 (1885), discussed above. See also *Ashburner* v. *Balchen*, 7 N.Y 262 (1852), holding that a representation in the charter as to the ship's registered tonnage was not a warranty; *The Emily S. Malcolm*, 278 F. 943 (3d Cir. 1922), holding that a charter provision estimating the ship's carrying capacity was not a warranty, and that the owner was entitled to the full freight provided in the charter even though the ship's capacity was substantially less than as described; *Ontario Paper Co*. v. *Neff*, 261 F. 353 (7th Cir. 1919), holding that the owner was entitled to rescind the charter where the parties had made a mutual mistake as to the ship's paper-carrying capacity; *S. O. Stray and Co*. v. *Trottier, Ide and Co*., 280 F. 249 (D. Mass. 1922), holding that a statement of the ship's bale capacity as to which there was a mutual mistake of fact was not a warranty, but was intended only to be an estimate.

"About"

3A.39 Where the charter provides that the deadweight capacity is "about" a specified amount, an allowance of 5 per cent more or less has been permitted. See *J. E. Hurley Lumber Co*. v. *Compania Panamena Maritima San Gerassimo S.A*., 1958 AMC 2502 (Arb. at N.Y. 1958); *The North Hills*, 1973 AMC 2318 (Arb. at N.Y. 1972). The use of the term "about" in describing the ship's deadweight, however, does not in the absence of qualifying language in the charter permit a reasonable allowance on the ship's actual carrying capacity for which the charterer has bargained

and paid. In *The Aghia Marina*, SMA 1236 (Arb. at N.Y. 1978), the ship's deadweight was given as "about 17,593 long tons" and the owner warranted that stores and fresh water would not exceed 300 tons. The panel rejected the owner's contention that the "about" provision should apply to actual carrying capacity. The charterer called for a cargo of 16,800 tons. Since only 16,467.78 tons were loaded, the charterer was held entitled to a hire reduction for a shortloading of 293.92 long tons for the applicable period of the voyage.

Speed and fuel consumption

3A.40 A description of the ship's speed and fuel consumption constitutes a warranty by the owner that the ship will be able to attain the stated speed at the stipulated rate of consumption under the described weather conditions. The statement is a warranty even though it is not expressly described as such in the charter. *Denholm Shipping Co*. v. *W. E. Hedger Co*., 47 F.2d 213, 1931 AMC 297 (2d Cir. 1931). Under U.S. law the ship must be capable of attaining the stated speed at the stipulated rate of consumption on the date of delivery to the charterer. It is not, however, a continuing warranty. As the court stated in *Denholm Shipping*:

> The meaning of the warranty is however another matter; it spoke from the time of delivery, and was satisfied if the ship was at that time "capable" of making the prescribed speed under the stipulated conditions. It did not follow that she would make it uniformly; that depended upon how she was driven, and whether she had become foul or disabled, even though the conditions were fulfilled. On the other hand, the charterer might assume that it meant something of practical use to him; that it spoke of ordinary service at sea; and it is not relevant whether she later made the required speed under a test by the owner, as apparently she did. We are to inquire whether when laden as intended, she could steam at the stipulated speeds in good weather and smooth seas. If the charterer showed that she could not, he proved a breach, and the best test is what she actually did during the voyage in question on such days as fulfilled the requirements. [47 F.2d at 215.]

3A.41 The warranty does not mean that the owner guarantees the ship will average the described speed throughout the period of the charter, unless the contract so provides. See *Cargo Ships El-Yam Ltd*. v. *Stearns & Foster Co*., 149 F. Supp. 754, 770 (S.D.N.Y. 1955); *The Ceres*, 72 F. 936 (2d Cir. 1896), *cert. denied,* 163 U.S. 706 (1896); *The Astraea*, 124 F.83 (E.D.N.Y. 1903). It is clearly inapplicable in bad weather or when the ship is in confined waters, such as harbors or rivers. See *The Mini Lap*, SMA 1077 (Arb. at N.Y. 1976) and *The Medita*, SMA 1150 (Arb. at N.Y. 1977). See also *The Drosia*, SMA 1303 (Arb. at N.Y. 1979), where the charterer was granted damages for owner's breach of his performance warranties in good weather, but no allowance was made for failure to meet the charter warranties in bad weather. In some charter forms, the warranty is expressly described as a continuing one which must be maintained throughout the charter. See, e.g., *The Ionic*, SMA 2519 (Arb. at N.Y. 1988).

3A.42 In contrast with English law, see paragraph 3.37, the rule in the United States appears to be that a disclaimer stating that the ship's details are provided "without guarantee" does not relieve the owner of its obligation to provide a ship that meets both the speed and consumption statements made in the charter. In *The Bavaria*, SMA 3929 (Arb. at N.Y. 2006), the charter stated that "all details believed to be correct but given w/o guarantee." The panel ruled that while the provision "may offer some protection for 'unforeseeable events' beyond the control of the initiating party, [it] does not provide for any special umbrella from speed and fuel performance claims."

3A.43 See also *The Treasure Island*, SMA 1776 (Arb. at N.Y. 1983), where the panel found that the owner's "without guarantee" disclaimer did not relieve it of liability for its representation that the ship's holds were free of obstructions. The panel found that the representation was material to the charter and was not a subjective question. The panel found that the charterer had reasonably relied on the representation about the holds, notwithstanding the "without guarantee" disclaimer.

3A.44 In determining whether the ship is in conformity with the speed warranty, the practice generally followed in New York arbitrations is to consider the ship's performance throughout the period of the charter. As the panel stated in *The Seamaid*, 1967 AMC 1362, 1364–1365 (Arb. at N.Y. 1966):

> There are two established methods of determining a speed claim. The first is. . . did the vessel make the Charter Party warranty of speed on the days when good weather conditions prevailed?
>
> Second. . . was the average speed that the vessel made on the entire voyage, taking weather conditions into consideration as well as currents, reasonable in relation to the Charter Party description?
>
> The majority of the Panel is of the opinion that both criteria should normally be used.

3A.45 In *The Stove Vulkan*, SMA 292 (Arb. at N.Y. 1968), the panel held that the method it should follow in determining whether there was a breach of the speed warranty was as follows:

> It was decided by the Panel that the average speed attained by the vessel on only those days when she was fully loaded and the weather was force 4 or less, coupled with a few other days when force 5 and 6 winds were generally following this ship, should be truly indicative of her capability made evident during this charter.

3A.46 In *The M/V Fomalhaut*, SMA 4145 (Arb at N.Y. 2011) (Szostak, Mordhorst, Berg), the Panel found that although the charter had separate representations for the ship's laden and ballast speeds and consumptions, the warranty was a single one covering the entire charter period, and thus the ship's performance during the entire charter must be considered together.

3A.47 In *The Waralee Naree*, SMA 4018 (Arb. at N.Y. 2008) (Sheinbaum), the arbitrator held that the methodology, analysis and evidence/reports used and presented by the Charterer did not meet its burden of proving breach of the speed warranty and did not justify withholding of hire. The arbitrator relied on *The M/V Grace V*, SMA 1760 (Arb. at N.Y. 1982) and *The Mangalina*, SMA 2839 (Arb. at N.Y. 1990), for support.

3A.48 In *The Penta*, SMA 1603 (Arb. at N.Y. 1981), the charter was on the Baltime 1939 form and stated "and fully loaded capable of steaming about 16½ knots in good weather and smooth water." The arbitrators held that in evaluating the charterer's speed claim, the criterion to be used was to review the ship's actual performance under the described weather conditions. They found that the ship had actually met her warranted speed at these times and proved her ability to comply with the speed warranty. See also *The Mount Athos*, SMA 1570 (Arb. at N.Y. 1981); *The Dimitris Perrotis*, SMA 3562 (Arb. at N.Y. 1999) (under a time charter the proper method to determine performance is to review the overall charter period).

3A.49 The "distance/speed" theory, by which the ship's performance is evaluated by dividing the distance traveled by the time required for the voyage, has been repudiated in some arbitrations as a means of determining whether there is a speed deficiency. See *The Bedeburn*, 1931 AMC 1678 (Arb.); *The Cape Palmas*, SMA 440 (Arb. at N.Y. 1964).

3A.50 Once a speed deficiency has been determined, any charter hire reduction should apply only to those periods when time was lost as a result. In *The Alpheos*, SMA 3473 (Arb. at N.Y. 1998), where it was shown that the ship's performance in good weather amounted to only 13.09 knots, as compared with the warranted speed of "abt 14k," the panel nonetheless denied charterer's contention that it was entitled to a set-off from hire for a speed deficiency. The panel stated as follows:

> The Charter party does not provide for liquidating damages and, therefore, failure of the vessel does not, in itself, validate Charterers' off-setting speed deficiency claim. On the contrary, unlike some tanker charter parties, which expressly penalize a vessel for speed deficiencies, or reward its owner for over-performance, the NYPE form of time charter requires Charterers to demonstrate damages, usually a showing of lost time. Although the Navitech report concludes that the vessel under-performed both sea passages by 0.08 days, the speed at which the separate sea passages were performed had no adverse effect on Charterers.

3A.51 Similarly, in *The Superten*, SMA 3304 (Arb. at N.Y. 1996), the panel majority noted that where there is a breach of the speed warranty on a New York Produce Exchange form of a charter, "Owner would only be liable to the extent of time lost calculated on how much longer each voyage took at the proven speed multiplied by the daily charter hire rate."

3A.52 In *The Olympic Garland*, SMA 1209 (Arb. at N.Y. 1978), where the ship failed to maintain its guaranteed average speed of 15.75 knots in moderate weather, the resulting hire deduction was neither based on the entire period of the contract including port time, nor limited only to the moderate weather steaming period, but was based on the period it would have taken the ship to cover the charter distance at the ship's actual moderate weather speed of 14.83 knots. In *The Mangalia*, SMA 2839 (Arb. at N.Y. 1991), the panel held that performance for the entire voyage should be evaluated based on the average speed during moderate weather.

3A.53 In *The Sly Fox*, SMA 3749 (Arb. at N.Y. 2002), the panel rejected the charterer's claim for lost profits allegedly caused by the ship's failure to meet its speed and consumption warranties, relying on a clause of the charterparty that excluded consequential damages.

3A.54 The speed warranty must also be considered in connection with the owner's undertaking under Clause 1 to maintain the ship in a thoroughly efficient state during the service. This undertaking requires that the ship be maintained throughout the charter in substantially the same condition as she is in at the commencement of the charter, insofar as the performance warranties are concerned. If a defect in the hull, machinery or equipment arises after delivery and adversely affects the ship's speed and fuel consumption, the charterer may have a basis for asserting a claim against the owner under that clause, even if it is unable as a practical matter to show a breach of the speed warranty on the date of delivery. See *Hellenic Bulk Transport S.A*. v. *Burmah Oil Tankers Ltd*., SMA 1086 (Arb. at N.Y. 1976); *Compania Venetico de Navegacion S.A*. v. *Presthus Chartering A/S*, SMA 1110 (Arb. at N.Y. 1977); *Romano* v. *West India Fruit & S.S. Co*., 151 F.2d 727 (5th Cir. 1945); *The Astraea*, 124 F. 83 (E.D.N.Y. 1903).

3A.55 In *The Grace V*, SMA 1760 (Arb. at N.Y. 1982), the panel refused to accept a charterer's speed claim based upon a report prepared by a weather routing service:

> Arbitration panels have consistently held in the past that a speed claim based upon actual time consumed on a voyage, adjusted for assumed weather conditions derived from inconclusive sources, fails.
>
> Further, the method employed by Charterer in its speed claim presentation based upon the findings of the weather service utilized, effectively converts the speed evaluation under the charter party to an *all weather* computation, whereas the language of the contract and commercial interpretation exclude heavy weather periods from consideration. [Emphasis in original.]

3A.56 Arbitration panels have preferred to rely upon ship's logbooks over reports prepared by independent weather routing services. See, e.g., *The Dimitris Perrotis*, SMA 3562 (Arb. at N.Y. 1999), holding that the ship's good weather speed was deficient. Panels will generally rely on the ship's records unless there is proof that the records are "so at variance with any conceivable prevailing condition that they lack integrity or that no reliance whatsoever should be given to them." *The Manila Enterprise*, SMA 2060 (Arb. at N.Y. 1983). See *The Myrina*, SMA 3846 (Arb. at N.Y. 2004); *The Nilam*, SMA 2705 (Arb. at N.Y. 1990); *The Georgios*, SMA 2005 (Arb. at N.Y. 1984); *The Trade Endeavor*, SMA 1916 (Arb. at N.Y. 1983); and *The Spray Cap*, SMA 1706 (Arb. at N.Y. 1982). In some cases, the weather routing service report has been found to be more reliable than the ship's logs. See, e.g., *The United Bounty*, SMA 2040 (Arb. at N.Y. 1984).

"About"

3A.57 The speed description is usually modified by the word "about". This frequently has been held to give the owner an allowance of half a knot below the described speed. See, e.g., *The SCM Mexico*, SMA 3885 (Arb. at N.Y. 2005); *The Pella*, SMA 3614 (Arb. at N.Y. 2000); *The Northern Clipper*, 1967 AMC 1557 (Arb. at N.Y. 1967); *The Ghikas*, SMA 686 (Arb. at N.Y. 1972); *Byzantine Maritime Corp*. v. *Matthew Shipping Co. Ltd*., SMA 972 (Arb. at N.Y. 1975); *The Skadi*, SMA 789 (Arb. at N.Y. 1973); *Hellenic Bulk Transport S.A*. v. *Burmah Oil Tankers Ltd*., SMA 1086 (Arb. at N.Y. 1976); *The Panagiotis Xilas*, SMA 1035 (Arb. at N.Y. 1976); *The Grand Integrity*, SMA 671 (Arb. at N.Y. 1971); *The Stove Vulkan*, SMA 292 (Arb. at N.Y. 1968); *The Aghia Marina*, SMA 1236 (Arb. at N.Y. 1978); *The Argo Master*, SMA 1489 (Arb. at N.Y. 1980); and *The Astro Energy*, SMA 2771 (Arb. at N.Y. 1991). However, the interpretation of the "about" provision may depend upon the facts of each case and the intent of the parties as expressed in the entire charter. See *Cargo Ships El-Yam Ltd*. v. *Stearns & Foster Co*., 149 F.Supp. 754, 1957 AMC 668 (S.D.N.Y. 1955). Thus, it is possible the panel would find that the parties intended a greater or smaller allowance should be applicable. For example, in *The Seamaid*, 1967 AMC 1362 (Arb. at N.Y. 1966), nine knots was held to be a reasonably average all-weather speed for a 20-year-old ship described in the charter as capable of "about 10 knots." In *The Adelfoi*, 1972 AMC 1742 (Arb. at N.Y. 1972), the panel held that the warranty of 13 knots on the stated consumption of 26 tons would have been satisfied if the ship had made 12.6 knots, based on an allowance of .5 knot for "about" and adding .1 knot for the fact that the ship was not always fully laden. In *The Chris*, SMA 199 (Arb. at N.Y. 1958), "about" was held to permit an allowance of .33 knot, against the warranty of "about 10 knots."

3A.58 See *The FFM Matarengi*, SMA 2592 (Arb. at N.Y. 1988) for an example of a charter in which the word "about" had been deleted and no modification of the warranty was allowed.

"Good weather"

3A.59 "Good weather" is generally held to mean winds of Force 4 or below on the Beaufort Scale: *The Astro Energy*, above; *The Northern Clipper*, above; *The Miami*, SMA 240 (Arb. at N.Y. 1967); *The Costa Rican Trader*, SMA 203 (Arb. at N.Y. 1967); *The Argo Sky*, SMA 627 (Arb. at N.Y. 1971); *The Adelfoi*, 1972 AMC 1742, 1743 (Arb. at N.Y. 1972); *The Alma*, SMA 261 (Arb. at N.Y. 1964); and *The Union Mariner*, SMA 89 (Arb. at N.Y. 1960). In *The Stove Vulkan*, SMA 292 (Arb. at N.Y. 1968), the panel held that "good weather" is inclusive of Force 4 and can even be Force 5 or 6 when such winds are following or on the ship's quarter.

3A.60 In *The M/V Fomalhaut*, SMA 4145 (Arb at N.Y. 2011) (Szostak, Mordhorst, Berg), the panel considered the proper meaning of Douglas Sea State 3 in the definition of a good weather day. Sea State 3 is generally described as having maximum wave heights of 1.25 meters. The panel concluded that this referred to the "Significant Wave Height" and not the "Average Wave Height." Thus, the panel rejected charterer's contention that the observed wave conditions were subject to a conversion factor.

3A.61 In *The FFM Matarengi*, SMA 2592 (Arb. N.Y. 1988), the panel held that "moderate weather" should be measured by wind conditions up to and including Force 4. In *The Leonidas Glory*, SMA 2753 (Arb. at N.Y. 1991), the New York Produce form was modified to provide that "good weather" was up to Force 3 with no adverse current or swell. See *The Ypapadi*, SMA 2814 (Arb. at N.Y. 1991), for a case involving a charter which contained an all-weather performance guarantee by the owner.

3A.62 *The Superten*, SMA 3304 (Arb. at N.Y. 1996), involved a ship whose design required full

submergence of the bulbous bow and sea conditions not exceeding Force 2 to achieve its maximum speed. In that charter, "good weather conditions" was modified to "not exceeding wind force 2 Beaufort." Since the ship did not encounter such conditions during the charter period, the panel majority ruled that owner was not in breach due to a speed deficiency.

Bottom fouling

3A.63 A common problem that has arisen in connection with the speed warranty and the collateral undertaking to maintain the ship in a thoroughly efficient state is that of bottom fouling which slows the ship down. Who bears this risk?

3A.64 The earlier cases approached the problem in conjunction with the owner's obligation to drydock. Thus, where the charterer failed to bargain for a drydocking clause, fouling in the ordinary course of tropical trading was held not to be a breakdown or defect of hull within the meaning of Clause 15. *Glasgow Shipowner's Co*. v. *Bacon*, 139 F. 541 (2d Cir. 1905); *Damps. Norden* v. *Isbrandtsen-Moller Co*. (*The Katonia*), 43 F.2d 560, 1930 AMC 1441 (S.D.N.Y. 1930). As stated in *The Katonia*:

> The charterer knew the use to which the vessel was to be put, and the waters through which she would travel, and if it wished to protect itself against the consequences of marine growths encumbering the hull, specific provision for that contingency should have been made. It will not do to take chances with marine growths, and then at a later date seek to hold the owner to liability under a provision of general fitness contained in the agreement, which was designed to cover an entirely different subject matter. [43 F.2d at 562.]

3A.65 Where the charter contains a drydocking clause, it has been held that the owner is under a duty to drydock the ship to remove bottom growth if the bottom fouling is readily discernible. Thus, in *The Praxiteles*, SMA 104, 600 (Arb. at N.Y. 1964), the owner was held liable for a speed deficiency resulting from bottom fouling where the growth could have been detected and he had failed to drydock the ship. Clause 21 of the New York Produce form requires drydocking every six months in tropical trade, even if there is no reason to suspect bottom growth and drydocking appears to be unnecessary. *Munson S.S. Line* v. *Miramar S.S. Co*., 166 F. 722 (2d Cir. 1908), *cert. denied,* 214 U.S. 526 (1909); *Noyes* v. *Munson S.S. Line*, 173 F. 814 (S.D.N.Y. 1909); *Falls of Keltie S.S. Co*. v. *United States & A.S.S. Co*., 108 F. 416 (S.D.N.Y 1901). See also *The FFM Matarengi*, SMA 2592 (Arb. at N.Y. 1988).

3A.66 Some cases have tended to ignore the question of responsibility for fouling, and have simply treated the resulting slow speed as a deficiency like any other under the off-hire clause. See *The Northern Clipper*, 1967 AMC 1557 (Arb. at N.Y. 1967); *The Panagiotis Xilas*, SMA 1035 (Arb. at N.Y. 1976). See discussion of the off-hire clause at paragraph 25A.39.

3A.67 Where fouling exists before delivery, the owner must, of course, bear the responsibility. *The Atlanta*, 82 F. Supp. 218, 1948 AMC 1769 (S.D. Ga. 1948). Similarly, in *The Pomona*, SMA 118 (Arb. at N.Y. 1966), the owner was held liable for delays caused by bottom fouling which developed while the ship was off-hire for an extended period of time.

3A.68 On the other hand, bottom growth during the charter period has been held to be the charterer's responsibility. In *The Stove Vulkan*, SMA 292 (Arb. at N.Y. 1968), the charterer was held to be responsible for contributing to the speed deficiency on inward and outward voyages resulting from bottom growth during the term of the charter. The panel deducted 25 per cent of the award for a speed deficiency to account for bottom growth. In *The Mount Athos*, SMA 1570 (Arb. at N.Y. 1981), the arbitrators applied to their speed computations an allowance for speed reduction occasioned by the presence of bottom growth.

3A.69 In *The Milly Gregos*, SMA 2190 (Arb. at N.Y. 1986), the panel denied charterer's claim for a speed deficiency attributable to bottom growth which grew during the ship's prolonged stay

in the Philippines. The panel noted that charterer had the right to have the problem removed by cleaning the bottom at its expense. Similarly, in *The Mykali II*, SMA 2240 (Arb. at N.Y. 1986), the panel held that bottom and propeller fouling during the ship's prolonged stay at Durban "was a natural and foreseeable consequence of the vessel's complying with charterer's orders." The panel declined charterer's claim that the ship was off hire, as well as its claim for excess consumption.

3A.70 In *The Happy Empress*, SMA 2599 (Arb. at N.Y. 1989), the owner's claim for hull cleaning costs was disallowed based on the majority's finding that the charter contained no language under which the charterer was responsible for cleaning the hull and that the owner failed in its duty to provide a ship in every way fit for the voyage. The case involved a hybrid voyage and time charter modified to provide for floating storage. Compare *The Grand*, SMA 2548 (Arb. at N.Y. 1989), which also involved a voyage charter modified to allow for storage. The charterer was held liable for the cost of removing barnacles from the ship's hull as required by the discharge terminal to prevent damage to the cargo hoses.

Fuel consumption

3A.71 The speed description is followed immediately by a representation as to the amount of fuel the ship will consume to maintain that speed. This statement is also a warranty which must be satisfied on delivery of the ship to the charterer. One panel of arbitrators held that the speed and fuel consumption warranties are not independent guarantees, but are to be read together. As the panel stated in *The Vendelso*, SMA 663 (Arb. at N.Y. 1971): "Compliance means satisfaction of both—not one in deference to the other." In *The Olympic Garland*, SMA 1209 (Arb. at N.Y. 1978), however, the arbitrators held otherwise. After noting that the combined consumptions of diesel fuel and high viscosity fuel oil determined the net consumption for which the owner was liable, and after finding that the combined overconsumption of the one fuel and under-consumption of the other resulted in a net underconsumption, the panel denied the owner's request that the value of the net balance for underconsumption of fuel be deducted from the damages for speed deficiency, holding flatly that "the speed and consumption guarantees of the contract are independent of each other and cannot be used to adjust the value of the other."

3A.72 In *The Panamax Venus*, SMA 1979 (Arb. at N.Y. 1984), however, the panel found that owner's claim for fuel underconsumption could be set-off against a charterer's claim for speed deficiency.

3A.73 As with the speed warranty, the word "about" does modify the owner's duty, although the allowance that will be permitted depends upon the facts of each case. In *The Medita*, SMA 1150 (Arb. at N.Y. 1977), the ship was given an allowance of 3 per cent for the word "about" in the charterparty description. The same allowance was applied in *The FFM Matarengi*, SMA 2592 (Arb. at N.Y. 1988). In *The Astro Energy*, SMA 2771 (Arb. at N.Y. 1991), however, the panel stated that the standard allowance in the industry for the word "about" is 5 per cent. In *The Areti S*, 1965 AMC 2116 (Arb. at N.Y. 1965), the panel held there was no breach of the warranty of about 10 knots on a consumption of 26/27 tons of fuel, where the ship made 9.5 knots on an average consumption of 24.35 tons. See also *The Atlantic Master*, SMA 510 (Arb. at N.Y.); *The Panagiotis Xilas*, SMA 1035 (Arb. at N.Y. 1976); *The United Bounty*, SMA 2040 (Arb. at N.Y. 1984).

3A.74 Like the speed warranty, the consumption warranty normally applies only to the ship's performance in the open sea. *The Eurytan*, SMA 289 (Arb. at N.Y. 1968). But see *The Alma*, SMA 261 (Arb. at N.Y. 1964), where in-port consumption was extraordinarily high and the warranty was held to have been breached.

3A.75 *The Maro*, SMA 2533 (Arb. at N.Y. 1988), involved a "slow steaming" claim arising from a voyage from South America to the former Soviet Union. Charterer instructed the ship to

proceed at "economical speed", a term not referred to in the charter. In response, the ship slow steamed at an average speed of 8.25 knots. The panel found that the result was fuel consumption of 12 more tons than would have been warranted for a full-speed voyage and the duration of the voyage was increased by 12 days. Charterer was awarded its costs over and above the calculated cost of a full-speed voyage.

Present position

3A.76 A statement as to the ship's position may constitute a warranty depending upon the importance of the statement in the circumstances. Compare *Davison* v. *Von Lingen*, 113 U.S. 40, 41 (1885) (warranty) and *Lovell* v. *Davis*, 101 U.S. 541 (1879) (no warranty).

3A.77 In *Davison*, the court found that the "time and situation of the ship were material and essential parts of the contract." Thus, according to the court, the statement as to the ship's position was a warranty, the breach of which justified cancellation or a claim for damages. According to the court:

> That the stipulation in the charter-party, that the vessel is "now sailed or about to sail from Benizaf, with cargo, for Philadelphia" is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor. [113 U.S. at 49–50.]

3A.78 See also *Himoff Indus*. v. *Seven Seas Shipping Corp*., 1976 AMC 1030, 1032–1033 (N.Y. Sup. 1976), holding that an innocent misrepresentation by the owner as to the ship's position permitted cancellation of the charter, inasmuch as the position was material because of approaching ice conditions on the St. Lawrence Seaway.

3A.79 In *Lovell*, on the other hand, the court held that the statement as to the ship's position was not a warranty, but a representation, which the charterer apparently knew to be incorrect and upon which it therefore did not rely. The ship was represented in the charter to be lying in the harbor of New Orleans, when she was in fact at sea. The ship was delayed in arriving at New Orleans, and the charterer cancelled the charter. The court held that the representation as to the ship's position should be given no significance since the charterer did not rely on it, and held for the owner.

3A.80 The result in *Lovell* would probably have been quite different, however, had the charterer not known the ship's true position and had it in fact been induced to charter the ship on the basis of the owner's misrepresentation as to her position. In these circumstances, under general principles of contract law, the charterer would have had a basis for an action for damages.

Gear and equipment

3A.81 In *The M/V CEC Castle*, SMA 4118 (Arb. at N.Y. 2011) (Nergaard, Martowski, Siciliano), the panel considered whether the owner of a ship which was capable of carrying heavy lift project cargoes misdescribed the ship by not having spreader bars or lifting beams on board. The panel found that it was customary in project cargo liftings for owner and charterer to analyze in advance the equipment and ship characteristics required to undertake the project. Although owner held itself out as an expert in heavy lift and project cargoes, that did not oblige owner to anticipate problems charterer might have where charterer failed to advise owner in advance of its requirements.

CHAPTER 4

Duration of the Charter

"13. ..... the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for
14. about ....."

4.1 The duration of a time charter is usually fixed in one of two ways. It may be agreed that the ship will be chartered for a particular period of time, say three months or a year. Alternatively, it may be agreed that the ship will be chartered for a particular voyage or series of voyages. Lines 13 to 14 of the New York Produce form and Clause 1 of the Baltime form both envisage a charter made on the first basis, referred to as a period time charter. But charters made on the second basis are common. They are referred to as time charters for a trip, or trip time charters. This chapter deals first with period time charters and then, from paragraph 4.99, with trip time charters.

Period time charters

4.2 Where parties agree that a ship will be chartered for a particular period, the charter does not automatically expire at the end of the agreed period. If the ship is still being employed in the charterers' service when the agreed period comes to an end, then, other things being equal, the charter continues and the charterers must continue to pay hire: see *The London Explorer* [1971] 1 Lloyd's Rep. 523 (H.L.). In the case of a charter on the New York Produce form, this conclusion is supported by the terms of Line 54, "hire to continue until the hour of the day of her re-delivery": see Lord Reid's comment in *The London Explorer*, at pages 527 and 528. However, the principle applies to time charters generally.

The *London Explorer* was chartered under the New York Produce form for "12 months 15 days more or less in Charterers option". She was sent on a final voyage that should have allowed redelivery well within this period but which was extended by unforeseen strikes until considerably after the agreed period of the charter had come to an end. The freight market had fallen and the charterers sought to establish that the charter, and hence their obligation to pay hire, automatically expired at the end of the charter period. They argued that after the end of the charter period, their obligation was to pay the owners damages for detention, measured by the market rate, which was, in that case, lower than the charter hire. The House of Lords rejected this argument. It was held that the obligation under Clause 4 to pay hire continued until the hour of the day of the redelivery of the ship at the end of the last voyage. The charter continued whether or not there was a breach by the charterers in failing to redeliver by the end of the charter period.

The London Explorer [1971] 1 Lloyd's Rep. 523 (H.L.).

4.3 However, the parties' agreement that the ship will be chartered for a particular period gives rise to three implied obligations.

4.4 First, the charterers are under a duty to redeliver the ship at the end of the charter period. That obligation has as its corollary that the charterers must not redeliver the ship any earlier than the end of the charter period, nor any later. The charterers' duty to redeliver the ship at the end of the charter period is discussed at paragraphs 4.30 *et seq*.

4.5 Second, the charterers must ensure that their voyage orders are legitimate, meaning consistent with their obligation to redeliver the ship at the end of the charter period. That requires that the charterers only give orders that the ship can reasonably be expected to complete within the charter period. Voyage orders which the ship cannot reasonably be expected to perform without overrunning the charter period are illegitimate. This duty is discussed at paragraphs 4.64 *et seq*.

4.6 Third, the owners have a corresponding duty to allow the ship to remain in the charterers' employment until she has completed the charterers' final legitimate voyage orders. This duty is discussed at paragraphs 4.86 *et seq*.

4.7 However, before considering these duties further, the first matter to consider is the duration of the charter and how it is determined.

Determining the duration of a period time charter

4.8 Where the parties agree that a ship will be chartered for a period of time, they may agree either that she is to be chartered for a fixed period – such as "three months" – or that she is to be under charter for a variable period – such as "3–6 months" or "3 months, 15 days more or less". In either case, the duration of the charter may be qualified by the word "about". The effect of the word "about" is considered below in paragraphs 4.19 *et seq*.

Fixed duration

4.9 Where a charter is made for a fixed period – such as "three months" or "until 20 January next year" – and where the agreed period is not qualified by the word "about", the charter will, on its face, require the charterers to redeliver the ship on a particular day. However, "there is a presumption that a definite date for the termination of a time charter should be regarded as an approximate date only": see *The London Explorer* [1971] 1 Lloyd's Rep. 523, *per* Lord Reid at page 526. Or in other words, "the law presumes that any precise date agreed for redelivery must be intended by the parties to mean 'about' that date": see *The Berge Tasta* [1975] 1 Lloyd's Rep. 422, *per* Donaldson, J., at page 424. So the charterers are allowed a reasonable margin or tolerance either side of the agreed redelivery date. This margin is implied in recognition of the fact that it is not practicable for the charterers, in planning their use of the ship, to calculate exactly the day on which the final voyage will end: see *The Dione* [1975] 1 Lloyd's Rep. 115 (C.A.), *per* Denning, M.R., at page 117.

The *Blytheville* was chartered for three calendar months from 26 June 1880. The charterers ordered a final voyage which was then expected to allow redelivery four days after 26 September. Mathew, J., held that the charterers were not in breach in giving such orders.

Gray v. *Christie* (1889) 5 T.L.R. 577.

4.10 The extent of the margin that is to be implied will depend on the circumstances of the case. However, it is likely to be influenced primarily by the length of the basic charter period. In *The Berge Tasta* [1975] 1 Lloyd's Rep. 422, Donaldson, J., considered that under a consecutive voyage charter for 30 months from 25 April 1969, redelivery within 10 or 11 days of the end of the thirtieth month was just within a reasonable margin. In *The Dione* [1975] 1 Lloyd's Rep. 115, London arbitrators considered that an overlap of 8.4 days beyond a basic period of six months and 20 days would have been reasonable (although, as the Court of Appeal held, the particular charter in that case permitted no implied margin beyond the basic period). For further cases in which courts or arbitrators have had to consider what would be a reasonable margin to allow beyond a particular charter period, see paragraph 4.20, below.

Variable duration

4.11 When looking at charters for a variable period, it is helpful to start by distinguishing two different types of variable period. On the one hand, there are charters that provide for a 'tolerance' or 'allowance' either side of a particular redelivery date, for example a charter for "six months, 20 days more or less". On the other hand, there are charters that provide for a 'range' of redelivery dates, for example, a charter for "four to six months".

4.12 In one respect, both types of clause have the same effect: that is, they create a spread of dates during which the charterers are entitled to redeliver the ship. The charterers can redeliver at any time during the agreed spread, but also remain entitled to the full use of the ship until the latest date in the spread: see *Watson Steamship* v. *Merryweather* (1913) 18 Com. Cas. 294, at page 299 (a case of a redelivery range) and *The Kriti Akti* [2004] 1 Lloyd's Rep. 712 (C.A.), *per* Mance, L.J., at page 717 (a redelivery tolerance case). The charterers may therefore order the ship to perform a voyage which is expected to finish during the tolerance period: *The Kriti Akti*, above. Sometimes it is expressly stated that fixing the length of the charter is in the charterers' option (see, for example, *The Didymi* [1984] 1 Lloyd's Rep. 583 (C.A.)), but even in the absence of such words, it is the charterers who have the right to decide when the ship is redelivered during the redelivery spread.

4.13 In other respects the two types of clause are not interchangeable. In particular, the type of clause used affects the question whether the charterers are entitled to an implied margin or tolerance beyond the expressly agreed redelivery spread.

4.14 Where the parties have agreed a variable duration in the form of a tolerance clause, the rule is that there can be no implied allowance in addition to the express tolerance agreed.

The *Dione* was time chartered on the Baltime form "for a period of 6 (six) months time charter 20 days more or less in Charterers' option". The period of six months from the date of delivery ended on 8 September 1970, and 20 days more than six months on 28 September. On 24 July, while the ship was discharging at Ancona, the charterers declared their intention of sending her on another round voyage to the River Plate – a voyage which could reasonably be expected to take about 73 days, so keeping the ship in service beyond 28 September. Despite the owners' protests, the charterers sent the ship on 2 August to the Plate and she was not redelivered until 7 October. It was found as a fact by arbitrators that, if a margin was to be allowed over six months and 20 days, the actual overlap of 8.4 days was reasonable. It was held by a majority of the Court of Appeal that the clause expressly defined the margin as "20 days more or less" and left no room for any implied margin beyond this.

The Dione [1975] 1 Lloyd's Rep. 115 (C.A.).

(See also *The Matija Gubec* [1983] 1 Lloyd's Rep. 24, where Staughton, J., succinctly stated the principle established by *The Dione* and added, at page 27, "No doubt commercial convenience requires the implication of some tolerance when the parties have not provided any themselves. But commercial convenience will also be well served if they can readily provide and define their own tolerance. . .".)

4.15 Where, on the other hand, the parties have agreed a 'range' of redelivery dates, the position is more complex. In *Watson Steamship* v. *Merryweather* (1913) 18 Com. Cas. 294, Atkin, J., said, *obiter*, that where there was an express range of redelivery dates, an additional tolerance could be implied.

The *Hugin* was time chartered for a period of approximately 3 months "until 15/31 October, 1912". The charter contained printed words stipulating "hire to continue. . .until her redelivery to owners (unless lost) at a port on east coast of the United Kingdom", after which there were the handwritten words "between 15th and 31st October, 1912". The ship was only redelivered on 20 November 1912. In a claim for hire at the market rate from 31 October, Atkin, J., held:

(1) had the handwritten words not been added, a reasonable margin beyond 31 October would have been allowed for redelivery; but
(2) the addition of the handwritten words imposed an obligation on the charterers to redeliver by 31 October and the market rate was claimable from that date.

Watson Steamship v. *Merryweather* (1913) 18 Com. Cas. 294.

4.16 The view that an expressly agreed 'range' of redelivery dates is subject to a further implied tolerance gains support from remarks made in subsequent cases: see Browne, L.J., in *The Dione* [1975] 1 Lloyd's Rep. 115 (C.A.), at page 121, and Donaldson, J., in *The Berge Tasta* [1975] 1 Lloyd's Rep. 422, at page 424. See also Staughton, J.'s comments on this point in *The Matija Gubec* [1983] 1 Lloyd's Rep. 24, at page 27.

4.17 However, these decisions must be approached with caution. If a tolerance or allowance is to be implied, it must be justifiable as an implied term: see *The Dione* [1975] 1 Lloyd's Rep. 115 (C.A.), *per* Browne, L.J., at page 121. It may be necessary or obvious that some further tolerance should be allowed where the spread of redelivery dates is a narrow one, as in *Watson Steamship* v. *Merryweather*, where the spread was only 15 days. By contrast, where the spread of redelivery dates is already a wide one, it may be impossible to imply an additional tolerance. In *Bocimar* v. *Farenco Navigation* [2002] EWHC 1617 (QB) the charter was for "a period of 11 to 14 months" and the charterers redelivered five days before the expiry of the 11 months. Arbitrators declined to imply any margin, noting that the charterers could have found further employment to bring redelivery within the "broad 3 month span". Aikens, J., refused leave to appeal, saying that "the arbitrators' conclusion is probably, if not almost certainly, correct".

4.18 In all events, the parties may agree a 'range' of redelivery dates in terms that preclude the implication of any additional margin. If the charter period is defined as being between a certain "minimum" and a certain "maximum" time, the court will not imply an additional margin beyond the stated "maximum".

The *Mareva A.S.* was chartered under the New York Produce form for a trip. By addendum No. 1 the charter was extended to "five (5) months, twenty (20) days more or less in Charterers' option". Subsequently, a further addendum was concluded providing "Charterers are to keep the vessel on Time Charter for a further period of 2 months minimum, 3 months maximum, in direct continuation from the end of the full period of 5 months and 20 days". It was held by Kerr, J., that no margin beyond the further three months was to be allowed.

The Mareva A.S. [1977] 1 Lloyd's Rep. 368.

(See also for an example of a case with a minimum/maximum period, *The Johnny* [1977] 2 Lloyd's Rep. 1, and paragraph 4.55, below, and *The Gregos* [1992] 2 Lloyd's Rep. 40, at page 41, where the arbitrator found that the words "about 50 to maximum 70 days Timecharter in charterer's option" gave no margin beyond the 70 days, a finding that was accepted by both parties on appeal. See also the comments below at paragraph 4.21 as to the effect of deleting the word "about" from the New York Produce form.)

"About"

4.19 The New York Produce form qualifies the agreed duration of the charter with the word "about". This has the effect that the period stated is to be construed as an approximate period only. The word "about" imports a reasonable margin either side of the agreed period. It gives express effect to the otherwise implied presumption that a date for redelivery is flexible: see paragraph 4.9, above.

4.20 No simple rule can be stated by which to determine the extent of the margin imported by the word "about". The court or arbitrators will take the same approach to deciding what margin would be allowed as they would take if the "about" were only implied: see paragraph 4.10, above. So the extent of the allowance permitted must depend on the terms of the charter, particularly its overall length, and the circumstances of the case. In *The Democritos* [1976] 2 Lloyd's Rep. 149, a ship was chartered on the New York Produce form for "about 4 to 6 months". The arbitrators allowed a margin of five days. In *Meyer* v. *Sanderson* (1916) 32 T.L.R. 428, a ship was chartered for "about 6 months". The ship was redelivered 12 days after the end of the sixth month. Atkin, J.,` held this was beyond the tolerance allowed by "about".

4.21 In some cases, the parties agree to delete the word "about". Where they do so, is that an indication that they intend to confine the charterers to the expressly specified time of redelivery? In other words, does the deletion prevent the implication of any further tolerance? In *The London Explorer*, above, at page 527, Lord Reid was of the view that he was entitled to take note of the deletion of the word "about" from a standard printed charter form – something which he regarded as different from taking account of the deletion of words from an earlier draft drawn up by the parties themselves – but refrained from expressing a final opinion on the point. (On the general problem of deletions from standard forms of charter, see the judgment of Diplock, J., in *Dreyfus* v. *Parnaso* [1959] 1 Lloyd's Rep. 125, at page 130, and that of Staughton, L.J., in *Punjab National Bank* v. *De Boinville* [1992] 1 Lloyd's Rep. 7 (C.A.), at page 32.)

Options as to the charter period

4.22 Where the charter period is for a variable period (for example, "four to six months" or "five months, twenty days more or less"), the charterers may choose when they redeliver the ship: see paragraphs 4.11 and 4.12, above. This is called a 'performance option', that is: (i) the contract allows the charterers a choice or option as to when they redeliver; and (ii) they exercise that option simply by redelivering the ship at a time of their choosing, within the permitted spread of dates. A performance option does not have to be declared: see *The Didymi and The Leon* [1984] 1 Lloyd's Rep. 583 (C.A.), *per* Sir John Donaldson, M.R., at page 587.

4.23 However, in some cases, the charterers are given an option as to the period of the charter which requires them to make a declaration. One example of such an option is Clause 13 of the New York Produce form, discussed in chapter 23. In such cases, the charterers' option can be exercised only by being declared and, usually, if the charterers fail to declare their option in accordance with the terms of the charter, their right to exercise the option is lost: see *Empresa Cubana de Fletes* v. *Aviation & Shipping* [1969] 2 Lloyd's Rep. 257 and *The Black Falcon* [1991] 1 Lloyd's Rep. 77.

By an addendum to an existing time charter, owners time chartered their ship, the *Black Falcon*, to charterers for "a period of 6 or 8 months 15 days more or less in charterers' option – exact period to be declared latest 21/12/1987". The charterers failed to make any declaration until after 21 December. Steyn, J., held that, on the true construction of the addendum, the ship was to be chartered for a period of six months, with an option to extend that period to eight months. However, since the charterers had not declared their option within time, the primary charter period of six months applied.

The Black Falcon [1991] 1 Lloyd's Rep. 77

4.24 In both the *Empresa Cubana* case and *The Black Falcon*, the charter period was described as two alternative lengths of time. In *The Black Falcon*, the period was "6 or 8 months"; in the *Empresa Cubana* case, the period was described as "24/30 calendar months". In both cases, the court assumed, without discussion, that the shorter period was the primary or default period and the longer period was the subject of the charterers' option.

4.25 However, in some cases, the charterers have both a right *and a duty* to declare their option. Where that is the case, the charterers are still entitled and obliged to exercise their option, even after the agreed time for exercising the option has elapsed. In *The Didymi and The Leon* [1984] 1 Lloyd's Rep. 583 (C.A.), the parties agreed that the primary charter period of five years would be subject to a tolerance of "three months more or less in charterer's option to be narrowed to 45 days more or less in charterers option latest by end of the fourth year". In the middle of the fifth year of the charter, the charterers served a notice purporting to narrow the redelivery window. Staughton, J., and subsequently the Court of Appeal held: (*a*) that the charterers had a duty to give notice narrowing the redelivery spread and might be liable in damages if they failed to do so promptly in accordance with the clause; (*b*) that the late notice was effective; and that (*c*) until they

had served notice narrowing the redelivery spread, they remained entitled to redeliver at any time during the original tolerance.

4.26 Clauses which permit the charterers to extend the period of the charter to accommodate a last voyage are discussed below at paragraphs 4.79 *et seq*., below.

Off hire

4.27 Where a ship is off hire, the time spent off hire is not added to the period of the charter, unless the parties expressly agree that this shall be done: see, for an example of such an agreement, *The Kriti Akti* [2004] 1 Lloyd's Rep. 712 (C.A.).

"Duration without guarantee"

4.28 In *The Lendoudis Evangelos II* (1988) LMLN 408, it was held by Leggatt, J., that the description of a time charter trip on the New York Produce form "via safe berth(s)/port(s). . . 40/120 days duration without guarantee" imposed no obligation on the charterers to employ the ship for any minimum period, although it did require that the estimate of duration should have been made in good faith. Nevertheless, a further provision in the charter required the charterers to give "not less than 15/10 days approximate and 7 days definite notice of vessel's expected date of redelivery" and in the circumstances Leggatt, J., held that it was to be inferred that the trip would be for a minimum of 15 days. (For a further discussion of trip time charters, see paragraph 4.99.)

4.29 In a subsequent case concerning the same ship, *The Lendoudis Evangelos II* [1997] 1 Lloyd's Rep. 404, Longmore, J., followed Leggatt, J., in holding that under a charter for a trip "duration about 70/80 days without guarantee", the obligation on the charterers was no more than to have made their estimate of duration in good faith. He added at page 406, "If I were to formulate a test of good faith myself, I would say that all it requires is that the charterers genuinely believed at the time of fixing that the trip would last between 70 and 80 days." See also *The Lipa* [2001] 2 Lloyd's Rep. 17 ("all details given in good faith but without guarantee") and *Japy Frères* v. *Sutherland* (1921) 26 Com. Cas. 227 (C.A.) ("no guarantee given").

Charterers' duty to redeliver the ship at the end of the charter period

4.30 It is implicit in a time charter that the charterers are obliged to redeliver the ship at the end of the charter period. The corollary of this duty is that it is a breach of charter to redeliver the ship either before the minimum period of the charter has elapsed, or after the maximum period of the charter.

Early redelivery

4.31 If the charterers purport to redeliver before they are entitled to do so, their conduct is a repudiation of the charter. In those circumstances, the owners have a choice. They may choose to accept the redelivery or they may refuse it. If they accept it, they bring the charter to an end. Their acceptance does not have to take any particular form. It is sufficient that their decision to bring the charter to an end is communicated to the charterers: for the general principles relating to acceptance of repudiatory breach, see *The Santa Clara* [1996] 2 Lloyd's Rep. 225 (H.L.) (a sale of goods case) and, for an example of the application of those principles in the context of chartering, see *The Liepaya* [1999] 1 Lloyd's Rep. 649, *per* Rix, J., at page 670.

4.32 On the other hand, the owners may refuse to accept the redelivery of the ship. If they do so, the question then arises whether the owners can maintain the charter and continue to claim

hire. The general rule is that they can. Where one party repudiates a contract, the other party has a choice whether to accept the repudiation and claim damages or reject it and hold the other party to the contract: see *White & Carter* v. *McGregor* [1962] A.C. 413 (H.L.) and *Guys* v. *Société Générate* [2013] 1 A.C. 523 (s.c.). Applying this principle, Kerr, J., held in *The Odenfeld* [1978] 2 Lloyd's Rep. 357 that the owners were entitled for a certain period to hold the ship at the charterers' disposal and claim hire (although he indicated that with the passage of time they might have lost their right to treat the contract as continuing).

4.33 In reaching that conclusion, the judge rejected the submission that a time charter is a type of contract which involves such a high degree of co-operation that it is akin to a contract between employer and employee, where the general rule is that the servant cannot choose to maintain the contract when wrongfully dismissed. This view has been shared subsequently: see Cooke, J.'s judgments in *Lauritzencool* v. *Lady Navigation* [2005] 1 Lloyd's Rep. 260, at page 268 (upheld by the Court of Appeal, [2005] 2 Lloyd's Rep. 63), and *The Aquafaith* [2012] 2 Lloyd's Rep. 61, below.

4.34 How far does the owners' right to keep the time charter alive go? In *White & Carter* v. *McGregor*, above, Lord Reid envisaged an exception for situations where the innocent party had "no legitimate interest" in continuing to perform. Following this remark, in *The Puerto Buitrago* [1976] 1 Lloyd's Rep. 250 (see paragraph 15.28 for a summary of the facts), the Court of Appeal stated that where: (*a*) damages were an adequate remedy; and (*b*) it would be "wholly unreasonable" to refuse to accept the redelivery, the owners were bound to accept it and claim damages. Likewise Lloyd, J., in *The Alaskan Trader* (*No. 2*) [1983] 2 Lloyd's Rep. 645, said, at page 651, "there comes a point at which the Court will cease, on general equitable principles, to allow the innocent party to enforce his contract according to its strict legal terms. How one defines that point is obviously a matter of some difficulty; for it involves drawing a line between conduct which is merely unreasonable. . . and conduct which is *wholly* unreasonable". As Cooke, J., has now put it in *The Aquafaith* [2012] 2 Lloyd's Rep. 61, at [42] and [44], the owners' refusal to accept the charterers' repudiation of the charter must be "beyond all reason", that is to say "perverse", before they can be held disentitled to full hire under the charter; see also the summary of principles in Simon, J.'s judgment in *The Dynamic* [2003] 2 Lloyd's Rep. 693, at pages 697 to 698.

4.35 Thus, the principle recognised in *The Puerto Buitrago* and *The Alaskan Trader* is applicable only in very clear cases, in which the owners' behaviour has been unusual or extreme. If, however, there is nothing extraordinary or unusual about the facts, the owners are entitled to continue claiming hire. They do not lose that right merely because after a time it has become clear that there is no chance of a change of mind by the charterers.

The *Alaskan Trader* was chartered on the New York Produce form for 24 months and delivered in December 1979. In October 1980 she suffered a serious engine breakdown which it was clear would take several months to repair. The charterers indicated that they had no further use for the ship but the owners nevertheless proceeded with the repairs. The repairs were completed in April 1981 but the charterers declined to give the master any orders and said they regarded the charter as at an end. The owners did not treat the charterers' conduct as a repudiation but continued to hold the ship at the charterers' disposal, fully crewed and ready to sail, until the charter expired in December 1981. She was then sold for scrap. Hire was paid throughout by the charterers on a without prejudice basis. The charterers claimed to recover the hire they had paid on the basis that the owners should have accepted their repudiation and claimed damages.

It was held by an arbitrator that the owners were not obliged to accept the charterers' repudiation in October 1980, but that they should have done so in April 1981 as the finality of the charterers' refusal to accept the ship made it "clear that the Charter was dead". The arbitrator held further that the owners had no legitimate interest in holding the charterers to their contract rather than claiming damages, rejecting the various grounds upon which it was argued that the owners were justified in continuing to claim hire: the requirements of their bank, the difficulty in assessing damages and the difficulty in finding other employment.

Lloyd, J., upheld the award, saying that he could find no fault with the arbitrator's approach in law and that the findings of fact were a matter for him.

The Alaskan Trader (*No. 2*) [1983] 2 Lloyd's Rep. 645.

The *Aquafaith* was chartered in 2006 for 59 to 61 months, with a warranty that she would not be redelivered before the end of the 59th month on 10 November 2011. The charterers, having made it clear in early July 2011 that they had no intention of making further use of the ship, purported to redeliver her at the conclusion of her then employment on 9 August 2011, some 94 days before the end of the minimum charter period. The owners refused to treat the charter as at an end, and claimed hire for those 94 days.

It was held by an arbitrator that the owners were not entitled to the hire claimed, but were limited to damages for early redelivery, reasoning that the owners could not complete the charter without the charterers' co-operation (so that the rule in *White & Carter* v. *McGregor*, above, did not apply at all) and that owners had no legitimate interest in performing the contract rather than claiming damages because it would be possible to ascertain an appropriate damages amount to award.

Cooke, J., allowed an appeal against the award, and substituted an award for the full amount of hire claimed. The rule in *White & Carter* applied to time charters; the arbitrator had misunderstood the prior authorities and misdirected himself as to what was required to bring the exception to that rule into play. On the arbitrator's findings that there were only 94 days left of a 5-year time charter, that it would be impossible to find a substitute time charter for that period and that trading on the spot market was very difficult at the time, it was impossible for the owners' wish to maintain the charter to be characterised as unreasonable, let alone wholly unreasonable. This was not an extreme or unusual case and the exception to the *White and Carter* principle did not apply.

The Aquafaith [2012] 2 Lloyd's Rep. 61.

4.36 For a case in which there was special provision in the charter for the continuation of the payment of hire, apparently up to the end of the charter period, and hire was thus payable from the date of early redelivery until that date, see *Reindeer Steamship* v. *Forslind* (1908) 13 Com. Cas. 214.

Owners' measure of damages for wrongful early termination by the charterers

4.37 If the charterers redeliver the ship early, or if they repudiate the charter in some other way so that the charter is terminated before the end of the charter period, the proper approach to assessing damages involves comparing (1) the owners' position if the charter had been performed with (2) their position following the termination. However, as discussed below, it is relevant whether there is an available market on which the ship can be re-chartered. If there is an available market, the owners' position after the termination will generally be assessed by reference to what the owners would have earned if they had promptly re-chartered in the market. The discussion below is essentially directed at period charters. If a time charter trip is terminated upon a repudiation by the charterers, the damages exercise is generally akin to that where a voyage charter is wrongfully repudiated, as to which see *Voyage Charters* (4th edn), paragraphs 21.96 to 21.100, and, for a time charter trip example, *The Elbrus* [2010] 2 Lloyd's Rep. 315.

4.38 The assessment of what the owners' position would have been if the charter had been performed is generally a straightforward exercise of calculating what the owners would have earned under the charter (giving credit for accelerated receipt if any of the unperformed period of the charter falls after the date when damages are being assessed). However, this exercise must take into account all evidence available, at the time when damages are being assessed, as to what would have happened: see *The Golden Victory*, below. This will require the owners to prove that they would have performed their part of the contract so as to earn hire: see *The Glory Wealth* [2013] 2 Lloyd's Rep. 653.

The seven-year time charter of the *Golden Victory* included a war clause entitling either party to cancel in the event of war between listed countries including the U.S.A., the U.K. and Iraq. In December 2001, three years into the charter, the charterers repudiated and the owners accepted the repudiation. At the time, the outbreak of war between the U.S.A., the U.K. and Iraq was a mere possibility. In March 2003, however, the U.S.A. and the U.K. declared war on Iraq. In October 2004, the sole arbitrator was asked to assess the owners' damages.

On the evidence that was available to him, he found that, had the charter then been in force, the charterers would have cancelled the charter on the outbreak of war in March 2003.
Langley, J., the Court of Appeal and the House of Lords (Lord Bingham and Lord Walker dissenting) held that the owners could recover damages only for the period up to March 2003. The charterers' repudiation had deprived the owners of a contract that was always subject to termination upon an event, which event it had been proved would have occurred. In assessing damages, the courts should not ignore facts that had become known since the breach.

The Golden Victory [2005] 1 Lloyd's Rep. 443, [2005] 2 Lloyd's Rep. 747 (C.A.) and [2007] 2 Lloyd's Rep. 164 (H.L.).

4.39 Lord Bingham's dissent in *The Golden Victory*, above, was strongly expressed; Professor Treitel criticised the result after the Court of Appeal decision: see (2007) 123 L.Q.R. 9; and Lord Mustill argued after the House of Lords' decision that the minority were right: see (2008) 124 L.Q.R. 569. The majority decision does, however, seem correct. In particular, Lord Bingham's stress upon the existence of an available market as a means of crystallising the owners' loss at the time of breach is problematic. *The Golden Victory* was concerned only with the assessment of the position the owners would have been in had the charter been performed. In that assessment, evidence of an available market might perhaps be relevant, if it was a market in which the owners could have resold their rights under the charter. But Lord Bingham did not have such a market in mind (see [10]), and indeed the owners had accepted that "[their] charterparty rights would not, in practice, have been marketable for a capital sum" (*per* Lord Scott at [37]); it is thus, with respect, misleading to suggest (*per* Lord Mustill at 124 L.Q.R. 585) that the arbitrators found to exist an available market on which the "capital value" of the time charter as a financial instrument in the owners' hands could be ascertained). The different available market that Lord Bingham had in mind – for a time charter to replace the repudiated time charter – was irrelevant to the issue in *The Golden Victory*. That market is used to measure what owners are able to earn following a repudiation by the charterers, which is part of assessing the position owners have been left in by the repudiation. In any event, any hypothetical substitute charter on that market would have to be on equivalent terms to the terminated charter, if it were to be a fair measure of the owners' loss. Those terms would include the war cancellation clause, so one is back to the majority decision: on the evidence, the owners would have been thrown back on to the market in March 2003, with or without the charterers' repudiation; there could therefore be no damages for repudiation beyond March 2003.

4.40 Where there is an available market for substitute employment, the owners may or may not take advantage of that market. If they do not take advantage of it, choosing instead to employ the ship in some different way, they may earn more or less than if they had taken advantage of it. For present purposes, as a working definition, there is an available market where that which has been lost can be satisfactorily (even if not exactly) replaced, at a price fixed by a functioning system of supply and demand: see *The Arpad* [1934] P. 189, *Charter* v. *Sullivan* [1957] 2 Q.B. 117, *Shearson Lehman Hutton* v. *Maclaine Watson* (*No.2*) [1990] 1 Lloyd's Rep. 441, *Petrotrade* v. *Stinnes Handel* [1995] 1 Lloyd's Rep. 142 and *The Kildare* [2011] 2 Lloyd's Rep. 360. In the case of period time charters, that means a market on which the ship could be re-chartered for the balance of the charter period on terms (other than the rate of hire) generally similar to those of the repudiated charter.

4.41 Where the owners take advantage of the available market, making a similar substitute fixture by re-chartering the ship in the market at the time of or shortly after the early redelivery, the proper measure of loss is likely to be the difference between what the owners would have earned under the charter and what they did in fact earn: see, for example, *The Riza and The Sun* [1997] 2 Lloyd's Rep. 314. In such a situation, assuming no failure to mitigate, the ship's actual earnings will reflect the relevant market.

4.42 Where the owners do not take advantage of the available market, deciding instead not to re-charter the ship, or to re-charter the ship in a wholly different market, they cannot recover

more than the loss that they would have suffered if they had made a similar substitute fixture at or shortly after the termination of the original charter: see, by way of analogy, two cases involving repudiation by the owners: *The Elena D'Amico* [1980] 1 Lloyd's Rep. 75 and *The Wave* [1981] 1 Lloyd's Rep. 521, *per* Mustill, J., at page 532.

4.43 What, however, is the position if the owners do not take advantage of the available market but instead find better-paid employment for their ship? In that case, the owners will ultimately have suffered a smaller loss than they would have done if they had re-chartered their ship in the market. In those circumstances, are the owners entitled to the full amount of the loss they would have suffered on the market? Or are damages to be measured by reference to the employment that they actually found for the ship? Robert Goff, J.'s analysis in *The Elena D'Amico* [1980] 1 Lloyd's Rep. 75, at pages 89 and 90, suggests that the owners are entitled to the market measure of loss. Judge Chambers Q.C. held that to be the law, in a case where the defendants, guarantors of the charterers, did not participate and so made no contrary submission: *Star Reefers Pool* v. *JFC Group* [2011] EWHC 542 (Comm), at [189]; the difficult case of *The North Prince* [2011] Lloyd's Rep. Plus 19 can only satisfactorily be explained by saying that David Steel, J., applied that as the law; Popplewell, J., took it to be the law in *The New Flamenco* [2014] 2 Lloyd's Rep. 230, at [42]; and it can be argued that all members of the House of Lords in *The Golden Victory* proceeded on the basis that where there is a relevant available market, the owners' actual conduct is irrelevant. As explained below at paragraph 4.92, awarding the owners the market measure of loss in this case involves saying that an above-market employment secured for the ship after a wrongful early termination by the charterers is an independent speculation by the owners and not a result of the charterers' breach. However, *The Elena D'Amico* was a case of repudiation by owners and it may be that slightly different considerations apply there, as the charterers are not inherently tied to the withdrawn ship. Moreover, there are difficult, and conflicting, decisions in the field of sale of goods on the extent to which a claimant's loss must be measured by the market at the date of the breach, rather than his actual pecuniary position following the breach (including *Wertheim* v. *Chicoutimi Pulp* [1911] 1 A.C. 301 (P.C.); *Slater* v. *Hoyle & Smith* [1920] 2 K.B. 11 (C.A.); *Bence Graphics International* v. *Fasson* [1988] Q.B. 87). In the circumstances, the law on this issue cannot be regarded as settled.

4.44 Where there is no available market, the owners are entitled to such sum as would put them in the same financial position as if the charter had been performed, taking account of what the owners have in fact chosen to do with the ship for that period (assuming they have acted reasonably): see, for example, *The Griparion* [1994] 1 Lloyd's Rep. 533, *per* Rix, J., at page 537, a case in which a ship on demise charter was redelivered before the end of the charter period in a condition so bad that there was no market in which it could have been re-chartered, and *The Flamenco C* [2014] Lloyd's Rep. Plus 59, a case in which the owners of a cruise ship sold her upon finding no employment for her after a redelivery two years early. In the latter case, the ship was worth much more when sold than she would have been at the end of the charter two years later and the question was whether that had to be brought into account in the calculation of damages for the early redelivery. Popplewell, J., held at [64]–[65] that it did not – in principle, a benefit in relation to the capital value of the ship might require to be brought into account, but only if it was "legally caused by the breach", and the high sale price achieved by the owners was not so caused, for reasons given by the judge at [66]–[73]. It has been held at first instance that this approach applies, and *The Elena d'Amico* analysis considered above is therefore irrelevant, where there is no market to fix for the balance of the repudiated period at the time of the repudiation, but there is such a market thereafter, so that (for example) the owners, having been forced to trade differently for some time could then have replaced (the balance of) what they had lost: see *The Kildare* [2011] 2 Lloyd's Rep. 360; *The Wren* [2011] 2 Lloyd's Rep. 370. It is not easy to see how that can be right

if *The Elena d'Amico* analysis applies to owners' damages, providing a measure of, and not merely a cap upon, those damages (see paragraph 4.43 above), and the issue would merit consideration in a higher court.

4.45 Where (as is normal) the charterers have the right to choose when they redeliver the ship within a range of dates permitted by the charter, it is to be assumed in their favour that they would have redelivered the ship at the earliest possible time: see *The Riza and The Sun* [1997] 2 Lloyd's Rep. 314, *per* Timothy Walker, J., at page 321 and, for analogous cases, *The World Navigator* [1991] 2 Lloyd's Rep. 23 and the prior authorities reviewed there. This does not appear to be affected by the review of this 'minimum performance' aspect of damages in *Durham Tees Valley Airport* v. *BMIBaby* [2011] 1 Lloyd's Rep. 68.

Late redelivery

4.46 Where parties have agreed that the ship will be chartered for a period of time, the charterers are under a duty to ensure that the ship is redelivered at the end of that period: see *The Peonia* [1991] 1 Lloyd's Rep. 100 (C.A.). In practice, that means that the charterers must ensure that the end of the ship's final voyage under the charter coincides with the end of the charter period.

The *Peonia* was chartered on the New York Produce form for "about minimum 10 months maximum 12 months time charter, exact duration in charterers' option". Line 15 added, "Charterers have further option to complete last voyage within below mentioned trading limits". She was delivered on 11 June 1987. On 6 May 1988 the charterers fixed her for a voyage which would have prevented redelivery before 19 July. The owners protested, demanding voyage orders that would allow redelivery by 25 June (allowing 14 days for the word "about"). Such orders were not forthcoming and eventually the owners withdrew.

The charterers claimed that the "further option" in Line 15 gave them the right to order the ship on a final voyage which could not be expected to allow redelivery within the charter period. Their argument was that as they were entitled to pay at the charter rate for any overrun on a legitimate final voyage even if by then the market rate were higher, their "further option" must give them an additional right, namely to send the ship on a final voyage that would otherwise be illegitimate in that it could not be expected to allow redelivery within the charter period.

This argument was rejected by Saville, J., in the Commercial Court, and by the Court of Appeal. Ordinarily under a time charter the charterers would be in breach, despite the legitimacy of their final voyage orders, if they failed (otherwise than because of fault by the owners) to redeliver by the end of the charter period and would be liable thereafter to pay as damages the market rate if higher than the charter rate. In this particular case, the further option under Line 15 gave the charterers protection against this potential liability in damages rather than the wider right that they claimed.

Hyundai Merchant Marine v. *Gesuri Chartering* (*The Peonia*) [1991] 1 Lloyd's Rep. 100 (Commercial Court and C.A.).

4.47 In *The Peonia*, above, at page 107, Bingham, L.J., said: "It would seem to me. . . that every time charter must have a final terminal date, that is a date by which (in the absence of an exonerating cause) the charterer is contractually obliged to redeliver the vessel. Where the law implies a margin or tolerance beyond an expiry date stipulated in the charter-party, the final terminal date comes at the end of such implied extension. When the parties have agreed in the charter-party on the margin or tolerance to be allowed, the final terminal date comes at the end of such agreed period. But the nature of a time charter is that the charter is for a finite period of time and when the final terminal date arrives the charterer is contractually bound (in the absence of an exonerating cause) to redeliver the vessel to the owner." However, the charterers are not liable for failing to redeliver the ship on time if that failure is caused by fault on the part of the owners, whether or not that fault is strictly a breach of charter: see Bingham, L.J.'s comment at page 108.

4.48 Prior to the decision in *The Peonia*, it had been widely believed that the charterers did not break the charter by redelivering the ship after the end of the charter period, provided that

their final voyage orders were legitimate orders, that is to say provided that when the final voyage orders were given, it was reasonably expected that the ship would be redelivered at the end of the charter period. This view was reflected in many of the authorities that pre-date *The Peonia* (see, for example, *per* Lord Denning, M.R., in *The Dione* [1975] 1 Lloyd's Rep. 115, at page 117).

4.49 However, *The Peonia* dispelled this belief and, subsequently, in *The Gregos* [1995] 1 Lloyd's Rep. 1, the House of Lords proceeded on the basis that the decision of the Court of Appeal in *The Peonia* was correct. (For the facts of *The Gregos*, see paragraph 4.70, below.)

4.50 The obligation to redeliver the ship no later than the end of the charter period is probably an intermediate term. In Lord Mustill's speech in *The Gregos* [1995] 1 Lloyd's Rep. 1, at page 9, he tentatively stated this conclusion, saying that "a short delay in redelivery would not justify the termination of the contract". Lords Ackner, Slynn and Woolf agreed with him. Lord Templeman, however, reached the opposite conclusion, saying, at page 3, that the time for redelivery of the ship by the charterer to the owner at the end of the charter period is a condition of the contract, absent any provision in the contract to the contrary.

4.51 For the circumstances in which a "last voyage" clause will excuse a failure to redeliver the ship on time, see paragraphs 4.79 *et seq*., below.

Owners' measure of damages for late redelivery

4.52 Where the charterers fail to redeliver the ship at the end of the agreed charter period and the market rate of hire at that time exceeds the charter rate, the owners are entitled to damages compensating them for the loss of the opportunity to take advantage of the market rate during the period of the overrun. In certain circumstances, discussed below at paragraphs 4.57 *et seq*., the owners may also be entitled to recover in respect of additional losses.

The normal measure

4.53 The normal measure of damage is the difference between what the owners earned in hire under the charter during the period of the overrun and what the market would have paid for the use of the ship during the same period. An early statement of this measure of damages is in Atkin, J.'s judgment in *Watson* v. *Merryweather* (1913) 18 Com. Cas. 294. More recently Bingham, L.J., stated that this was the owners' measure of damages in *The Peonia* [1991] 1 Lloyd's Rep. 100 (C.A.), at page 108, and his statement was adopted by Lord Mustill in *The Gregos* [1995] 1 Lloyd's Rep. 1 (H.L.), at page 5. The House of Lords confirmed the correctness of this measure in *The Achilleas* [2008] 2 Lloyd's Rep. 275, discussed at paragraphs 4.58 *et seq*., below.

4.54 The damages recoverable under this normal measure are limited to those suffered during the period of the overrun. For these purposes, the overrun is the period from the latest time at which the ship could lawfully have been redelivered, up to the date on which she was in fact redelivered. In *The Black Falcon* [1991] 1 Lloyd's Rep. 77, Steyn, J., held, at page 80, that this was the proper definition of the overrun, even in a case where the ship had been sent on an illegitimate last voyage (as to which see paragraphs 4.64 *et seq*., below). He rejected the owners' argument that in such a case the overrun should be the period between the date on which the ship would have redelivered if she had not been sent on an illegitimate last voyage and the date on which the ship was in fact redelivered. In *The Paragon* [2009] 2 Lloyd's Rep. 688, the Court of Appeal confirmed the view that where a charter overruns, the last voyage having been illegitimate, the measure of damages is the same as in the case of a legitimate last voyage that overruns and so held that a provision requiring the charterers to pay the market rate for the 30 days before the late redelivery, whatever the length of the overrun, was a penalty and therefore unenforceable.

4.55 In applying this normal measure, there may be a question as to *which* market should be used to fix the market rate for the ship. Should it be the market for period time charters or should it be the market for a time trip charter similar to the voyage on which the ship is engaged at the time of the overrun? In *The Johnny* [1977] 2 Lloyd's Rep. 1, the Court of Appeal confronted a similar problem when it was called upon to construe the phrase 'the market rate' in Clause 7 of the Baltime form. In that case Clause 7 read, "Should the vessel be ordered on a voyage by which the Charter period will be exceeded, the Charterers to have the use of the vessel to enable them to complete the voyage, . . . but for any time exceeding the termination date of the Charter the charterers to pay the market rate if higher than the rate stipulated herein." A majority of the Court of Appeal held that the relevant market was the market for period time charters of a length similar to that from which the ship was redelivered late. Lord Denning, dissenting, said, at page 2, that the appropriate rate was the rate payable for a time trip charter similar to the voyage on which the ship was engaged at the time of the overrun. He commented that, where the ship is sent on an illegitimate last voyage, and the charter contains no provision equivalent to Clause 7, "the owners could recover either damages or a *quantum meruit*. . . In either case, the amount would be assessed at the market rate then ruling for a time charter trip for that voyage at that time".

The *Johnny* was chartered for minimum 11/maximum 13 calendar months under the Baltime form. The maximum 13 calendar months expired on 7 November. On 19 September the charterers fixed the ship for a voyage from U.K./Continent to Karachi. She loaded at Rotterdam between 2 and 18 October and was redelivered in Karachi on 7 December. The owners, who conceded that Clause 7 applied, argued that they were entitled to hire from 7 November to 7 December at the current market rate for a time charter trip from U.K./Continent to Karachi. The charterers contended that the appropriate rate was the current market rate for an 11/13 months' time charter. It was held by a majority of the Court of Appeal that the use in Clause 7 of the words "if higher than the rate stipulated herein" pointed to a comparison between period charter rates at different times and not to a comparison between a rate for a period and a rate for a trip: accordingly the appropriate market rate was the current rate for a period charter as nearly as possible identical to the original charter.

The Johnny [1977] 2 Lloyd's Rep. 1.

4.56 The normal measure of loss can be applied only where there is a market for equivalent ships. Where there is no such market, the damages to which the owners are entitled are such sum as would put them in the same financial position as if the charter had been performed – that is to say, as if the ship had been redelivered on the last permissible day for redelivery – and normal rules of causation and remoteness apply to the assessment of those damages.

Additional losses

4.57 In addition to losing the opportunity to take advantage of an increased rate of hire, the owners may suffer other loses as a result of late redelivery. Such losses may arise either during the period of the overrun or after it.

4.58 One additional loss that the owners may suffer is the loss of the next charter which the ship was due to perform. In *Transfield Shipping* v. *Mercator Shipping* (*The Achilleas*), below, the question arose whether damages for such a loss could be recovered, or whether the owners' damages were limited to the normal measure of loss discussed above. The arbitrators (by a majority), Christopher Clarke, J., and the Court of Appeal, all decided that such damages were recoverable. The House of Lords reversed those decisions and limited the owners' damages to the normal measure.

The *Achilleas* was chartered on the New York Produce form for an initial period of about five to seven months, which was extended for a further period of minimum five months maximum seven months ending on 2 May 2004. On 20 April the charterers gave notice of redelivery between 30 April and 2 May.

On 21 April the owners fixed the ship's subsequent employment, which was a time charter for about four to six months with cancelling on 8 May. There was no evidence that there was anything out of the ordinary about this follow-on fixture, although the market had been rising strongly and this was naturally reflected in its rate of hire. The ship was not redelivered under the original charter by the latest permissible date, that is, 2 May. She was ultimately only redelivered on 11 May. By 5 May, the owners had realised that the ship would miss the cancelling date under the follow-on charter. They therefore negotiated an extension of that date beyond 8 May. However, during the two weeks that had elapsed since the follow-on charter had been fixed, the market had fallen back sharply. Therefore, in order to secure an extension of the cancelling date, the owners had to agree to a reduction in the rate of hire for the whole period of the follow-on charter. The reduction fairly reflected the then current market rate.

Arbitrators, by a majority, awarded the owners damages for late redelivery, which they assessed as the value of the hire that the owners lost under the follow-on charter. That loss continued until 18 November, which was when the follow-on charter came to an end. In the arbitration, the charterers had conceded that, as a matter of fact, if a ship were redelivered late, it was 'not unlikely' that, as a result, the ship might miss: (a) a subsequent fixture or (b) a dry-docking or (c) the delivery date under a contract for the sale of the ship. The majority of the arbitrators decided that this concession had been rightly made, commenting, "in today's market with its ease of communication and much higher emphasis on maintaining a vessel in almost continuous employment those 'not unlikely results' are known, recognised and accepted hazards of late redelivery".

The charterers appealed the award. They argued that there was an established normal measure of damages for late redelivery, namely the difference between the charter rate and the market rate for the period of overrun, which was in this case, from 2 to 11 May. Loss of profit under the follow-on charter could be relevant only if the charterers had been told, at or before the time at which the period of the original charter was extended, that the owners intended to use the ship for a particular follow-on charter and that it was therefore critical that the ship be redelivered on time.

Christopher Clarke, J., and the Court of Appeal upheld the award of the majority arbitrators.

In the Court of Appeal, Rix, L.J., held there was no binding authority in support of the special rule argued for by the charterers, as none of the cases on which the charterers relied involved the loss of a follow-on charter. Moreover, the supposed rule in question did not derive support from principle or pragmatism. The ordinary test of remoteness should apply to damages resulting from late redelivery. Both parties in this case were experienced in the chartering market and thus aware: (a) that it was probable that an owner would refix his ship from a date shortly after expected redelivery under the preceding charter and (b) that rates of hire rise and fall, sometimes rapidly.

The House of Lords reversed the Court of Appeal and restricted the owners' damages to those admitted by the charterers, namely the difference between the charter rate and the market rate for the period of overrun.

Lord Hoffmann, Lord Hope and Lord Walker said that although a party to a contract would normally be liable in damages for a particular kind of loss only if a loss of that kind was within the reasonable contemplation of the parties as not unlikely to result from a breach of that contract, that was not the only relevant issue. It was also necessary that, on a proper interpretation of the contract, the party eventually in breach ought fairly to be taken to have assumed responsibility for that type of loss.

Lord Rodger agreed that the appeal should be allowed, but on a narrower ground, and Baroness Hale entertained doubts as to whether the appeal should be allowed at all, but said that if it was to be allowed, it should be only on the narrower ground identified by Lord Rodger.

Transfield Shipping v. *Mercator Shipping* (*The Achilleas*) [2007] 1 Lloyd's Rep. 19, [2007] 2 Lloyd's Rep. 555 (C.A.) and [2008] 2 Lloyd's Rep. 275 (H.L.).

4.59 The additional requirement that the party eventually in breach ought fairly to be taken to have assumed responsibility for the relevant type of loss echoes the analysis of the scope of a duty of care set out in *South Australia Asset Management* v. *York Montague* [1997] A.C. 191, and is to be taken as the *ratio decidendi* of the House of Lords decision in *The Achilleas*: see *Supershield* v. *Siemens Building Technologies* [2010] 1 Lloyd's Rep. 349 (C.A.). On the facts of *The Achilleas*, the parties would not have considered that the charterers were assuming responsibility for the loss of any follow-on charter. The charterers would not have had any control over – or even knowledge of – the terms of such a charter, nor would they have been able to quantify the liability they were assuming. In *John Grimes* v. *Gubbins* [2013] EWCA Civ 37 (C.A.) Sir David Keene said, at

[24], "It seems to me to be right to bear in mind, as Lord Hoffmann emphasised in *The Achilleas*, that one is dealing with the law of contract, where the situation is governed by what has been agreed between the parties. If there is no express term dealing with what types of losses a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term to determine the answer. Normally, there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken. But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability. Such was the case in *The Achilleas*".

4.60 In the light of the cases since *The Achilleas*, especially *Supershield*, above, *John Grimes* v. *Gubbins*, above, and *The Sylvia*, below, we suggest the law on remoteness of loss may now be summarised as we have in the Glossary, below at G.11. As a result, we suggest that Lord Rodger was correct to say in *The Achilleas* that if, at the time when the original charter was being entered into, the owners had drawn the charterers' attention to an existing follow-on charter with a specific cancelling date, then the charterers could be liable to pay damages for its loss if they failed to redeliver in time to meet that cancelling date, at all events in the absence of anything to indicate that they refused to accept such responsibility. Similarly, it may also be the case that the charterers will be held liable for the loss of a follow-on fixture caused by the charter overrunning in circumstances where they have insisted upon an illegitimate voyage order in the knowledge that the owners had fixed a particular follow-on charter: see *per* Rix, L.J., at page 577 of the Court of Appeal report.

4.61 Lord Rodger also raised the possibility that if at the time of making the original charter the charterers could reasonably have contemplated "that late redelivery of a vessel of that particular type, in a certain area of the world, at a certain season of the year would mean that the market for its services would be poor. . . the owners might have a claim for some general sum for loss of business, somewhat along the line of the damages for the loss of business envisaged by the Court of Appeal in *Victoria Laundry* (*Windsor*) *Ltd* v. *Newman Industries Ltd* [1949] 2 KB 528, pages 542–543". Again, we suggest that such a claim would be sound in principle, if the necessary finding of fact is made on the evidence in the particular case.

4.62 But it is clear that the decision of the House of Lords in *The Achilleas* will, in most circumstances, restrict the owners' damages in cases of late redelivery to the normal measure, namely the difference between the charter and market rates for the period of the overrun.

4.63 As regards the question of what kinds of losses may be regarded as being within the contemplation of parties to a time charter, the charterers in *The Achilleas* conceded before the arbitrators that missing the cancelling date under a follow-on charter was a not unlikely result of late redelivery. They also conceded that losing a sale contract or a dry-docking booking was not unlikely. But in his judgment at first instance, [2007] 1 Lloyd's Rep. 19, Christopher Clarke, J., said, at page 29: "It is, I think, debatable whether missing a dry docking or, even more, the sale of a vessel on account of late redelivery is to be regarded as a contingency within the contemplation of the parties or whether it is sufficiently unusual to be outside their contemplation."

Charterers' duty to give legitimate voyage orders

4.64 In addition to their duty to redeliver the ship at the end of the charter period, the charterers have an implicit duty to ensure that, during the course of the charter, they give only 'legitimate' voyage orders, that is to say, orders that the ship can reasonably be expected to complete in time

to allow the ship to be redelivered on time. A voyage order which the ship cannot reasonably be expected to perform without overrunning the charter period is an 'illegitimate' order and the owners are entitled to refuse to perform it.

The nature of charterers' duty

4.65 In *The Batis* [1990] 1 Lloyd's Rep. 345, at page 349 (a voyage charter case), Hobhouse, J., said, "In a time charter which makes express provision for the charterers to give orders to the master there is little difficulty in construing the contract as including an obligation not to give improper orders to the master." Accordingly, if the charterers give illegitimate orders for a final voyage, merely giving that order is probably a breach of contract: see Bingham, L.J., *obiter*, in *The Peonia* [1991] 1 Lloyd's Rep. 100, at page 108.

4.66 The charterers' duty to ensure that their voyage orders are legitimate is a continuing duty. If a change of circumstances makes a once valid order invalid, then they must give fresh and legitimate orders. "The original order having become ineffectual the charterers were obliged by cl. 11 ['. . . the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions. . .'] to replace it with one which they were entitled to give": *per* Lord Mustill in *The Gregos*, above, [1995] 1 Lloyd's Rep. 1, at page 9.

4.67 Lord Mustill there held that the obligation not to give illegitimate orders was an intermediate term and not a condition of the charter, a view confirmed by the Court of Appeal in *The Paragon* [2009] 2 Lloyd's Rep. 688. (Lord Mustill expressed some scepticism about whether the giving of an invalid order amounted to a breach of charter at all, but was prepared to assume it was.)

4.68 However, if the charterers persistently refuse to provide legitimate orders, their conduct may be sufficient to demonstrate that they do not intend to perform their obligations under the charter. In that event, the owners may treat the charter as repudiated and claim damages. Lord Mustill in *The Gregos*, above, at pages 9 and 10, explained the position in the following passage: "it is plain from the facts stated by the arbitrator that the charterers had no intention of [giving orders for a legitimate final voyage], and that the critical time would pass without any valid orders being given. This is the significance of the changed circumstances which rendered the original order [to load at Palau] invalid. Not that the order constituted a repudiation in itself, but that the charterers' persistence in it after it had become invalid showed that they did not intend to perform their obligations under the charter. That is to say, they 'evinced an intention no longer to be bound' by the charter. This was an anticipatory breach, which entitled the owners to treat the contract as ended." Similarly, Lord Denning, M.R., said in *The Dione* [1975] 1 Lloyd's Rep. 115, at page 118, "If the charterer sends the vessel on an illegitimate last voyage – that is, a voyage which it cannot be expected to complete within the charter period, then the shipowner is entitled to refuse that direction and call for another direction for a legitimate last voyage. If the charterer refuses to give it, the shipowner can accept his conduct as a breach going to the root of the contract, fix a fresh charter for the vessel and sue for damages."

Time at which legitimacy is to be judged

4.69 The charterers' orders must be legitimate both when they are given and when performance falls due.

4.70 The charterers may, and usually will, give orders for the final voyage some time in advance. If at the time such orders are given they appear to be valid in the sense that the employment ordered can reasonably be expected to allow redelivery by the end of the charter period (including any express or implied margin), the owners are not entitled to reject them. But the validity of an

order for a final voyage given in advance is contingent only. If circumstances change so that, before they fall to be performed, the orders that have been given cease to be legitimate, the owners are entitled to reject them and ask for new ones.

The *Gregos* was chartered on the New York Produce form for "about 50 to maximum 70 days", which required redelivery not later than 18 March 1988. On 9 February orders were given for a final voyage to Fos. At the time these orders allowed for timely redelivery. But on 12 February another ship grounded and blocked for several days the River Orinoco on which were sited both the discharging port of the penultimate voyage, Matanzas, and the loading port of the final voyage, Palua. Consequently the *Gregos* reached the latter port only on 25 February, by which time the final voyage to Fos could no longer be completed by 18 March; an overrun of two to four days was to be expected. On 25 February the owners advised the charterers that they declined to perform the voyage to Fos and called upon the charterers to give revised orders for a legitimate final voyage, failing which they would treat the charterers as having repudiated the charter and would withdraw their ship accordingly. The charterers maintained their original orders and declined to give revised orders.

It was held by the House of Lords, unanimously reversing the Court of Appeal and affirming the decisions of the arbitrator and of Evans, J., at first instance, that the charterers had repudiated the charter and the owners were entitled to treat it as discharged. In the leading speech, Lord Mustill said:

(1) the date for judging the validity of the charterers' orders was the time when the performance fell due, in this case 25 February; by then the orders, originally valid, had become invalid;
(2) even if the giving of an invalid order as to the employment of a time-chartered ship, including an order for a final voyage, was of itself a breach of the charter contract (which was assumed to be correct for the purposes of the judgment, but was not decided), such a breach was not, as the owners had argued, necessarily repudiatory;
(3) *obiter*, the charterers' obligation to redeliver in time was probably an intermediate term rather than a condition so that a short overrun would not justify the owners treating the contract as discharged, and this was probably fatal to the owners' argument that an order for a voyage likely to overrun was necessarily repudiatory (contrary to the speech of Lord Templeman);
(4) but the charterers of the *Gregos* were under a continuing primary obligation to give a valid order for the final voyage, and the original order having become invalid, the charterers were obliged by Clause 11 of the charter to give a valid order. The charterers' persistence in the invalid order amounted to a repudiation in that it evinced an intention no longer to be bound by the contract.

Torvald Klaverness v. *Arni Maritime* (*The Gregos*) [1992] 2 Lloyd's Rep. 40, [1993] 2 Lloyd's Rep. 335 (C.A.) and [1995] 1 Lloyd's Rep. 1 (H.L.).

4.71 Lord Mustill said, at page 7 of the House of Lords report of the case above: " . . . in practice the interests of both parties demand that the charterer is entitled to give orders in advance of the time for performance; and this must entail at least a provisional judgment on the validity of the order. If it can be seen at this early stage that compliance will involve a service which lies outside the shipowner's undertaking, the latter can say so at once and reject the order. But if the order is apparently valid its validity is no more than contingent, since the time for matching the service against the promise to serve does not arrive until the nature of the service is definitely known; and this will not usually be until the service is due to begin, or in some instances until it is already in progress. Thus, if and for so long as the service required conforms with those which the shipowner promised in advance to render, the specific order creates a specific obligation to perform them when the time arrives. But only for so long as that state of affairs persists. If circumstances change, so that compliance with the order will call for a service which in the original contract the shipowner never undertook, the obligation to comply must fall away. As I see it, the charterer's order in advance amounts to a continuing requirement, the validity of which may change with the passage of time."

4.72 In *The Gregos*, the owners had complied with the charterers' final voyage orders to the extent of going to and presenting notice of readiness to load at the loadport, Palua. Yet, at that stage, it was held, they were still entitled to reject the order to load a cargo destined for Fos, on the

ground that such a voyage could not be completed within the charter period. The House of Lords did not have to decide what would have been the effect of a delay that occurred after loading. That is, if the owners had loaded a cargo destined for Fos, and something had occurred which would have made it impossible to complete a voyage to Fos within the charter period, could the owners at that stage have rejected the order to discharge at Fos and called for the nomination of another discharge port? Despite Lord Mustill's comments above, it is thought that the owners would not be entitled to refuse to complete a voyage once the cargo was loaded, unless the probable delay in redelivering the ship was such as would amount to a repudiatory breach of the charter.

The effect of illegitimate orders generally

4.73 An illegitimate order is an order that the charterers are not entitled to give and is therefore not binding on the owners. The owners may choose either to accept it or reject it. If the owners reject the charterers' order, the charterers come under a duty to provide fresh orders. If they refuse to do so, they may be held to have repudiated the charter: see paragraph 4.68, above. Where the owners choose to accept the order, the position is more complex.

Owners' rights to damages or remuneration

4.74 If they choose to comply with an illegitimate order, the owners are entitled to hire at the charter rate until redelivery (see paragraph 4.2, above). They are also entitled to damages for the losses they suffer as a result of complying. In particular, they will be entitled to damages for late redelivery: see *The Dione* [1975] 1 Lloyd's Rep. 115, *per* Lord Denning, M.R., at page 118. See generally paragraphs 4.52 *et seq*. above on the measure of damages for late delivery. It is thought that, strictly, the owners' damages claim can be formulated both as a claim for damages caused by the illegitimate order and as one for damages for failure to redeliver timeously, but in practice the two claims are likely to be indistinguishable.

4.75 The owners may also be entitled to recover any losses they suffer not as damages, but either (*a*) as a claim under an indemnity implied by law (see the comment of Lord Mustill in *The Gregos* [1995] 1 Lloyd's Rep. 1, at page 9) or (*b*) as a claim for *quantum meruit* in respect of extra-contractual services (see Hobhouse, J.'s comments in *The Batis* [1990] 1 Lloyd's Rep. 345, at page 352). However, where the claim is essentially for loss resulting from late redelivery, the way in which the claim is formulated will normally not affect the amount that the owners recover: see the *obiter* remarks of Lord Denning, M.R., in *The Johnny* [1977] 2 Lloyd's Rep. 1, at page 2. In *The Gregos* the last voyage was undertaken under an *ad hoc* agreement, resolving an *impasse* over whether it would be performed, that the charterers would pay the market rate for the whole duration of the voyage if it were subsequently held to have been illegitimate. In the absence of such an express agreement, on the law as it presently stands (*cf.* paragraph 5.23, below), the owners will generally not be entitled to additional remuneration for service up to the latest redelivery date permitted by the charter (see *The Paragon* [2009] 2 Lloyd's Rep. 688, paragraph 5.22, below).

Election and waiver

4.76 If, knowing the charterers' order is illegitimate, the owners unequivocally choose to accept that order, they are taken to have made an election. Having chosen to accept the charterers' order, they cannot subsequently decide to reject it and refuse to perform: see *The Kanchenjunga* [1987] 2 Lloyd's Rep. 509, [1989] 1 Lloyd's Rep. 354 (C.A.) and [1990] 1 Lloyd's Rep. 391 (H.L.). So, in particular, where the owners allow a ship to proceed on a voyage in circumstances

where they know that the orders for that voyage were illegitimate, they cannot refuse further compliance with the order at a later stage.

4.77 However, the owners' acceptance of the order must be unequivocal. In *The Kanchenjunga*, it was held that serving notice of readiness at a loadport was an unequivocal representation that the owners accepted the charterers' order to load there. But Lord Goff also expressed the view that mere absence of protest does not amount to an unequivocal representation that orders have been accepted: see page 400 of the House of Lords report. Contrast that view, however, with the view expressed by Hirst, L.J., in *The Gregos* [1993] 2 Lloyd's Rep. 335 (C.A.), at page 346, where he said, "It seems to me that, in a field of commerce where communications are swift and easy, with telexes sometimes flowing back and forth several times a day, it is legitimate to treat silence on the owners' part after the expiry of a reasonable interval for consideration as connoting [the owners'] consent to the [charterers' illegitimate] order." (This issue was not discussed when this case was before the House of Lords.)

4.78 In all events, by choosing to accept an illegitimate order for a final voyage, the owners do not waive their right to damages for any losses caused by that order: see *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (H.L.), *per* Lord Goff at page 397. Nor can it be said that acceptance of the order has broken the chain of causation between the charterers' breach of contract and the losses that result: *The Batis* [1990] 1 Lloyd's Rep. 345, *per* Hobhouse, J., at page 351. This is the case even if the owners know or reasonably should realise that the charterers' order is illegitimate: see *The Stork* [1954] 2 Lloyd's Rep. 397, *per* Devlin, J., at page 414 and *The Batis* [1990] 1 Lloyd's Rep. 345, *per* Hobhouse, J., at page 351. Of course, the parties may agree to vary the period of the charter to permit a particular voyage to be undertaken, but such a variation would almost certainly have to be agreed expressly.

Effect of a "last voyage" clause

4.79 Some charters make special provision, whether by a standard printed clause such as Clause 19 of the Shelltime 4 form or by special addition, for what is to happen if the ship is still on her final voyage at the end of the charter period.

4.80 A distinction must be drawn between two kinds of clause. On the one hand, there are clauses which protect the charterers from a liability in damages when a legitimate final voyage overruns the charter period – that is, when the ship is not redelivered on time even though, at the time that the charterers gave their final voyage orders, it was reasonably expected that the voyage would be completed within the period of the charter. On the other hand, there are clauses which render lawful orders for a final voyage which is not reasonably expected to be completed within the period of the charter. A clause of the latter kind in effect overrides the charterers' duty to redeliver the ship at the end of the agreed charter period.

4.81 Clauses of the first kind are much more common. In *The Peonia*, summarised in paragraph 4.46 above, the charter period was defined as "about minimum 10 months maximum 12 months time charter, exact duration in charterers' option". It was held by the Court of Appeal that the sentence which followed, "Charterers have further option to complete last voyage within below mentioned trading limits", did not permit orders for a voyage that could not reasonably be expected to allow redelivery within the basic charter period, but merely shielded the charterers against a claim for damages if a legitimate final voyage overran.

4.82 The same conclusion was reached in *The Black Falcon* [1991] 1 Lloyd's Rep. 77, also a charter on the New York Produce form. This charter was expressed to be "for about 9 (nine) months, charterers' option 3 months, charterers' option further three months, 15 days more or less on final period". This was followed by a sentence reading, "Charterers having option to complete last round voyage under performance prior to redelivery at charterparty rate". Steyn, J., in the

Commercial Court, rejected as contrary to 'business common sense' the charterers' argument that this sentence protected them when an illegitimate final voyage overran the charter period; taken so literally the sentence would have validated orders for a lengthy final voyage given shortly before the last day for redelivery, which would have been "an utterly absurd position".

4.83 It was likewise held in *The Ambor* (2000) LMLN 549, the facts of which are set out at paragraph 37.94, that the final voyage clause, Clause 19, of the Shelltime 4 form was not so worded as to legitimise orders that would otherwise be illegitimate.

4.84 However, in *The World Symphony*, below, the Court of Appeal accepted, in a case on the earlier version of the Shelltime charter (Shelltime 3) that a final voyage clause could be worded so as to enable the charterers to give orders for a last voyage estimated to overrun the maximum period of the charter. See also *Hector Steamship* v. *V/O Sovfracht* (1945) 78 Ll.L.Rep. 275, another case in which the parties had agreed such a clause, and for further comments on the last voyage clause of the Shelltime form, see paragraphs 37.92 *et seq*.

The *World Symphony* was time chartered on the Shelltime 3 form. Clause 3 provided for "a period of six months fifteen days more or less in Charterers' option". Clause 18, dealing with the final voyage, was unamended and so included the following: "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 the charter." The charterers having exercised their 15-day option, the basic charter period expired on 24 December 1988. On 4 October 1988 the charterers ordered a final round voyage which clearly could not be completed by that expiry date. Redelivery eventually took place on 18 January 1989 and the owners claimed damages based on the market rate for the overrun beyond 24 December. The Court of Appeal rejected this claim. Clause 18 would have had only the limited effect of the disputed sentences in *The Peonia* and *The Black Falcon* had it not begun with the words, "Notwithstanding the provisions of Clause 3 hereof", but this "crucial" phrase showed that the draftsman recognised inconsistency between the two clauses and that this inconsistency was to be resolved in favour of Clause 18, which should therefore be given overriding effect by the court; the charterers' orders were legitimised by the latter clause and they were not obliged to redeliver within the basic charter period. It was also desirable that such a printed clause should be interpreted in the same way worldwide and English courts should recognise the treatment by New York arbitrators of the very similar Clause 11 of the Texacotime 2 form: see *The Narnian Sea* and *The Pacific Sun*, at paragraphs 4A.19 and 4A.20, below.

Lord Donaldson, M.R. said, at page 188: "There is a fundamental difference between a clause which qualifies another clause and one which is inconsistent with and overrides that other clause. A clause which makes provision for what is to happen if, through the fault of no one, the period of hire is exceeded is no more than an exceptions clause. By contrast a clause which overrides the terms of another clause – in this case by 'bolting on' a round trip charter on to one for a fixed term – plainly involves an inconsistency. It is only the latter type of clause which calls for introductory words acknowledging the inconsistency and specifying which is paramount."

The World Symphony [1991] 2 Lloyd's Rep. 251 and [1992] 2 Lloyd's Rep. 115 (C.A.).

(The meaning of the phrase "at the expiry of the period of this charter" was discussed in *The Kriti Akti* [2003] 2 Lloyd's Rep. 584 and [2004] 1 Lloyd's Rep. 712 (C.A.).)

4.85 The last voyage provision in Clause 7 of the Baltime form legitimises a final voyage expected to allow redelivery "about the time fixed for the termination of the Charter", but requires payment for the actual overrun at the market rate if above the charter rate. In his dissenting judgment in *The Johnny* [1977] 2 Lloyd's Rep. 1, Lord Denning, M.R., expressed the view, *obiter*, that the word "about" in this provision allowed an overlap of only two or three days beyond the fixed maximum period of 13 months. But *obiter* comments of Parker, J., in *The Bunga Kenanga* [1981] 1 Lloyd's Rep. 518, are to the effect that this view is too restrictive. It may be that exactly the same considerations apply to the latitude given by the word 'about' in this context as when it is used to define the charter period itself: as to which see paragraphs 4.19 to 4.21, above. It could, however, be argued that when considering this word in Line 108 no account should be taken of the length of the total charter period, but only of

the time unexpired when the last voyage orders are given. For an earlier case on an amended version of this clause see *Hector Steamship* v. *Sovfracht* (1945) 78 Ll.L.Rep. 275 and the comments on it of Bingham, L.J., in *The Peonia* [1991] 1 Lloyd's Rep. 100, at page 110.

Owners' duty to keep the ship in the charterers' service

4.86 The parties' agreement that the ship will be chartered for a particular period imposes on the owners an implicit duty to keep the ship in the charter service at least for the duration of the charter period and to perform the charterers' legitimate voyage orders. Accordingly, the owners are under a duty not to use the ship for other employment during the charter period: see, for example, *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276, at page 298.

Charterers' measure of damages where the owners fail to provide the ship's services

4.87 Where the owners are guilty of only a temporary failure to provide the charterers with the ship's services, ordinary rules of contractual damages apply to the assessment of the charterers' loss. The charterers are entitled to compensation to place them, as far as possible, in the position in which they would have been if there had been no breach of charter. The charterers can usually recover (so long as care is taken to avoid double-counting): (*a*) expenses thrown away during the period in which they are deprived of the ship's services; (*b*) loss of profits that they would have earned during the same period; and (*c*) any consequential loss of profits during the period following the ship's return to their service: *The Derby* [1984] 1 Lloyd's Rep. 635, *per* Hobhouse, J., at page 644 (the case went to the Court of Appeal but on other issues; [1985] 2 Lloyd's Rep. 325). So, for example, the charterers may be entitled to recover the profit that they would have made on a lost sub-fixture: see, for example, the same case at page 643. However, ordinary principles of causation and remoteness apply. So, again in the same case, the losses that the charterers suffered on a sub-fixture that was concluded only after the ship had returned to the charter service were held not to have been caused by the owners' breach in failing to keep the ship in the charter service: see page 644. This summary of the relevant principles was approved by Hamblen, J., in *The Sylvia* [2010] 2 Lloyd's Rep. 81 at [64].

4.88 On the other hand, where the withdrawal leads to the termination of the charter, the charterers are entitled to compensation for the loss of the ship's services during the remainder of the charter period. In such a case, the measure of the charterers' damages will depend upon (*a*) whether there is an available market for obtaining a substitute ship and (*b*) what the charterers choose to do.

4.89 Where there is no available market, the charterers are entitled to compensation to place them, as far as possible, in the position in which they would have been if there had been no repudiation of the charter. Such damages are assessed on the principles set out above.

4.90 Where there is an available market, the charterers will usually be expected to obtain a reasonable substitute charter at or shortly after the termination of the charter. If they do so, their damages are measured by the difference between the cost of the original charter and the cost of a substitute fixture in the market, for the remaining duration of the charter: see, for example, *The Product Star* (*No. 2*) [1991] 2 Lloyd's Rep. 468, *per* HHJ Diamond, Q.C. at page 481. It will be for the charterers to prove, on the evidence, how long the charter would have continued: see *The Golden Victory*, Paragraph 4.38 above.

4.91 Where there is an available market, but the charterers choose not to obtain a substitute fixture at the time of the termination or shortly afterwards, the charterers will probably be limited to recovering damages measured as the difference between the cost of the original charter and what a reasonable alternative fixture would have cost in the market: *per* Robert Goff, J., in *The Elena d'Amico* [1980] 1 Lloyd's Rep. 75, at page 89, and *per* Mustill, J., in *The Wave* [1981] 1 Lloyd's

Rep. 521, at page 532; see also *Norden* v. *André* [2003] 1 Lloyd's Rep. 287 (a case concerning a repudiated freight derivatives agreement). Thus, the difference between the market and charter hire rates becomes a cap on the damages that the charterers can recover.

4.92 Is that difference also a floor under the charterers' recoverable damages? That is, where there is an available market at the time of termination, but the charterers delay in making a substitute fixture in that market, or cover their need for tonnage otherwise than on that market, may they recover the full difference between the market and charter hire rates, even if their alternative arrangements have cost them less than it would have cost them to find a substitute fixture in the market? In *The Elena d'Amico*, above, at pages 89 and 90, Robert Goff, J., considered that they could. He explained this on the basis that the decision not to take advantage of the available market is an independent decision, albeit made "in the context of" the owners' breach of the terminated charter, so that any resulting benefit is not caused by the breach. He said, "It does not matter. . . that [the] decision [not to go into the market] was a reasonable one . . ., taken with a view of reducing the impact upon [the charterers] of the legal wrong committed by the shipowners. The point is that [the] decision. . .is independent of the wrong. [The charterers] could have done it anyway. [They] could have decided, for example, to have assigned away [the] existing charter-party at that time, and not to charter in a substitute vessel at all or alternatively to have chartered in a substitute vessel at a later date, depending upon [their] judgment of the market. [Their] decision to do so in the context of the breach is merely a decision which is 'triggered off' by the fact that there has been a breach; but it is not caused by the breach." However, given the conflicting decisions referred to in paragraph 4.43 above, the law on this question cannot be regarded as settled.

4.93 If the charterers choose not to obtain a substitute fixture in the market, and also choose not to enter into any other substitute contract, they are still entitled to compensation on the same measure, the difference between the cost of the original charter and what a reasonable alternative fixture would have cost in the market: see *The Product Star* (*No. 2*) [1991] 2 Lloyd's Rep. 468, *per* Judge Diamond, Q.C. at page 484, in which the charterers chose to use their own ship instead of chartering in the market. This is because the charterers have still suffered a loss, inasmuch as they have been deprived of the opportunity to use the services of the owners' ship at a discount to the current market price for those services.

4.94 One final issue is as to how one determines the remaining period of the charter, for the purposes of calculating the charterers' damages. The terminal date of a time charter is always flexible and it is the charterers who choose when precisely the ship is redelivered. So how does one decide when the charterers' right to damages comes to an end? In *The Li Hai* [2005] 2 Lloyd's Rep. 389, it was argued by the owners that the court should decide, on the balance of probabilities, the date on which the ship would have been redelivered. The deputy judge, Jonathan Hirst Q.C., rejected that argument and awarded damages for the maximum balance of the charter: see page 407. This decision should perhaps be regarded with caution.

Injunctions to prevent the withdrawal of the ship

4.95 Where the owners wrongfully withdraw their ship from the charterers' service, the charterers cannot obtain an order compelling the owners to perform their obligations: see *The Scaptrade* [1983] 2 Lloyd's Rep. 253 (H.L.), *per* Lord Diplock at page 256, and *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276. The reason for this is that a time charter is a contract for the services of the ship and as a general rule, the courts will not make an order compelling a person to perform a contract of this kind.

4.96 For the same reason, the court will not grant an injunction – interim or final (see further paragraph G.19, above) – restraining the owners from withdrawing the ship from the service of the

charterers. Lord Diplock so stated, *obiter*, in the House of Lords in *The Scaptrade* [1983] 2 Lloyd's Rep. 253, at page 257, saying that such an injunction "though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy that English Courts have always disclaimed any jurisdiction to grant".

4.97 However, the court may grant an injunction enforcing the owners' implicit promise not to use the ship other than in the charter service for the duration of the charter period: see paragraph 4.86. Such an injunction orders the owners or other parties interested in the ship not to employ the ship for purposes or in a manner inconsistent with the charter. The power to grant this type of injunction has long been recognised: see *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276, at page 299. Such injunctions may be interim: see, for example, *Lauritzencool* v. *Lady Navigation* [2005] 1 Lloyd's Rep. 260, [2005] 2 Lloyd's Rep. 63 (C.A.). They may also be final: see *The Oakworth* [1975] 1 Lloyd's Rep. 581 (a charter for a series of voyages) and *The Georgios C* [1971] 1 Lloyd's Rep. 7 (where the injunction granted by Donaldson, J., was presumably a final injunction). In general, an injunction is granted only where damages would not be an adequate remedy.

4.98 Interim injunctions are granted in cases where it is just and convenient to preserve the *status quo* pending resolution of the dispute. The principles applicable to the granting of such injunctions were reviewed by Cooke, J., in *Lauritzencool* v. *Lady Navigation* [2005] 1 Lloyd's Rep. 260.

Definition of the period of hire by reference to the duration of a specified trip or voyage

4.99 It has become a frequent practice to time charter for the duration of a certain trip or voyage, or series of trips or voyages, instead of for a period of months or days. Where such an agreement is made, the charterers must send the ship on the particular trip(s) or voyage(s) described. The charter is not merely a charter for the period of time usually occupied by the stipulated voyage(s).

The *Temple Moat* was chartered on an amended Baltime (1920) form, with delivery in the Bristol Channel and redelivery in the Cape Town/Lourenço Marques range for a voyage to the Kara Sea and then directly to South Africa. The charter also specified that she should be employed within certain wide limits which included the United Kingdom. She sailed in ballast to Igarka in the Kara Sea. There, in August 1939, she loaded a cargo of timber for Durban. However, owing to the intervention of the Russian Government, the charterers sent her to Murmansk to discharge the timber there. At Murmansk, the ship was loaded with pitprops for Garston, near Liverpool, and was requisitioned at the latter port by the British Government. Had she proceeded instead to South Africa, it was unlikely that she would have been requisitioned there. The owners argued that the charterers were in breach in delaying at Murmansk and in reloading for and proceeding to Garston instead of South Africa. The charterers replied that the voyage described was only intended to fix the period of time for which the ship was to be available to them. The charterers maintained that they were entitled to send the vessel on any voyage within the prescribed trading limits, provided they redelivered the vessel within such time as the voyage described would take at the agreed place of redelivery.

The House of Lords rejected these submissions, holding that the described voyage was paramount. The charter was thus for a voyage first to the Kara Sea and thence to South Africa. The trading limits in the charter limited rather than extended the confines of that voyage. Therefore, the charterers were in breach by sending the ship to Garston and liable in damages for the owners' losses caused by the requisition of the ship.

(The obedience of the master to these orders did not prejudice the owners' claim as he was, by Clause 8, under the orders of the charterers as to employment.)

Temple Steamship v. *Sovfracht* (1945) 79 Ll.L.Rep. 1 (H.L.).

4.100 However, absent agreement otherwise, a trip time charterer remains entitled to call at as many ports as he chooses in the course of the trip. In *The Aragon* [1975] 1 Lloyd's Rep. 628, the owners argued that a trip time charterer who had nominated a particular loading port could not nominate another. Donaldson, J., rejected that argument at page 633, holding that the idea of

nomination was "wholly foreign to the whole conception of a time charterparty, which entitled the charterer upon paying the hire to call upon the vessel to visit any port or ports which he wished within trading limits subject to any express agreement to the contrary". This decision was upheld by the Court of Appeal, [1977] 1 Lloyd's Rep. 343 without further reasons.

4.101 Where a ship is chartered for a trip or voyage to a particular place, it is probably the case that the charterers must send the ship only to ports which are substantially on the way to that place: see *Temple* v. *Sovfracht*, above, *per* Lord Porter at page 10. So in *Scottish Navigation* v. *Souter* [1917] 1 K.B. 222, it was assumed that a charter for a round voyage from England to the Baltic and back allowed the charterer to call at United Kingdom, Continental and Baltic ports, but only if they were substantially on the way: *per* Bankes, L.J., at page 245. In such a case, the described voyage is paramount and is not overridden by a trading limits clause that appears to envisage a wider range of destinations than this principle would allow: see *Temple* v. *Sovfracht*, above, *per* Lord Porter at page 10.

4.102 However, other ways of describing the charter trip can leave the charterers with a much wider power to decide where the ship goes. In *The Aragon* [1975] 1 Lloyd's Rep. 628 a ship was chartered for a trip from Germany "via safe port(s) East Coast Canada", redelivery in Europe. The charterers sent the ship to a port on the east coast of Canada and then to New Orleans. The arbitrator held that there was no custom of the trade as to what a trip *via* a particular place meant. Donaldson, J., held that – other things being equal – the charterers would have been entitled to send the ship to New Orleans. He said, at page 633, that "the charterer was entitled to order the vessel to proceed anywhere within the trading limits which was not inconsistent with the underlying nature of the charterparty, namely a trip *via* safe port(s) East Canada and return to Europe". Going to New Orleans was not inconsistent with the idea of a transatlantic round trip. It did not, for example, "involve any retracing of the vessel's tracks". The Court of Appeal upheld this decision at [1977] 1 Lloyd's Rep. 343.

Hybrids of period and trip charters

4.103 The parties are not confined to contracting either solely by reference to a period or solely by reference to a defined trip. The parties may define the charter service in any way they like. Of owners' and charterers' ability to construct any manner of particular hybrid, Hobhouse, J., said in *The World Symphony* [1991] 2 Lloyd's Rep. 251, at page 257, "The variety of contractual structures that can be adopted by charterers and shipowners for any given transaction are as various as the ingenuity of chartering brokers and the ever changing demands of the market may determine. It is not for Courts to fit the parties' transactions within a strict and limited frame-work which the parties themselves may not have chosen to adopt." Lord Donaldson, M.R., echoed his words in the Court of Appeal [1992] 2 Lloyd's Rep. 115, at page 117, noting at page 118 that by Clause 18 of the Shelltime 3 charter the parties had in effect "bolted on" a round trip charter to their basic time charter.

4.104 However, such hybrid charters may present problems. An indication of the problems that might arise can be seen in *The Democritos* [1976] 2 Lloyd's Rep. 149 (C.A.). There the duration of a charter on the New York Produce form was described as "for about a trip via port or ports via the Pacific, duration about 4 to 6 months". It was argued for the charterers that these words had made the contract a voyage or at least a hybrid between a voyage and a time charter, so the charter service continued until the trip was completed and the owners could not, on the ordinary principles set out above, claim damages for an overrun beyond the six months. The Court of Appeal rejected that argument as they considered the contract was clearly still a period time charter. It is suggested, however, that had the contemplated trip been more precisely defined, by contrast to the very vague words actually used, it might have been more difficult to decide whether the trip or the period was intended to be paramount. See further the discussion of Mustill, J.'s decision in *The Rijn* at paragraphs 15.9 *et seq*.

U.S. Law

Overlap/underlap: implied margin

4A.1 Under United States law the rule is that a reasonable overlap is permitted if the charter is for a "flat" period of time. Thus, prior to redelivery the charterer may send the ship on the shortest commercially practicable voyage possible under the charter, even if it appears redelivery may be late, provided that the anticipated overlap will be shorter than the underlap which would result if the voyage was not made. An early redelivery, or underlap, will be a breach of the charter if another voyage could have been made with an expected overlap shorter than the period of underlap. This rule sometimes is referred to as the "final voyage doctrine."

4A.2 In the leading case of *Straits of Dover Steamship Co*. v. *Munson*, 99 F. 690 (S.D.N.Y. 1899), *aff'd*, 100 F. 1055 (2d Cir. 1900), the court excused redelivery two months 23 days after the expiration of the charter period. The charter provided for a flat period of three months from the time of delivery. The ship was delayed as the result of causes for which the charterer was not responsible. The court concluded that the parties must have understood that redelivery on a given day could not be promised, and that since the charterer had sent the ship on a reasonable voyage which could have been performed within the three-month period except for the delays, the charterer was not in breach. The rule enunciated is that the propriety of the final voyage is to be determined as of the date the voyage commences, based on the overlap which can be reasonably anticipated at that time.

4A.3 In *Anderson* v. *Munson*, 104 F. 913 (S.D.N.Y. 1900), redelivery 49 days late was excused, despite the fact that the word "about" was deleted. In *Trechman S.S. Co*. v. *Munson S.S. Line*, 203 F. 692 (2d Cir. 1913), the charterer was not permitted to redeliver 29 days before expiration of the term because an additional voyage with a reasonable overlap could have been performed. The court held, however, that the owner was entitled to damages only up to the end of the flat period.

4A.4 In *Britain S.S. Co*. v. *Munson S.S. Line*, 31 F.2d 530 (2d Cir. 1929), the charter was to be "from the time of delivery, for *about* two (2) to *about* three (3) consecutive calendar months." The ship was delivered on March 20 at Cuba. She was to be redelivered at a U.S. Atlantic port north of Cape Hatteras. Charterer tendered redelivery at New York on 7 May or 13 days before the expiration of two months from the date of delivery. The court held that redelivery was premature and ineffective, because the ship could reasonably have made another voyage between Cuba and New York and redelivered within the "about three (3)" month period. According to the court:

> [T]he use of the word "about" is interpreted as signifying an intention to allow the charterer a reasonable leeway in respect to the date on which the vessel shall be surrendered. . . Hence, if a voyage terminates in a port of redelivery before the end of the stated term, the charterer may require the vessel to make another "reasonable" voyage, even though it is certain to overlap the stated term. If, however, the time remaining before the end of the stated term is so short as to render another voyage "unreasonable," then the vessel may be surrendered by the charterer, or withdrawn by the owner, thus creating an underlap. [31 F.2d at 531].

4A.5 The court further held, however, that since the charterer could have made a valid redelivery on 20 May, the owner's damages should be limited accordingly. The court reasoned that although the charterer had an option to use the ship beyond 20 May, the owner could not insist that the option be exercised.

4A.6 In *The Sea World*, SMA 3791 (Arb. at N.Y. 2003), the panel concluded that because the charterer issued voyage orders that were reasonably expected to result in an overlap, the owner

was justified in completing the voyage under protest and seeking an award for damages based on increases in the charter market.

Minimum/maximum

4A.7 Where the charter provides for minimum and maximum periods, redelivery is proper at any time in between the two. *Tweedie Trading Co*. v. *Sangstand*, 180 F. 691 (2d Cir. 1910). It is customary and, of course, logical to delete the word "about" where there is a minimum/maximum range of redelivery dates. When this occurs, no overlap will be permitted. Thus, principles of underlap and overlap as such are inapplicable where the charter is for a fixed "minimum" or "maximum" period and there is a range of redelivery dates.

4A.8 In *The Romandie*, SMA 1092 (Arb. at N.Y. 1977), the printed word "about" in the New York Produce form was deleted from the charter, which provided for a period of a minimum of 35 months to a maximum of 38 months, at the charterer's option. The ship was redelivered eight days beyond the maximum flat term of 38 months. The panel held that the owner was entitled to recover damages resulting from the late redelivery. According to the panel:

> The Panel considers that the deletion of the word "about" preceding the time period for which the ROMANDIE was to be chartered, coupled with the minimum/maximum phraseology, are expressions of clear intent that the parties contemplated specific minimum and maximum dates of redelivery. There can be no other sensible interpretation of the words. We were not unmindful of the references that had been made to the uncertainties of navigation and that ships do not run on rails. Neither could we disregard the rights of the parties to make any arrangements they chose and to express their intent as they deemed proper.
>
> We are of the opinion that this Charter Party, by its very terms and conditions, is an absolutely fixed period charter, allowing no overlap. A redelivery of the vessel prior to the 35th month or after the 38th month would be a breach of the contract for which Charterers would become liable in damages, unless the breach was the result of an Owners' breach. Here Charterers took a calculated risk that they could perform their contemplated voyage within the maximum period for redelivery, although we consider that the possibility of success was marginal at best. The risk failed, not due to any fault of the Owners, and Charterers are, therefore, liable for the reasonable and foreseeable damages of Owners.

4A.9 Similar results were reached in *The Scaldia*, SMA 905 (Arb. at N.Y. 1975), where the panel held that "the maximum employment period of seven months [was] inflexible and absolute" in a charter providing "for a minimum of six months/maximum seven months," and in *The Elizabeth Entz*, SMA 588 (Arb. at N.Y. 1971), where the panel held that no overlap or underlap would be allowed where the charter provided "for fourteen (14) months, one month more or less." See also *The Themis*, 244 F. 545 (S.D.N.Y. 1917); *Schoonmaker-Conners Co. Inc*. v. *Lambert Transp. Co*., 269 F. 583 (2d Cir. 1920).

4A.10 But see *Ropner* v. *Inter-American S.S. Co*., 243 F. 549 (2d Cir. 1917), where the court held that the maximum period should be treated as a flat period, and allowed a reasonable overlap. As the cases cited above show, however, this case has not been followed in arbitration decisions.

4A.11 *The Arctic Confidence*, SMA 2987 (Arb. at N.Y. 1992), involved a trip time charter which provided for a charter period of "minimum 30/35 days without guarantee." The arbitrators ruled that the only meaning which could be given to this language was that the charterers warranted at least the 30-day period, but without committing to the actual length of employment.

4A.12 *The Handy Leader*, SMA 3140 (Arb. at N.Y. 1995), concerned a trip charter for a period of "65/75 days without guarantee." The panel found that the charterer was committed to use the vessel for a minimum of 65 days and an early redelivery would have entitled the owner to recover damages for an underlap. Because of special circumstances which resulted in the vessel going off-hire for an extended time, however, there was no actual underlap.

Express margin

4A.13 Where the charter states an express range of redelivery dates no additional overlap will be permitted. In *The Themis*, 244 F. 545 (S.D.N.Y. 1917), the charter provided for redelivery "between December 15th and January 5th" at the charterer's option. The court held that this clause imposed a duty on charterer to surrender the vessel no later than January 5. According to the court:

> The period of 16 days was thought enough to give commercial latitude for the enterprises to be undertaken, and the event of unforeseen contingencies was amply provided for by the exceptions to be considered later. That period of 16 days was the "overlap" or "twilight" zone which gave the charterer a sufficient leeway against ordinary vicissitudes, beyond which he engaged himself not to go. Such a plan was altogether reasonable. [244 F. at 552].

4A.14 In *Tweedie Trading Co*. v. *Sangstand*, 180 F. 691, 692 (2d. Cir. 1910), the court found that the provision for an express margin distinguished the charter from ones providing for a flat period. There the charter provided "for a period of about twelve months, charterers guaranteeing to redeliver steamer within three weeks more or less of this period." According to the court, by this clause the charterer had the right if it chose to keep the vessel for 11 months and one week or for 12 months and three weeks. At the same time, the charterer had the duty to redeliver the ship within the precise dates specified.

4A.15 In *Tweedie*, the charterer was also given the option to extend the charter for another term with a fixed margin which was to end on April 9. On March 28, the ship lay at Hampton Roads. When the charterer directed the master to sail to Cuba for a cargo of sugar, the owner withdrew her and returned the hire the charterer had paid for the period March 29 to April 6. The charterer brought an action for damages based on wrongful withdrawal. The court held that the withdrawal was a breach of the charter, since the charterer had the right to keep the ship until April 9. Since the ship could not have made the voyage and been redelivered by April 9, however, it was held that the return of hire for that period, plus payment for bunkers put aboard by the charterer, was full compensation.

4A.16 In *The Medita*, SMA 1150 (Arb. at N.Y. 1977), the owner was awarded damages based on the market rate for the period of the overlap. The panel stated:

> Shortly expressed, a charterer has an absolute obligation to ensure redelivery within the maximum period allowed, or must pay for the daily hire at a rate commensurate with the existing overlap. This Panel considered carefully whether there is sufficient or any evidence of poor performance of the ship on the last voyage that might permit an exception of the stated rule to be applied. In fact the evidence shows no undue delays that may be attributed to "non-performance" of the ship. The delays were all weather related. . . A charterer has to take all such matters into consideration when deciding upon the final voyage of a vessel, and even whether a last voyage may reasonably be undertaken. The absolute obligation to redeliver within the maximum period is exactly that. It may not be considered as an option for a charterer to overlap, even by a few days against payment of an increased hire.

4A.17 In *The Har Rai*, SMA 1868 (Arb. at N.Y. 1983), the charterer attempted to fix the ship for a voyage which could not reasonably have been completed prior to a stated range of redelivery dates (the date had already been extended once). The panel ruled that the charterer had committed an anticipatory breach of the charter by such action, and that the owner was entitled to refuse the charterer use of the ship for any employment likely to exceed the maximum period of the charter. However, the owner was not entitled to withdraw the ship because hire had been paid in advance for a period after the ship was withdrawn.

4A.18 The Texacotime 2 form contains language in Clause 11 which provides:

> . . . should the vessel be upon a voyage at expiry of the period of this charter, charterer 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 until her return to a port of redelivery as provided by this charter.

4A.19 A dispute arose in *The Narnian Sea*, 1991 AMC 274 (Arb. at N.Y. 1990), as to the definition of "round voyage" for purposes of Clause 11. The charter provided for a term of one year. The charterer contended it was entitled to treat a ballast voyage as the first leg of a "round voyage" and thereby load a cargo after the one-year period had expired. The panel held that the charterer's contention would be correct if it were governed by the final voyage rule discussed above. The panel concluded, however, that Clause 11 negates "the subjective reasonableness standard of the Final Voyage Doctrine," replacing it with an objective test based on the status of the ship on the expiration date. Applying this test, the panel found that since no actual voyage orders were issued to the ship except to wait for "orders," she was not engaged on a round voyage when the charter period expired.

4A.20 See also *The Pacific Sun*, SMA 1789 (Arb. at N.Y. 1983).

"About"

4A.21 Where the charter describes the term as "about" a given period, a margin will be permitted, although the duration of the margin will depend on the facts of each case. As the court stated in *Britain S.S. Co*. v. *Munson S.S. Line*, 31 F.2d 530 (2d Cir. 1929):

> When a charter party is for a term of "about six months" . . . the use of the word "about" is interpreted as signifying an intention to allow the charterer a reasonable leeway in respect to the date on which the vessel shall be surrendered. [31 F.2d at 531.]

4A.22 In *The Rygja*, 161 F. 106 (2d Cir. 1908), a leading U.S. case, the charter was for a period of "about six months," and gave the charterer the option to extend the period for a further period of "about six months." The ship was delivered on July 13, 1905. On 12 December 1905, the charterer exercised its option for a further six-month period. On June 12, 1906, the charterer declared its option to redeliver the ship in Europe. The owner, however, ordered the master to refuse to perform the voyage, and the charterer commenced an action for damages. The issue presented was when the second six-month period began. The last voyage under the original six-month period terminated on March 4, 1906, and the charterer contended that it was at this time that the extended term commenced. The owner argued that it began on January 13 or six months after delivery. The court held for the charterer, stating:

> In this charter the term is not an absolutely fixed period, but is "about six calendar months." The district judge restricted the effect of the word "about" to the underlap. Doubtless in a charter containing a clause like No. 4 the word is not necessary because that clause accomplishes the same thing. Still we think the word "about" applicable to the term whether it be over or under six calendar months, and that, if the last voyage terminates so near the end of the fixed time as to make another voyage unreasonable, the charterer may deliver and the owner may withdraw the vessel, or, if any voyage is reasonable, the charterer may require it at the charter rate of freight. This leaves room for dispute in the case of an underlap as to what voyage is reasonable, but that is a difficulty which cannot be avoided where a fixed term is not agreed upon. In this case, if there were no question of a second term, it could not be denied that the charter terminated March 4th. The charterer having declared its option for a second term, we think the further period began to run from March 4th. [161 F. at 108.]

4A.23 In *Prebensens Damps. A/S* v. *Munson S.S. Line*, 258 F. 227 (2d Cir. 1919), "about" was held to allow a one-month overlap on a charter for 36 months. For any overlap beyond 36 months, the charterer was required to pay hire at the market, rather than the charter, rate.

4A.24 In *The Adelfoi*, 1972 AMC 1742 (Arb. at N.Y. 1972), however, while accepting the principle that an additional voyage is permitted where the charterer, acting in good faith, calculates that the projected overlap will be no greater than the existing underlap, the arbitrators limited the permissible overlap to 14 days. The ship was chartered for "about 21 to about 24 months, period

at Charterer's option." The charterer opted for the 24-month period. According to the panel, "a normal overlap for the word 'about' on this 2-year charter, expiring under the circumstances, should only be about 2 weeks beyond the flat term." 1972 AMC at 1745.

4A.25 In *The Derrynane*, 1954 AMC 1015 (Arb. at N.Y 1954), the panel held that under a New York Produce form charter providing for "about six (6) to about eight (8) consecutive calendar months, period at Charterers' option," the charterer was entitled to a leeway of at least two weeks more or less because of the broad trading limits, and that the charterer was justified in sending the ship on a voyage before redelivery which it reasonably believed would take two weeks.

4A.26 In *The Federal Voyager*, 1955 AMC 880 (Arb. at N.Y. 1953), "about" was held to allow an overlap of 11 days on a seven-month charter. In that case, the charter was for "about four to about seven consecutive calendar months, period at Charterers' option." The owner contended that since the charter contained two "about" periods, ordinary rules of overlap and underlap were inapplicable, and that no overlap should be allowed. The panel rejected this argument, and held that the charterer was permitted to make a voyage that would result in a reasonable overlap.

4A.27 In *The Trade Yonder*, SMA 2435 (Arb. at N.Y. 1987), the charter called for a time charter trip of "about 80 days without guarantee." The panel held that redelivery after a voyage which lasted 97 days did not give rise to a claim by owner for overlap.

4A.28 In *The Arisbe*, SMA 3563 (Arb. at N.Y. 1999), the charter called for a trip of "about 60/65 days without guarantee." The panel found that an early redelivery of 19 days was not reasonable and should be considered outside the meaning of "about." The panel also found that the words "without guarantee" protected charterer only from those events that were unforeseeable and beyond its control.

4A.29 In *The Genco Carrier*, SMA 4206 (Arb. at N.Y. 2013)(Arnold, Bulow, Mordhorst), the charter provided for a duration of about 60–70 days without guaranty, whereas the actual voyage took 85.267 days, including some 40 days waiting for a berth at Luanda, Angola. Owner contended that Charterer should have known that calls at Luanda invariably result in extended delays and that it consequently acted in bad faith in fixing the vessel for this period of time for such a voyage. The panel rejected this argument, however, concluding that Owner "had equal market knowledge and surely had checked the Luanda condition before it entered into this contract."

4A.30 In some charters, the provision for "about" a given period is modified to state an agreed limitation on the period of leeway that will be allowed the charterer. Thus, in *The Aretusa*, SMA 835 (Arb. at N.Y. 1973), the panel held that the words "about eighteen months, fifteen days more or less" gave the charterer the option to redeliver 15 days before or after the 18-month period.

Extent of reasonable margin

4A.31 The test for determining whether the underlap or overlap is reasonable is set out in *Britain S.S. Co*. v. *Munson S.S. Line*, see paragraph 4A.4, above.

Redelivery after end of charter period

Is hire payable until redelivery or only until the end of the charter period?

4A.32 Although the New York Produce form provides that hire is to continue until redelivery, where redelivery is made after the allowed period, the owner is also entitled to damages based on the market rate. *Constantine & Pickering S.S. Co*. v. *West India S.S. Co*., 231 F. 472 (S.D.N.Y. 1914); *Munson S.S. Line* v. *Elswick Steam Shipping Co*., 207 F. 984 (S.D.N.Y. 1913), *aff'd per curiam*, 214 F. 84 (2d Cir. 1914).

4A.33 In general, damages in an underlap or overlap case will be based on the market rate. As Judge Learned Hand wrote in *Constantine & Pickering S.S. Co*., above, the owner is to be awarded damages on a basis which will "produce, so far as money can," the same result as if the ship had been redelivered at the time and place provided in the charter. Thus, if there is an underlap, damages usually will be based on the difference between the charter rate and the lower market rate for the period of underlap. In an overlap situation, damages are usually based on the difference between the higher market rate and the charter rate for the overlapping period. The application of these general principles in the cases, however, will always depend on the particular factual situation presented.

4A.34 In *The Jagat Padmini*, SMA 1097 (Arb. at N.Y. 1977), where the charter contained an express margin, the panel held that the ship should have been surrendered to the owner on May 11, 1973. She was actually redelivered on June 1. Accordingly, the owner was awarded damages based on the substantially higher market rate for the period May 11 to June 1. The panel rejected the owner's contention that he should be awarded damages from the date the ship could have been redelivered prior to the last voyage which caused the overlap.

4A.35 This same formula for determining the owner's damages was applied by the panels in *The Julia*, SMA 552 (Arb. at N.Y.) and *The Romandie*, SMA 1092 (Arb. at N.Y. 1977). In the latter case, the charterer breached a "minimum/maximum" redelivery provision. It is noteworthy that the owner sought to recover "special damages" in that case, based on a profitable transatlantic voyage it claimed could have been completed had the ship not been redelivered late. The panel held that the evidence did not support this claim for "special damages," but clearly indicated they would have awarded them had the owner proved that "Charterers either had been forewarned or had other independent knowledge of the financial consequences of overlapping the maximum 38 months."

4A.36 In *The Thorgerd*, 1926 AMC 160 (Arb. at N.Y. 1925), the owner was awarded a form of special damages, consisting of profits it would have earned under a charter that was cancelled as a result of the late redelivery. In that case, the charterer had been given notice of the cancelling date under the new charter.

4A.37 See also *The Rygja*, 161 F. 106, 107 (2d Cir. 1908), where, in describing the method of computing damages where the charter provides for an express margin, Judge Ward stated:

> Charters for a fixed period involve from the nature of things considerable difficulties because of the uncertainty as to the time voyages are likely to occupy. At the expiration of a fixed term the charterer is no longer entitled to possession. If in the employment of the ship he overruns the term, he is certainly liable at the charter rate of freight for the overlap, and, if freights have risen, to the difference between the market rate and the charter rate in addition. If the last voyage of the vessel terminates so near the expiration of the fixed term that another voyage cannot be made, the charterer either loses that time entirely, or if he employs the vessel on another voyage, he does so at the risk of being liable for the increase of the market rate of freight for the overlap.

4A.38 In *The Scaldia*, SMA 905 (Arb. at N.Y. 1975), the panel declined to base damages for an overlap on the market rate. There, the charterer was held to have breached its charter with disponent owner by making a late redelivery. The redelivery was made to the disponent owner simultaneously with the redelivery to the actual owner, and the disponent owner was not required to pay any overlap penalty to the actual owner. In addition, the overlap amounted to only 10 days, and the panel doubted that the disponent owner actually could have used the ship advantageously during that period. The charterer, however, had made profits on its own sub-charter during the 10-day overlap. The panel held that while in the circumstances it would be unrealistic to award the disponent owner damages based on the market rate, fairness dictated that it recover the profits made by the charterer during the overlap.

4A.39 This issue was also considered in *The Hans Sachs*, SMA 1493 (Arb. at N.Y. 1980). It was conceded by the charterer that the ship was redelivered eight days and 20 hours beyond the

allowed period, and the only issue before the panel concerned the quantum of damages the owner was entitled to recover. The owner sought damages based upon the prevailing charter market rates during the overlap period. The charterer, on the other hand, contended that the proper measure of damages was the difference between the existing charter rate and the rate for the ship's subsequent employment under a charter which was fixed by the owner prior to the commencement of the overlap voyage. According to the charterer, since the owner was committed to another charter when the ship was redelivered, it would be inappropriate to base owner's damages on a market rate which exceeded that charter rate. The panel agreed with the charterer and held that the rule generally followed in overlap situations whereby the owner is awarded compensation based upon the difference between the existing charter hire and the prevailing market rate was not applicable because the ship was not in fact available to enter the market. According to the panel, since the ship was previously committed to a specific charter, it was the difference between the rate under that charter and the existing charter that formed the basis of owner's damages.

Is the last voyage a legitimate voyage?

4A.40 The test for determining whether the last voyage is a legitimate one is set out in *Britain S.S. Co*. v. *Munson S.S. Line*, 31 F.2d 530 (2d Cir. 1929). Under U.S. law, however, this question will only be considered where the charter is for a flat period, or if the period is modified by the word "about." Where there is an express margin, or a "minimum/maximum" term, it is generally held irrelevant whether the last voyage is reasonable, if redelivery is made after the cut-off date. See *The Romandie*, above; *The Scaldia*, above; *The Elizabeth Entz*, above.

Early redelivery

4A.41 If there is an underlap, the owner is entitled to damages based on its loss of earnings until the end of the minimum charter term. In *The Itel Taurus*, SMA 1220 (Arb. at N.Y. 1977), for example, the charterer redelivered the ship 10 days before the earliest date allowed under the charter. The panel held that the owner was entitled to recover its provable damages for the 10-day period, and stated: "Specifically, the Owners are entitled to charter hire less the amount of any earnings received in the mitigation of this loss."

4A.42 The owner, of course, remains under a duty to mitigate damages if there is an underlap. Thus, the owner cannot refuse a wrongful redelivery, but must accept the ship and seek substitute employment for the period of the underlap. In *The Lamyrefs*, 1970 AMC 1966 (Arb. at N.Y. 1970), the ship was redelivered four days early. The panel held that redelivery prior to the redelivery date the charterer had given notice of was a breach of the charter. The owner, however, re-employed the ship almost immediately. The panel held that the re-employment was in mitigation of damages, and that the owner's damages consisted only of hire it would have earned after redelivery up to the date the ship was again employed.

4A.43 After the charterer redelivered the ship early, the owner in *The Golden Gate*, SMA 3797 (Arb. at N.Y. 2003), re-employed the ship in the coastwise MTBE trade, rather than for the carriage of PL 480 grains as had been originally contemplated under the charterparty. The panel concluded that the owner had been justified in accepting reduced demurrage payments due to the ship's inability to meet the pumping warranties set forth in the voyage charters that were subsequently made by the owner, even though the original (breached) time charter had not included a pumping warranty in that it contemplated the carriage of grains. The panel concluded that the owner's decision to employ the ship in the MTBE trade and accept reduced revenue was reasonable in light of the fact that, at the time of the charterer's breach, there were limited opportunities for the

carriage of PL 480 grains. The panel awarded damages based on the difference between the hire payable under the charter and the revenue that the owner had actually derived in mitigation.

4A.44 In *The Tharinee Naree*, SMA 3811 (Arb. at N.Y. 2003), however, the owner relet the ship at less than current market rates. The panel ruled that the owner could only recover the difference between hire promised under the charter and the market rate at the time the ship was relet. It appears that the distinguishing factor between *The Golden Gate* and *The Tharinee Naree* is that in the former case, the owner was able to justify its lost revenue as a reasonable business decision.

Place of redelivery

4A.45 The owner is entitled to a redelivery of the ship at the place or in the range stated in the charter. The owner, however, may waive this right if it is to his benefit to do so. For example, in *Munson S.S. Line* v. *Elswick Steam Shipping Co*., 207 F. 984 (S.D.N.Y. 1913), *aff'd per curiam*, 214 F. 84 (2d Cir. 1914), the time charter called for redelivery at a European port. The ship lost a significant amount of time en route to the discharge port, Buenos Aires, by a series of unexpected and unforeseen delays, however, and did not complete discharging until some three weeks after the end of the agreed charter period had passed. In these circumstances, the owner was held to be entitled to insist on redelivery of the ship at Buenos Aires. See discussion below at paragraphs 6A.1 *et seq*.

4A.46 The charterer, of course, is entitled to make redelivery at any place within the specified range. In *The Federal Voyager*, 1955 AMC 880 (Arb. at N.Y. 1953), the charterer had the option of redelivering the ship within a range of areas, including the United Kingdom, Continent, U.S. Gulf, U.S.N.H. or British North America. Near the end of the charter period, the charterer entered into a sub-charter which called for redelivery at a U.S.N.H. port, and so advised the owner. The owner then fixed employment for the ship on the assumption that she would be redelivered at a U.S.N.H. port. Subsequently, the sub-charter was cancelled, and the charterer in fact made redelivery in Holland. The arbitrators held that the charterer was justified in making redelivery in Holland, and that the owner acted at its own risk in arranging a future charter on the assumption redelivery would be made at a U.S.N.H. port.

Notice of redelivery

4A.47 In *The Procyon*, SMA 2674 (Arb. at N.Y. 1990), the panel held that charterer breached its obligation pursuant to an addendum to give owner seven days' definite notice of redelivery, despite the fact that this "lapse" was probably due to the difficulties which charterer experienced while the ship was docked in an area where a devastating earthquake occurred. The charterer was directed to pay the owner for the required notice period.

CHAPTER 5

Trading Limits

"15. ..... within below mentioned trading limits."

Purpose of the trading limits

5.1 Lines 13 to 15 of the New York Produce form articulate the essence of the time charter bargain: ". . . Owners agree to let, and. . . Charterers agree to hire the. . . vessel, from. . . delivery, for [the agreed period] within below mentioned trading limits". The owners place the employment of their ship in the hands of the charterers. The question immediately arises: what limits, if any, exist upon the charterers' freedom to direct what the ship is to do. That question is answered by the reference in Line 15 to the trading limits described in Lines 24 to 34, which will very often be supplemented or modified by the terms of the particular fixture.

5.2 Thus, in *Temple Steamship* v. *Sovfracht* (1944) 77 Ll.L.Rep. 257, a case of a trip time charter for a round voyage, Scott, L.J., said of the trading limits clause in time charters, at page 265: "It originated in and belongs to pure time charters. In such a charterparty there is nothing to limit the geographical range of the voyages on which the charterer is free to send the ship: he may send it to any navigable waters in the wide world that he likes (apart from navigation and trading dangers). That is the fundamental distinction from a voyage charter, which *ipso facto* defines the geographical employment of the ship. The object of a trading limit clause in time charter-parties is obvious. It is not to grant a liberty (because *ex hypothesi* the charterer already has it), but to impose a limit or restriction, by cutting down the otherwise unlimited and universal liberty of the charterer and excluding him from certain areas." (For the decision of the House of Lords in this case, see below; and for comments on the distinction between time and voyage charters see paragraphs I.7 and I.8, above.)

5.3 For a case on misrepresentation of the extent of trading limits see *The Lucy* [1983] 1 Lloyd's Rep. 188, referred to in paragraph G.33, below.

Types of limit

5.4 The trading limits in Lines 24 to 34 of the New York Produce form concern the two fundamental parameters of cargo and voyages: what can the charterers require the ship to carry and from and to where can they require her to carry it? Cargo must be "lawful merchandise, including petroleum or its products, in proper containers, excluding [as may be agreed in the particular fixture]". This aspect is considered in more detail in chapter 9. Voyages must be "between safe port and/or ports" within the stipulated range(s) and limits. This is considered in more detail in chapter 10.

5.5 Line 27 also requires the ship to be employed (only) in "lawful trades". The trades in which a time chartered ship will be engaged are those of carriage by sea and (except on voyages within one country) the import and export of goods. Illegality in any of those activities will contravene the Line 27 trading limit. As with "lawful merchandise" (paragraph 9.1, below), illegality by the law of the

place of performance will suffice and also (it is suggested) illegality by either the law of the ship's flag or the law governing the charter. Thus, for example, it is suggested it would be an unlawful trade under a charter governed by English law, or a charter of a ship flying the British flag, to carry cargo being exported in breach of international sanctions given effect to under English law.

Charter for trip defined more narrowly than trading limits

5.6 Where a voyage is specified and wider trading limits are also stated, the description of the voyage will be regarded as paramount.

The *Temple Moat* was chartered on an amended Baltime (1920) form, with delivery in the Bristol Channel and redelivery in the Cape Town/Lourenço Marques range "for a period of one round voyage to the Kara Sea". The charter also specified that she should be employed within certain wide limits which included the United Kingdom. The charterers argued that the period of the voyage described was only a way of determining how long the ship was to be available to them for trading within the permitted limits and that although after the Kara Sea the ship had to proceed substantially in the direction of South Africa, it was permitted to trade to other places on that general route.

The House of Lords held that the described voyage was paramount. On the facts found as to the meaning of "one round voyage to the Kara Sea" (which were not to be regarded as a precedent as to the meaning of "round voyage") the charter was for a voyage to the Kara Sea and thence to South Africa. The trading limits in the charter did not extend but rather limited the confines of that voyage.

Temple Steamship v. *Sovfracht* (1945) 79 Ll.L.Rep. 1 (H.L.).

(For further comments on "time charters for a trip", see paragraphs I.17, 4.1 and 4.99 *et seq*., above.)

Orders to trade outside the limits

5.7 Where the charterers order the ship to perform a service outside the trading limits set (expressly or by implication) by the charter, a number of different questions may arise, including: whether the master or owners may refuse to comply with the charterers' orders; whether, if the ordered service is performed with adverse consequences (for example, damage to the ship), the owners are entitled to damages; whether, if the ordered service is performed, the owners are entitled to additional remuneration beyond the hire agreed in the charter.

Variation

5.8 It is possible in principle for parties to vary their charter, extending the trading limits originally agreed so as to embrace the particular service ordered by the charterers, or just agreeing specifically that that service be permitted under the charter. Such a variation might be effective for the remainder of the charter period, or be limited to sanctioning the particular service ordered by the charterers as a one-off departure from the trading limits originally agreed.

5.9 No particular formality is required for a variation, but (as when initially concluding a fixture) the parties' correspondence and conduct must be consistent only with that result; the only conclusion any reasonable person in the parties' position could come to must be that the contract was being amended. In that regard, the principal focus will normally be on the tenor and terms of any correspondence from the owners (or their agents) in response to the charterers' order, since the master has no authority to vary the time charter (so that his consent to the charterers' order is no variation; likewise his compliance with that order).

5.10 If there is a variation, then the service ordered is, by the variation, within trading limits and (subject to the particular terms agreed as part of the variation) the parties' rights and liabilities are unaffected by the fact that it is outside the limits originally fixed. (Of course, those particular terms

may be especially important and it is suggested that variation is probably the best explanation for the difficult case of *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, and paragraphs 10.56 and 10.66, below. Indeed, Gatehouse, J., himself said of variation, at page 522, "This may be the best analysis of the position.")

5.11 In the rest of the discussion of orders to trade outside limits, below, it is assumed that there has been no variation.

Must the ship comply?

5.12 It is the charterers' right, but only within the trading limits, to direct the employment of the ship. The master and owners may properly refuse an order from the charterers to proceed outside these limits. Dismissing a possible inference to the contrary in the judgment of Greer, L.J., in *Lensen Shipping* v. *Anglo-Soviet Shipping* (1935) 52 Ll.L.Rep. 141, Devlin, J., said in *The Sussex Oak* (1949) 83 Ll.L.Rep. 297, at page 307: "I cannot think that the clause in a time charterparty which puts the master under the orders of the charterers as regards employment is to be construed as compelling him to obey orders which the charterers have no power to give." Nor is the master obliged to sign a bill of lading which names a port of discharge outside the trading limits. MacKinnon, L.J., said in *Halcyon Steamship* v. *Continental Grain* (1943) 75 Ll.L.Rep. 80, at page 84: "The limits of trading. . . are Institute Warranty limits, not north of Holland. If the charterers shipped a cargo in America and then tendered bills of lading to the captain under which he was to deliver to Copenhagen or Danzig, of course he would rightly refuse to sign. . ."

5.13 Mere compliance, without more, with the charterers' order to proceed outside the trading limits will not necessarily amount to a waiver of the owners' right to refuse further compliance subsequently: see the speech of Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (H.L.), at page 400, and paragraph 10.64, below. But if the owners, with full knowledge of the departure from trading limits, make clear that they have elected to accept the order to proceed despite that departure, they will probably be held to have waived their right to refuse further compliance with the order subsequently: see *The Kanchenjunga* again.

Damages?

5.14 It is the charterers' obligation to direct the ship (when they do so) only within the trading limits. It is thus a breach of the contract for the charterers to direct employment of the ship outside those limits. Although the point was conceded before him, it is suggested that Devlin, J., in *The Sussex Oak*, above, was right to think this had been established by a number of earlier cases, including *Temple Steamship* v. *Sovfracht* (1945) 79 Ll.L.Rep.1 in the House of Lords. On the other hand in *The Gregos* [1995] 1 Lloyd's Rep 1, at 9, Lord Mustill (*obiter*) expressed doubts: since the owners may refuse to follow an order to proceed outside the limits fixed by the charter and will be entitled to indemnity against loss caused by an illegitimate order (see chapter 19 below), he tended to the view that characterising the illegal order as itself a breach was an "unnecessary complication".

5.15 In *Temple Steamship* v. *Sovfracht* (1945) 79 Ll.L.Rep. 1, above (summarised at paragraph 4.99 and 5.6, above), the charterers argued that the master's acceptance of an order to proceed to Garston and the owners' failure to protest amounted to a waiver. Lord Porter dealt with this argument in the following terms, at page 11: "The ship had been detained in Murmansk for over five weeks and the owners may well have thought it advisable to make no protest against a sailing to Garston, lest the charterers should be guilty of a worse deviation. In these circumstances the failure to protest is easily comprehensible and even the receipt of chartered hire under such conditions

might well take place without being held to excuse the deviation, and, deviation or no deviation, there still remains the breach of the obligation to prosecute the voyage with the utmost despatch as required by Clause 8 and to send the ship direct to South Africa. No doubt the master obeyed the charterers' orders in sailing to Garston, but under Clause 8 of the charter-party he was under their orders as regards employment, and in accordance with the principles adopted in *Tyrer* v. *Hessler*, 7 Com. Cas. 166, his obedience would not constitute a waiver of his employers' rights." (That last comment, strictly, was an extension of the decision in *Tyrer* v. *Hessler*, since in *Tyrer*'s case there was no question of the charterers' orders being outside the limits laid down in the charter. It does not mean that the master had been obliged to follow the extra-contractual order.)

5.16 In short, waiver of a right to refuse to comply with an order does not involve waiver of a right to damages should loss result: see *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391, at page 397 *per* Lord Goff. To lose that right will require a variation or estoppel, such as was found (on the facts, rather harshly, it is suggested) in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508 and paragraphs 10.56 and 10.66, below.

5.17 In *Steven* v. *Bromley* [1919] 2 K.B. 722, below, Atkin, L.J., raised the possibility, on which he reserved his opinion, of owners who charter their ship for non-dangerous work and find her used instead for dangerous work, claiming as part of their damages for breach of contract reasonable extra remuneration for the dangerous work. It is suggested, *per contra*, that no such damages claim exists, so that in those circumstances, apart from damages for loss or expense caused by the charterers' wrongful order, the owners' only claim, if any, is that considered in paragraphs 5.19 to 5.23, below.

Repudiation?

5.18 Where a master, or his owners, takes objection to the charterers' order, as being beyond the limits set by the charter, usually either the charterers withdraw the order (perhaps under protest) or the owners agree to proceed (typically under protest). But if there is an *impasse*, the charterers insisting that an order be followed and the owners insisting that it will not be, the result will be a wrongful repudiation by whichever party was in the wrong and a damages liability incurred to the other party for the early termination of the charter (as in *The Product Star* (*No.2*) [1993] 1 Lloyd's Rep. 397, see paragraphs 19.42 *et seq*., below).

Remuneration?

5.19 If the charterers order the ship outside the trading limits and the owners instruct the master to comply with the order under protest, it may be that the owners are entitled to hire at the current market rate (if higher than the charter rate) for the voyages performed outside the trading limits. In *Rederi Sverre Hansen* v. *Van Ommeren* (1921) 6 Ll.L.Rep. 193, a time charter was restricted to voyages between the U.K. and Holland, but certain voyages to France were undertaken under protest. The charterers having paid hire at the charter rate, the owners secured an arbitration award for damages equal to the balance of the (higher) current market rate. This far exceeded the additional cost to the owners of the voyages performed under protest, so the charterers challenged the award of damages as having left the owner better off than if the contract had been performed. The Court of Appeal upheld the monetary award, but not as damages. The voyage charter case of *Steven* v. *Bromley* [1919] 2 K.B. 722, below, was applied. Bankes, L.J., said that "The principle there laid down is that where work is done outside the contract, and the benefit of that work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration."

5.20 Since the claim, if it arises, will be for hire at the current market rate, the owners will benefit from: (*a*) any premium in the market for the services provided (as against those within the charter limits); and (*b*) any rise in market rates since the charter rate was fixed. The question is not what rate would have been fixed if the extra-contractual services had been included in the fixture, but what, in the market, those services are worth at the time they are performed: see *The Batis* [1990] 1 Lloyd's Rep. 345, at pages 352 and 353 *per* Hobhouse, J.

5.21 In *Rederi Sverre Hansen* v. *Van Ommeren* and *The Batis*, above, the charterers' instructions were performed under protest. In such a case, the result could be affected by the precise terms of the parties' communications around the disputed order. It is suggested, however, that it will generally be appropriate to infer, from the charterers' insistence that the service they have ordered be performed in the face of an objection by the owners that it is outside the limits agreed in the charter, that the charterers will pay the current value of the services if the owners' objection is well founded.

5.22 More difficult is the case where the charterers' orders are accepted and followed, without protest by, or indeed with the apparently unqualified consent of, the owners.

The *Olanda* was chartered for a voyage from a port on the River Parana to Europe, carrying wheat, maize, rye, linseed or rape seed, at 32s per ton (wheat, maize or rye) and 33s per ton (linseed or rape seed). There was an express term that linseed should not comprise more than 50% of the cargo, but considerably more than 50 per cent of the cargo shipped was linseed. The owners suffered no loss (i.e., there were no adverse consequences from the carriage of excessive linseed and, indeed, at charter rates the owners earned more freight than if the contract had been honoured). The owners claimed freight on the linseed at the market freight rate at the time of shipment, which was higher than the contract rate. The claim failed.

Lord Finlay, L.C., explained the decision as follows: "Both parties intended that this linseed should be carried under the charterparty, and the charterparty provides that linseed should be carried at the rate of 33s per ton. It would be entirely different if the owners of the ship, through their agents abroad, had protested against the putting of the linseed on board and had received the linseed under protest; but here by consent of both parties the linseed was taken as under the charter and at the chartered rate of freight. . . all that we have got is that the linseed was carried owing to a mistake both parties shared, as to the right to have more than 50 per cent of linseed carried on board the vessel. That seems to me to dispose of the claim to be paid at the current rate of freight at the time the linseed was carried."

The Olanda [1919] 2 K.B. 728 (H.L.), reported as a Note to *Steven* v. *Bromley*, below.

The *Strathcona* was sub-chartered for the carriage of steel billets from (in the event) Liverpool to Nantes, at 23s per ton. The sub-charterers shipped 1,208 tons of steel billets and 987 tons of general merchandise. A current market rate for the carriage of the latter was found to be 30s per ton. The disponent owners (who had the ship on time charter) were unaware of the departure from the sub-charter terms. Bailhache, J., gave the disponent owners judgment for freight on the general merchandise at 30s per ton. The Court of Appeal upheld his decision.

Bankes, L.J., said, at page 725, that the inference of "a fresh contract. . ., or a fresh term added to the original contract, by which the charterers came under an obligation to pay the current rate of freight in respect of general merchandise shipped in the place of steel billets" was "justified [where] a charterer tenders for shipment cargo which is not that contracted for but is a different cargo for which the current rate of freight is substantially higher than the agreed rate for the cargo under the charter". An offer by the charterer to pay at the current rate "may be inferred from the tender of [such] a cargo by the charterer to the captain, a man who to the knowledge of the charterer is not in a position to vary the original contract. This is a continuing offer which the owner may accept as soon as the act of the charterer comes to his knowledge."

Scrutton, L.J., said, at page 727, that "where work is done outside the contract, and the benefit of that work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration". The charterers had "tendered cargo which was not within the charterparty. . . to one who had no authority to vary the terms of the charterparty. The proper legal inference is a promise by the charterers to pay reasonable remuneration for carriage of the cargo outside the charterparty. . ."

Atkin, L.J., agreed, but at the start of his judgment (at page 728) identified as the key fact that "in the words of [the trial judge], 'it is not and could not be pretended that in loading general merchandise the charterers

thought that they were within their contractual rights. They knew that they were not. They did not load under the charterparty, and as they did not and knew that they did not' the charterparty rate for steel did not apply."

Steven v. *Bromley* [1919] 2 K.B. 722 (C.A.).

(See also *The Saronikos* [1986] 2 Lloyd's Rep. 277, although there the entitlement to a *quantum meruit* was conceded.)

The *Paragon*, having been time chartered for up to about 5 months ('about' being defined to mean +/- 15 days) was redelivered six days late, at the end of a last voyage performed without protest but claimed by the owners to have been illegitimate (on which, see paragraph 4.64 *et seq*, above). Clause 101 of the charter provided (in substance) that if, in breach of charter, the charterers ordered an illegitimate last voyage and the charter overran, the owners were entitled to be paid at the market rate, if higher than the charter rate, for the 30 days prior to redelivery. The Court of Appeal upheld an award ruling on a preliminary issue that Clause 101 was unenforceable, as a penalty.

In doing so, the Court of Appeal rejected an argument that if the last voyage had been illegitimate as the owners claimed, then its performance was an extra-contractual service (since the owners could have refused to perform) that, absent Clause 101, would have attracted remuneration at the market rate for the duration of the voyage.

Lord Clarke, M.R., said at [25], that "in the ordinary case in which charterers give orders for an illegitimate last voyage there is no basis for implying a request by the charterers that the owners should perform such a voyage outside the charterparty and on terms that they will pay for the voyage at the market rate".

The Paragon [2009] 2 Lloyd's Rep. 688 (C.A.).

5.23 To modern legal eyes, it may not be as clear as it was to their Lordships in *The Olanda*, above, why the charterers' honest mistake in ordering extra-contractual services should necessarily excuse them from paying the going rate for the services in fact requested and received. In many cases, if those services had not been performed purportedly pursuant to the time charter in question, the charterers would have had to pay that going rate to another ship to avoid defaulting on sub-fixture or cargo purchase commitments. It is suggested that nowadays a claim should lie in such a case, namely a claim for restitution of incontrovertible benefit conferred on the charterers by mistake and accepted by them (see Goff & Jones, *The Law of Restitution*, paragraphs 6–007 to 6–008, stated in the light of the general discussion at paragraphs 1–004 to 1–011 and 1–019 to 1–026; Goff & Jones, *The Law of Unjust Enrichment*, paragraphs 4.18–4.21 and 4.27–4.33). It may, however, require a case with suitable facts to come before the Supreme Court for the matter to be settled.

War risks clauses

5.24 As the New York Produce form does not include a war risks clause, parties contracting on that form will typically import one as an additional clause, very often one of the BIMCO clauses designed for inclusion in time charterparties, i.e. the Conwartime 1993 or 2004 or 2013. Other standard forms of time charter do include war risks provisions, for example the Shelltime 4 form deals with war risks in Clauses 34 and 35 (see paragraph 37.165 *et seq*., below), whilst Clause 20 of the Baltime form reproduces the Conwartime 1993 clause. One of the main effects of such a clause is to set limits within which the chartered ship may be required to trade, so it is convenient to consider such clauses in this chapter. To do so, we consider, first, the Conwartime 1993 clause, as set out as Clause 20 in the Baltime form.

5.25 The structure of the clause is as follows:

– Clause 20(A)(ii) (or clause 1(b) of the Conwartime 1993 clause) identifies a wide range of perils such as "war (whether actual or threatened), act of war, . . . revolution, . . . civil commotion, . . . the laying of mines (whether actual or reported), acts of piracy. . .". It provides that such perils are "War Risks" if "in the reasonable judgement of the Master and/or the Owners, [they] may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other

persons on board the Vessel". (The Conwartime 2013 clause uses the simpler expression "may be dangerous or may become dangerous".)
– Clause 20(B) provides, stating it broadly, that the ship is not to be ordered to trade to or through, or remain in, places or areas that may expose her to War Risks as defined in Clause 20(A).
– Clause 20(C) protects the ship from having to run blockades.
– Clause 20(D) allows the owners to insure against war risks and to claim from the charterers additional premiums or calls imposed for trading to areas of particular risk.
– Clause 20(E) allows the owners to claim reimbursement from charterers for additional amounts payable to crew for trading to such areas.
– Clause 20(F) allows the owners, inter alia, to obey the advice or orders of certain governments, supranational bodies and war risks underwriters.
– Clause 20(G) deals with notice to charterers of owners' intentions and gives the owners, after such notice, liberty to discharge cargo at an alternative safe port.
– Clause 20(H) prevents action or inaction in accordance with Clause 20 being treated as a deviation.

5.26 In a war risks clause, "war" will probably be given its ordinary non-technical meaning: *Kawasaki K.K.K.* v. *Bantham* (1939) 63 Ll.L.Rep. 155. But contrast *Government of the Republic of Spain* v. *North of England Steamship* (1938) 61 Ll.L.Rep. 44, paragraph 5.41 below, on the meaning given to "blockade" in a war clause (such as in Clause 20(C) in the Baltime form). As already noted, Clause 20(A) includes piracy as a "War Risk". Not all war risks clauses do so, for example Clause 35 of the Shelltime 4 form does not. In response to the rise of piracy, particularly off the Horn of Africa, in December 2008 and March 2009 (with a revision in November 2009), Intertanko and BIMCO respectively published Piracy Clauses for time charters. They have not given rise to any case law and are not separately considered in this book. For the meaning of other particular words and phrases in war risk clauses, see also paragraphs 5.36 to 5.39, 24.20, and 37.156 to 37.175, below; also *Voyage Charters*, paragraphs 26.1 *et seq*., and generally *Marine War Risks*.

Clause 20(B): prohibition on exposure to War Risks

5.27 Clause 20(B) of the Baltime form provides that unless the written consent of the owners be first obtained, the ship "shall not be ordered to or required to continue to or through, any port, place, area or zone. . ., or any waterway or canal, 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" and if the ship should be "within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it". (The Conwartime 2013 clause states, more simply, "may be exposed to War Risks" and "becomes dangerous, or may become dangerous" respectively.)

5.28 In broad terms, Clause 20(B) prohibits the charterers from ordering the ship to a place where, in the reasonable judgment of the master or the owners the ship might be at risk of harm from one of the named perils. The precise nature of the judgment required was considered in *The Triton Lark*, below, where Teare, J., held that Clause 20(b) requires the master or owners to consider whether there is at least a serious possibility that compliance with the charterers' orders would put the ship in danger from one of the War Risks (in that case, acts of piracy). It is considered that, in this context, a ship is in danger if she is at significant risk of harm despite the exercise by master and crew of due skill and care in the operation and navigation of the ship.

The time charter of the *Triton Lark* was on the New York Produce form, but incorporated the Conwartime 1993 clause. The charterers ordered her to perform a laden voyage from Hamburg to China, proceeding via the Suez Canal and Gulf of Aden. They told the owners that in their view the ship "should be safe" (from

pirates) if she followed current good practice on precautionary measures. The owners refused to go via the Gulf of Aden, saying that in their opinion taking that route would "expose vsl and crew members on board to serious risk of pirates attack". The charterers continued to insist that the ship sail via the Gulf of Aden but, despite their protests, she sailed via the Cape of Good Hope. The arbitrators upheld the owners' claim for hire for the full (prolonged) voyage. They held that the owners had been entitled under the Conwartime clause to refuse to go through the Gulf of Aden and that they had been entitled to proceed instead via the Cape. The charterers appealed.

Teare, J., allowed the appeal, concluding that the arbitrators had misdirected themselves in their reasons, and remitted the award to the arbitrators.

The main issue, on which the judge gave two judgments, was whether the Conwartime clause entitled the owners to refuse to proceed via the Gulf of Aden. In the second judgment, he considered what was meant by the phrase to "be exposed to War Risks". He held that it meant to be in danger from one of the relevant perils: see [10]. In the first judgment, he considered what was meant by the words "may be, or are likely to be. . ." in the phrase "the Vessel, her cargo [and] crew. . . may be, or are likely to be, exposed to War Risks". He held that they meant "a real likelihood", "real danger" or "serious possibility" of such exposure: see the first judgment, [38]–[40]. The result was a direction to the arbitrators to consider "whether in the reasonable [judgment] of [the owners], there was a real likelihood that the Gulf of Aden would, on account of acts of piracy, be dangerous to *Triton Lark*": see the second judgment, [15].

The charterers also argued that if the owners *were* entitled to refuse to sail through the Gulf of Aden route, they should have sailed to Port Said for orders and were not entitled to sail for the ordered destination in China via the Cape. Teare, J., upheld the arbitrators' rejection of that argument: the order to carry the cargo to China was never countermanded; the charterers had only added to it an order to sail via the Gulf of Aden that they were not entitled to give (if the owners were right on the main issue); the master's obligation was thus to proceed to China with utmost despatch (as qualified by the entitlement not to sail via the Gulf of Aden). The main issue, above, was therefore determinative.

The Triton Lark [2012] 1 Lloyd's Rep. 151 and 457.

It is suggested that the charterers' further argument, though bad on the facts in *The Triton Lark*, was coherent in principle. Had they said in terms that if the owners would not allow the ship to proceed via the Gulf of Aden, the order for China was withdrawn, or made it clear in some other way that the order for cargo to be taken to China was strictly conditional upon the Gulf of Aden route, then nothing in the Conwartime clause would have entitled the owners to override that condition and take the cargo to China anyway.

5.29 The required judgment on the part of the master or the owners must be reasonable. It was submitted in *The Triton Lark*, above, that this required that their decision be made rationally, and not capriciously, and after making reasonable enquiries. The judge rejected that and said, in his first judgment at [55], that there was ". . . no necessity to imply any term as to how that discretion or power must be exercised because the clause [says] expressly that the owner's judgment must be "reasonable". The effect of that clause is that the owners must make a judgment. It must be made in good faith; otherwise it would not be a judgment but a device to obtain a financial gain. Further, the judgment reached must be objectively reasonable. An owner who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. If he makes no enquiries at all it may be concluded that he did not reach a judgment in good faith. But if he makes those enquiries which he considers sufficient but fails to make all necessary enquiries before reaching his judgment I do not consider that his judgment will on that account be judged unreasonable if in fact it was an objectively reasonable judgment and would have been shown to be so had all necessary enquiries been made."

5.30 The provisions of Clause 20(B) apply even where the charterers' voyage orders do not expressly specify use of or transit through the port, place, area, zone, waterway or canal judged by the master or the owners to expose the ship to war risks. Whether the charter be for a period or for a trip, the ship is subject to the charterers' orders throughout, even when following a customary route, and if, with full knowledge of the route to be followed, the charterers allow the ship to

proceed into a dangerous zone, an implication that they ordered the ship to proceed into it will readily be drawn: see *The Eugenia*, below.

5.31 The owners' remedy for breach by the charterers of Clause 20(B) is not confined to the rights given to the owners under sub-Clauses (D)(ii) and (E). Those sub-Clauses come into operation if the owners consent to the ship being brought within a dangerous zone, but if the owners do not consent, and the charterers are in breach of sub-Clause (B), the owners have a remedy in damages.

The *Eugenia* was time chartered under the previous version of the Baltime form "for a trip out to India via Black Sea" from the time of delivery at Genoa. The charterers ordered the ship to load cargo at two Black Sea ports for discharge at ports on the East Coast of India, but did not give the master any express orders to proceed either via Suez or the Cape. However, at that time the Suez Canal was the customary route for such a voyage. On 29 October 1956, Israeli forces invaded Egypt and on 30 October the Canal became, as the umpire in arbitration proceedings found, a dangerous zone within the meaning of what was then Clause 21(A). The owners consented neither to the ship proceeding via Suez nor to her entering or continuing into the Canal after it became a dangerous zone. On 30 October the owners objected to the ship entering the Canal. The charterers took no action to prevent the ship entering the canal and their local agent at Port Said told the master that he had arranged for her to enter the following morning. On 31 October the ship entered the Canal and was subsequently blocked there.

It was held by the Court of Appeal, affirming Megaw, J., on this point, that the charterers were in breach of Clause 21(A) and were liable in damages to the owners on the grounds that they had ordered the ship, without the consent of the owners, to enter a dangerous zone or, alternatively, allowed the ship to continue into such a zone.

The Eugenia [1963] 2 Lloyd's Rep. 381.

5.32 Since Clause 20(B) concerns exposure to risk, the question has arisen whether, for the charterers' orders to be prohibited, the degree of risk (as reasonably assessed by the master or owners) must be materially greater than it was when the charter was entered into. In *The Product Star* (*No.2*) [1993] 1 Lloyd's Rep. 397, paragraph 37.172, below, the Court of Appeal held that the war risk clause there could not be invoked unless the owners reasonably assessed that the risks to which they objected were greater than had existed when the charter was concluded. But there was in that case a proved common intention to trade mainly to loading ports in the UAE and the owners' case for refusing to comply with the charterers' orders was that they had reasonably concluded that Ruwais, UAE, was dangerous. Any requirement for a material increase in risk should be limited to the case where some reasonably specific trade(s) or location(s) was expressly permitted by a term of the charter, or mutually contemplated when the charter was concluded, but then objected to by the owners without change of circumstance: see *The Paiwan Wisdom*, below. That is not to say that where there is such an express permission or mutual contemplation, the owners necessarily will be entitled to refuse orders upon proof of a material increase in risk. That will depend on the terms and effect of the permission or contemplation in question. If not qualified, however, by any express permission or mutual contemplation, nothing in the Conwartime clause itself creates a requirement to prove that circumstances have changed since the charter was concluded. Rather, the purport of Clause 20(B) is that the owners' general consent in advance, by entering into the time charter, to have the ship follow the charterers' orders, is qualified by an insistence on the right to decide from time to time during the charter period whether to have the ship proceed somewhere that in their reasonable opinion may be exposed to War Risks.

The *Paiwan Wisdom* was time chartered on the NYPE 93 form with additional clauses including the Conwartime 2004 clause. The trading limits stated that "Passing Gulf of Aden always allowed with H&M insurance authorization". The ship was delivered in Japan in April 2010 and the charterers' first voyage orders were for a voyage loading cement in Hoping, Taiwan for carriage to Mombasa, Kenya. The owners refused those orders, relying on the Conwartime clause, because of "recent developments in Indian Ocean in respect of piracy" and "piracy getting more severe and extending further along the coast/waters of East Africa".

Arbitrators, determining a preliminary issue in favour of the owners, held that there did not have to be a

material change in risk since the date of the charter for the owners' refusal to be justified. Teare, J., dismissed the charterers' appeal, holding that:

(a) The trading limits contained a specific agreement to pass through the Gulf of Aden. The Conwartime clause could not be invoked on account of a danger of attack by pirates when passing through the Gulf of Aden, as that would be inconsistent with the specific agreement.
(b) The owners were, however, at liberty to refuse to proceed through the Indian Ocean to Mombasa if there was a real likelihood of the ship being exposed to acts of piracy on such route. The Conwartime 2004 clause contained no requirement that any such likelihood should have increased materially since the date of the charter.

The Paiwan Wisdom [2012] 2 Lloyd's Rep. 416.

The Conwartime 2013 clause deals with this issue expressly, stating that the prohibition against exposing the ship to War Risks applies "whether such risk existed at the time of entering into this Charter Party or occurred thereafter". It is suggested that *The Product Star* (*No.2*), above, would be decided differently on that wording; but the explicit agreement to pass through the Gulf of Aden in *The Paiwan Wisdom*, above, would still override the Conwartime clause.

Clause 20(D): "The owners may effect war risks insurance"

5.33 In *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307, at page 321, the House of Lords held that the then war risks clause in the Baltime form, which gave the owners the right to insure against certain war risks and charge the premium to the charterers, operated as a complete code and prevented the owners claiming under other provisions of the charter in respect of those described risks; as the charterers were to refund the owners' war risk premium, it would be unjust that they should remain exposed to a subrogated claim by the war risk underwriters under the safe port obligation in Clause 2 (see the summary of this case in paragraph 10.50, below).

5.34 But in the current version of the Baltime form, Clause 20(D) leaves the basic war risks premiums or calls with the owners; it is only any additional premiums or calls that are to be reimbursed by the charterers. It is suggested that this more limited transfer will not negative the charterers' other obligations under the charter, including that in respect of the safety of ports. (Moreover, there is no general principle that such obligations of the charterers will be negatived, absent the 'complete code' found in *The Evia* (*No.2*), above, merely because they pay for the hull insurance: see paragraph 10.83, below.)

5.35 In a series of cases following the outbreak of hostilities between Iraq and Iran, the charterers challenged demands by owners for reimbursement of war risk insurance premiums. The cases are summarised below. Most were on standard form charters with added provisions, varying in their detailed wording, requiring reimbursement of premiums by charterers.

5.36 One general principle emerging from the decisions in these cases is that the extent of the war risks cover that is to be arranged (and therefore paid for ultimately by the charterers to the degree provided for by the additional clause(s) in question) is a matter for the discretion of the owners, albeit that this discretion is to be exercised according to the standards of a prudent owner: see *The Athos* [1981] 2 Lloyd's Rep. 74 and below. Of course, that must be subject to any requirements expressly stipulated in a particular case.

5.37 It also appears from the decisions that "insurance of the vessel" in Clause 1 of the New York Produce form and other general expressions of a similar kind will not be narrowly construed and will extend to certain ancillary risks, such as detention expenses, freight and disbursements which might not strictly be said to be insurances of the ship herself: see, again, *The Athos*, below.

5.38 Otherwise, the extent of the charterers' obligation to reimburse the owners depends on the precise wording of the particular additional clause. Consequently, it is with the construction of those precise words that the cases set out below are mainly concerned.

The New York Produce form charter for *The Athos* included an additional clause reading as follows: "35. War Risk Insurance is always to be maintained. . . Charterers to reimburse Owners for. . . extra War Risk Insurance following receipt of invoices and supporting vouchers. . . ".

In February 1980 the charterers ordered the ship to Iran, which at that time was a dangerous area. The owners were consequently obliged to pay an additional premium to their War Risks Association, the Hellenic. The full cover provided by the Hellenic was divided into the following parts:

Part A. (i) Hull, Machinery, etc.
(ii) Freight, Premiums, Disbursements, etc.
B. Detention or Diversion Expenses.
C. Protection and Indemnity cover.
D. Sue and Labour.

The additional premium paid was calculated on the ship's insured value, which included an element for freight and disbursements and had been maintained at the same level for several years despite a large drop in her market value. Moreover, the percentage applied to this insured value to produce the premium payable was considerably increased by the owners' decision to maintain full cover with the Association including the part described as "Detention or Diversion Expenses", which they could have opted to exclude. This part of the cover provided running expenses if the ship were detained or diverted by reason of certain war risks and, in the event of detention exceeding 90 days, 10 per cent of the insured value per annum pro rata to the period of detention. The charterers objected to the consequent size of the additional premium that the owners sought from them under Clause 35. They argued that by including cover for freight and disbursements and by opting for cover for "Detention or Diversion Expenses", the owners had gone beyond insurance "of the vessel" under Clause 1; also that the insured value on the ship should have been reduced.

Neill, J., held that the whole additional premium paid by the owners was recoverable from the charterers. He said that "insurance of the vessel" in Clause 1 should not be narrowly construed; and that the extent of the cover was a "matter for the discretion of the owners though that discretion is to be exercised according to the standards of a prudent owner". The cover arranged by the owners satisfied this test and the additional premium paid was recoverable under Clause 35. In particular he held that the owners were entitled:

(a) to include in the insured value of the ship the element for freight and disbursements, as being part of "the sum which an owner requires to compensate him if the vessel becomes an actual or a constructive total loss",
(b) to maintain the insured value despite the substantial fall in market value, in accordance with general market practice,
(c) as prudent owners, to take out the optional cover for "Detention or Diversion Expenses", in view of the high degree of risk of the ship being trapped in Iran.

The Athos [1981] 2 Lloyd's Rep. 74; appealed on other grounds [1983] 1 Lloyd's Rep. 127 (C.A.).

The *Antaios* was chartered and sub-chartered under four charterparties, each on the New York Produce form and each containing an additional Clause 40 which read: "Any increase in war risk premiums for the vessel, officers and crew, after delivery to be notified immediately by the Owners to the Charterers and the latter to pay the increase, if vessel trading in areas where increase effective, however, increase as payable by Charterers not to exceed what would have been quoted if vessel was covered with Lloyd's London."

Each charter also provided for worldwide trading within Institute Warranty Limits (which could be broken on payment by the charterers of extra insurance) and for the ship to be entered in a P. & I. Club. When the ship was delivered under the head charter, in January 1979, the Arabian Gulf had not been declared an additional premium area by the Hellenic War Risks Association, in which the ship was entered. But it had become an additional premium area by the time of delivery under the sub-charters. The *Antaios* entered the Gulf on 17 September 1981, and the owners paid for the full cover of the Hellenic Association, including cover in respect of "Detention or Diversion Expenses" (see *The Athos*, above) and in respect of "Freight, Premiums, Disbursements".

Robert Goff, J., held that: (1) the sub-charterers were liable only for the increased rate of premium over the rate current at the time of delivery; and (2) Clause 40 was intended to apply to the whole cover offered by the Hellenic Association.

The Antaios [1981] 2 Lloyd's Rep. 284.

The *Oinoussian Virtue* was fixed for a trip to the Persian Gulf on the New York Produce form. Additional Clause 36(b) provided: "Any additional war risk insurance premiums over and above normal war risk insurance premiums and any war risk bonuses, if any, to be for Charterers' account."

Robert Goff, J., held that everything depended on the wording of the particular clause and that the word "additional", when contrasted with "normal", naturally referred to the additional premium payable for entering an "additional premium area" under the ship's war risk insurance cover. He also upheld the arbitrator's decision that the charterers were liable for the premium payable by the owners for the full cover of the owners' War Risks Association, including cover for "Detention or Diversion Expenses" (see *The Athos*, above); the arbitrator had held that it was reasonable for the owners to take out such cover and Clause 36(b) referred to "any" additional war risk premium.

The Oinoussian Virtue (*No. 2*) [1981] 2 Lloyd's Rep. 300.

The *Apex* was chartered on the New York produce form for a trip to the Arabian Gulf. An additional Clause 53 provided that: "Premium for basic war risk insurance on hull and machinery and crew always to be for Owners account but any additional premium and/or crew bonus in respect of these risks arising from the vessel proceeding at time charterers request to areas currently or subsequently designated as excluded areas by vessel's war risk underwriters to be for time charterers account who to pay to the Owners the amount due against presentation of underwriters'/brokers' original invoice(s)."

The owners paid additional premiums to the Hellenic Association to maintain cover for all risks under Parts A to D of its cover (see *The Athos*, above.) They sought to recover these from the charterers who disputed liability for premiums other than for cover under Part A(i), C and D.

It was held by Mustill, J., that the words "hull and machinery" in Clause 53 were not to be construed as defining the cover and meant no more than the ordinary war risks insurance in respect of the ship; accordingly the charterers were liable to pay the additional premiums in respect of the Part A(ii) and Part B covers, the latter being an integral part of the cover offered by the Hellenic Association (see *The Athos*, above).

The Apex [1982] 2 Lloyd's Rep. 407.

(See also *The Agathon*, below, in which Hobhouse, J., criticised the construction of "hull and machinery" in this case.)

5.39 The above cases all concerned charters on the New York Produce form. The cases which follow concern other forms of charter.

The *Taygetos* was chartered on the Beepeetime 2 form for a period of 10 years from August 1975. Clause 38 of the charter provided: "Any extra expenses which may be incurred by Owners if the vessel has to trade in areas where there is war (de facto or de jure) shall be borne by Charterers provided that before such expenses are incurred Charterers are given an opportunity to signify their approval. Any additional war risk insurance premiums on the vessel and/or crew imposed by vessel's war risk underwriters by reason of vessel being in breach of trading warranty limits and/or crew war bonus to be borne by Charterers." (The second sentence was added in typescript to the printed Clause 38.) Disputes arose regarding the charterers' obligation to reimburse the owners for additional premiums for voyages into the Arabian Gulf in 1980 and 1981, the ship being entered in the Hellenic Association.

It was held by Bingham, J., that the second sentence of Clause 38 was wide enough to include Part B cover (see *The Athos*, above), and a reasonable and prudent owner would not have opted out of the Part B cover.

The Taygetos [1982] 2 Lloyd's Rep. 272.

The *Agathon* was chartered on a previous version of the Baltime form, the then war clause, Clause 21, being unamended. In the course of the 12-month charter the ship was ordered to Basrah and in September 1980 became trapped. The ship was entered in the Hellenic Association with full cover (see *The Athos*, above).

It was held by Hobhouse, J., that the words in Clause 21(B) entitling the owners to ". . . insure their interests in the vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit" were specific terms and were to be distinguished from the general terms considered in all previous cases except *The Apex*. Nevertheless, on a proper construction of these words, they did apply to the full cover provided by the Hellenic Association.

The Agathon (*No. 2*) [1984] 1 Lloyd's Rep. 183.

The *El Champion* and two other ships were time chartered under separate charters for trips to the Persian Gulf.

Two of the charters provided by Clause 68: "Basic War Risk Insurance Premium to be always for Owner's account. Any Extra War Risk Insurance premium on hull and machinery due to vessel's trading Persian Gulf to be for charterer's account. . . ." In the third charter "Persian Gulf" was omitted from Clause 68. Between the dates of the charters and the dates the ships entered the Gulf there had been no increase in the war risks rates either generally or for the Gulf. The charterers argued that they were therefore not obliged to pay for the Gulf premiums, these being "Basic" and not "Extra".

It was held by Staughton, J., that "Basic" war risk premiums referred to the rate payable for worldwide trading and that Clause 68 required the charterers to reimburse the owners for the "Extra" or additional premiums payable on entering an additional premium area. This was so whether or not "Persian Gulf" was included in Clause 68. He also held that if the owners had effected policies on "Increased Value and/or Disbursements and/or Interest Values", premiums on such policies were also "on hull and machinery".

The El Champion [1985] 2 Lloyd's Rep. 275.

The *Discaria* was voyage chartered for the carriage of cargo from Qatar to Iran. The charter provided by Clause N.4: "All additional war risk premiums and blocking and trapping insurance together with war risk bonuses payable to officers and crew to be for Charterers' account." Before the voyage the owners cancelled their existing war risks insurance, which did not include cover against loss of earnings, and took out a new package which did include this cover.

It was held by Staughton, J., that the clause did not enable the owners to recover the premiums in respect of loss of earnings cover, because it was restricted to extra premiums required under an existing insurance (by contrast to extra insurance taken out in face of the danger) and it was not necessarily comprehended in "blocking and trapping".

The Discaria [1985] 2 Lloyd's Rep. 489.

Clause 20(F): "Any other Government, body or group . . . with the power to compel compliance . . ."

5.40 The words "any other Government" in Line 309 of Baltime Clause 20(F) have been held, in the case of the War Risks Clause of the Gencon voyage charter, to mean any national government which exercised full executive and legislative power over an established territory irrespective of the fact that the charter was governed by English law and the British Government did not recognise the government in question either *de facto* or *de jure*. In *The Captain Stefanos*, paragraph 5.43 below, Cooke, J., doubted that the reference to bodies or groups "with the power to compel compliance" was apt to include pirates who had hijacked the ship.

The *Marilu*, flying the Italian flag, was chartered by a Czechoslovakian company for a voyage from North China ports to Europe under the Gencon form. The War Risks Clause provided: "The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or by any other Government or any department thereof, or any person acting or purporting to act with the authority of such Government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions . . .". Having loaded at Tsingtao and sailed for Europe, the ship was intercepted by a Formosan Government warship and taken to Keelung where, after discharge of her cargo, she was released. It was intimated by the British Foreign Office that, at the material time, the British Government had ceased to recognise the Formosan Government as being either the *de facto* or *de jure* government of the Republic of China, or to recognise that any government was located in Formosa.

It was held by Sellers, J., that the reference to "any other Government" meant a national government (as opposed to a subservient authority such as a municipal or provincial government), which exercised full executive and legislative powers over an established territory. On the arbitrator's findings of fact, the Formosan Government was such a government and it was held that neither as a matter of construction nor as a rule of law was it relevant that the Formosan Government was not recognised by the British Government. Accordingly, the owners were held to have been entitled to comply with the orders of the Formosan Government warship to proceed to Keelung and discharge the cargo there.

Luigi Monta v. *Cechofracht* [1956] 2 Lloyd's Rep. 97.

Exercise of discretions

5.41 The BIMCO Conwartime clause – in all its versions – expressly requires that judgments which the clause calls upon the master or the owners to make should be reasonable. The effect of that stipulation is discussed in paragraph 5.29 above. Other war risks clauses may give the owners or the master a discretion to decide whether a place is dangerous which is not subject to any express qualification. However, in such a case, it will be implicit that the decision must be made in an honest and rational manner.

The *Hartbridge* was chartered for a voyage from the River Tyne to one of several named Spanish ports including Barcelona. The war clause in the charter provided that if any discharging port to which the ship might properly be ordered was blockaded or if, owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law, it was considered by the master or the owners in his or their discretion dangerous or impossible to reach the discharging port, the cargo should be discharged at another safe port. A week after the charter was signed a threat was made over the radio that Barcelona and the other ports named in the charter were to be blockaded, but in the event they never were and other ships continued to use the ports. Prior to the loading of any cargo the owners made it clear that they would not accept orders for Barcelona or any of the other named ports and finally the charterers nominated Oran, under protest, as an alternative. It was held that:

(1) "blockaded" meant blockaded in its legal sense and that Barcelona was never blockaded;
(2) the provisions of the war risks clause applied only after the cargo was loaded; and (*obiter*) that
(3) the discretion given to the owners under the war risks clause had to be exercised reasonably.

Lewis, J., said: "discretion must not be exercised in an arbitrary and unreasonable manner, and in this case there was really no exercise of discretion at all as the matter was not considered or no full or sufficient enquiry was made."

Government of the Republic of Spain v. North of England Steamship (1938) 61 Ll.L.Rep. 44.

Similarly, in *The Product Star* (*No. 2*) [1993] 1 Lloyd's Rep. 397 the Court of Appeal held invalid the arbitrary exercise by owners of their right under Clause 40(2) of the Beepeetime 2 form to refuse orders to load at a port which they in their discretion considered, by reason of war, to be dangerous. Leggatt, L.J., said, at page 404: "In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably."

5.42 Furthermore, any option given to the owners or charterers must be exercised within a reasonable time.

The *Belpareil* was employed under a time charter which gave the owners and/or the charterers the option to cancel in the event of war between China and Japan. In September 1937, during the currency of the charter, war between China and Japan did break out and the war was still continuing in April 1938, when the charterers purported to exercise their option to cancel the charter. It was found as a fact by the umpire that a reasonable time for the exercise of the option had expired before April 1938. It was held by Branson, J., that the umpire had correctly directed himself and that the charterers were only entitled to a reasonable time in which to ascertain the relevant facts necessary to enable them to make up their minds.

Kawasaki v. *Belships* (1939) 63 Ll.L.Rep. 175.

(See now *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212 (C.A.) and paragraph 24.20.)

Baltime Clause 20(H): hire and frustration

5.43 Clause 21(B)(2) of the previous version of the Baltime form provided expressly that hire was to be paid for all time lost if the ship approached or was brought or ordered within a dangerous zone as defined in Clause 21(A), notwithstanding the provisions of the off-hire clause. But it was

held in *The Evia* (*No.2*), below, that it did not exclude the operation of the doctrine of frustration. The sub-clause did not apply in circumstances which would, apart from the clause, have the effect of frustrating the charter. In the current version of the Baltime form, Clause 20(H) states that anything done or not done in accordance with sub-Clauses (B) to (G) "shall be considered as due fulfilment of this Charter", which we suggest means that hire is payable whilst the owners are acting in accordance with (any of) those sub-Clauses, unless an off hire clause applies (which itself may be affected by the fact that the ship has acted in "due fulfilment" of the charter). In *The Captain Stefanos* [2012] 2 Lloyd's Rep. 46 Cooke, J., said, at [29], that, "in the abstract" (i.e. without reference to the presence or particular wording of any off-hire provisions), sub-Clause (H) does not have the effect that hire is payable when the ship complies with the orders of others pursuant to sub-Clause (F). It is respectfully suggested, to the contrary, that putting the ship off hire, at all events under off-hire wording triggered by "loss of time", during compliance with orders under, for example, sub-Clause (F), is inconsistent with the agreement that such compliance is "due fulfilment" of the charter. To say that compliance with an order from a specified third party is "due fulfilment" of a time charter is to say that the order is to be treated as if it came from the charterers and superseded any inconsistent prior orders. But then the ship will be undertaking, in proper time, the charterers' (deemed) employment orders and there will be no interruption to, or delay in performance of, the service immediately required. It should be neither here nor there that whilst doing so she will not be fulfilling, or will be causing delay to the ultimate fulfilment of, prior orders that have been (deemed to be) superseded. (On "loss of time" in off-hire clauses, see paragraph 25.55 *et seq*., below.) Whether that is right or not, it is thought that Clause 20, like its predecessor, does not bar frustration.

The *Evia* was time chartered on the Baltime form for a period of 18 months, two months more or less in charterers' option. The ship was delivered on 20 November 1979, and therefore redelivery was due between 20 March and 20 July 1981. In March 1980 the charterers ordered the Evia to load cargo for Basrah and on 20 August 1980 (after a period waiting to discharge) she berthed at that port. On 22 September 1980 she completed discharge at Basrah but by this date hostilities had broken out between Iraq and Iran and the ship was unable to sail because of the danger to navigation in the Shatt-al-Arab waterway caused by the war. It was held by the umpire in arbitration proceedings that the charter was frustrated on 4 October 1980, but the owners argued that since Clause 21(B) made provision for the events which had occurred the doctrine of frustration did not apply.

On appeal it was held by Robert Goff, J., and the Court of Appeal that Clause 21(B) was not intended to legislate for the consequences of frustration or to exclude frustration; it simply provided that if time was lost in the circumstances specified, hire was to continue to be paid notwithstanding the off-hire clause. The House of Lords agreed.

The Evia (*No. 2*) [1981] 2 Lloyd's Rep. 613, [1982] 1 Lloyd's Rep. 334 (C.A.) and [1982] 2 Lloyd's Rep. 307 (H.L.).

(For discussion of the nature of the safe port obligation, see chapter 10.)

The *Captain Stefanos* was time chartered on the New York Produce form, with additional clauses including the Conwartime 1993 clause and an off-hire clause, Clause 56, putting the ship off hire in the event of loss of time caused by, amongst other things "capture/seizure, or detention or threatened detention by any authority including arrest". The ship was hijacked by pirates on 21 September 2008, off the coast of Somalia, and released on 6 December 2008 after the owners paid a ransom. As a preliminary issue, arbitrators held that she was off hire under Clause 56 whilst in the hands of the pirates. That decision was upheld on appeal by Cooke, J., who agreed with the arbitrators that, in Clause 56, "capture/seizure" was not limited to capture or seizure "by any authority". The owners then contended that, whilst captured, the ship was exercising the liberty under sub-Clause (F)(i) of the Conwartime clause to comply with the orders of a "body or group . . . acting with the power to compel compliance with their orders", and that the "due fulfilment" provision of sub-Clause (H) overrode the off-hire provision in Clause 56. Cooke, J., doubted the premise and in any event rejected the argument that sub-Clause (H) would override Clause 56.

The Captain Stefanos [2012] 2 Lloyd's Rep. 46.

U.S. Law

Trading limits

5A.1 Broad trading limits are one of the distinctive features of a time charter. Whereas under a voyage charter the ship normally is chartered for a trip to one or more specified places, under a time charter the ship is under the charterer's orders as to which ports it shall visit. The geographical limitations found in time charters usually are dictated by safety or political considerations.

5A.2 The charterer is in breach of its obligations under the charter if it orders the ship to go outside the specified trading limits. The master is free to refuse such orders. Indeed, it has been held that the owner is justified in withdrawing the ship from the charterer's service if the charterer persists in a demand that the ship trade outside the agreed limits. In *The Central Trust*, 1971 AMC 200 (Can. Exch. 1970), the court held that the owner was entitled to withdraw the ship where the charter excluded "communist and communist satellite ports" from the permitted trading areas and the charterer nominated Yugoslavian ports for discharge. *Cf. The New Way*, 1977 AMC 88, 95 (Arb. at N.Y. 1976); *The Arietta Venizelos*, 1973 AMC 1012 (Arb. at N.Y. 1972), discussed below at paragraph 10A.36.

5A.3 In *The Andros Mentor*, SMA 2125 (Arb. at N.Y. 1985), the charterer's routing directions called for the ship to travel in the Bering Sea, an area outside Institute Warranty Limits (IWL), even though the charter explicitly limited trading to areas within IWL. The panel held that the master was not bound by the charterer's instructions, noting:

> Owner argued that it would have incurred an additional insurance premium of about $15,000 in so doing, and Charterer argued that it would have gained Owner's permission before so doing. While the Panel notes that permission to proceed via the Bering Sea is frequently granted by insurance companies without additional premium, such permission (with or without added premium) is granted upon application, and is not necessarily automatic. In this case, there was no contemporaneous evidence that any such permission had been applied for, or even discussed.

5A.4 In *The Universe Explorer*, 1985 AMC 1014 (Arb. at N.Y. 1984), a dispute under the Texacotime form, the panel stated that the owner had indirectly limited the ship's eligibility to engage in worldwide trading by calling for stores at South Africa. The panel held that the charterer was entitled to put the ship off-hire during the time when Nigerian authorities refused to allow loading because of the call at South Africa.

5A.5 In *The Mana*, SMA 2669 (Arb. at N.Y. 1990), a sole arbitrator was asked to decide whether the charterer could compel the ship to sail directly from Taichung in Taiwan to Shanghai in the People's Republic of China. The owner contended such a voyage would violate Taiwan's laws and thereby subject the ship to being blacklisted and unable to call at Taiwan again. The owner relied on the following clause:

> If vessel calls any port in People's Republic of China then no direct calls between People's Republic of China and Taiwan.

The arbitrator ruled that this language did not prohibit the charterer from directing the ship to proceed from Taiwan to Shanghai. The arbitrator found that the owner was aware of the potential blacklisting when the charter was drafted and could have insisted on a specific clause which would have restricted such voyages.

5A.6 *The Jerom*, SMA 2790 (Arb. at N.Y. 1991), involved a dispute under a Mobiltime form of charter arising from the owner's refusal to permit the ship to trade to the Persian Gulf because of the Iran/Iraq war. There were no trading restrictions in the charter, except those in the war clause. The panel found the owner in breach of the charter. See discussion at paragraphs 38A.98 to 38A.100.

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CHAPTER 6

Liberty to Sublet

"16. Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for
17. the fulfillment of this Charter Party."

Effects of sub-charter

6.1 Line 16 of the New York Produce form gives the charterers the express right to sub-charter the ship during the currency of the head time charter. A sub-time charter (or a sub-voyage charter) does not of itself create any contractual relationship between the owners and the sub-charterers. The owners may not, therefore, sue the sub-charterers, or be sued by them, under or by virtue of the head charter or the sub-charter. This is in accordance with the principle that a contract cannot, generally, confer rights or impose obligations on persons who are not parties to that contract. (The mere liberty to sub-contract will not engage the Contracts (Rights of Third Parties) Act 1999, so the sub-charterers will not enjoy rights under the head charter by virtue of that Act, nor will the owners under the sub-charter.)

6.2 Sub-charterers may, however, be in direct contractual relationship with the owners under bills of lading issued under the sub-charter, if both the owners and the sub-charterers are parties to such bills. In these circumstances the owners may sue (and be sued) under the bills of lading, although they have no rights or obligations under the sub-charter and are not entitled to enforce the terms of the head charter against the sub-charterers.

The *Bombay* was time chartered for six months with an option to sublet and was sub-chartered for a round voyage. The head charter provided that bills of lading were to be signed at any rate of freight the charterers or their agents might direct, without prejudice to the head charter. The head charter further provided that the owners were to have a lien "upon all cargoes for freight or charter money due under this charter". Bills of lading were issued to the sub-charterers on terms that did not include a lien for money due under the head charter, but the owners sought to exercise a lien on the sub-charterers' cargo for hire due under that charter. It was held that the owners had no right of lien for the time charter hire; that was a right enforceable only against the head charterers. Under the bills of lading, which constituted contracts between the owners and the sub-charterers and not mere receipts, the owners had a lien only for the freight due under those bills.
Turner v. *Haji Goolam* [1904] A.C. 826 (P.C.).

6.3 The owners may also be responsible to sub-charterers in tort as bailees if the owners, through their servants or agents, are in possession of the sub-charterers' cargo: see *The Pioneer Container* [1994] A.C. 324 (P.C.) (*sub nom*. *The K.H. Enterprise* [1994] 1 Lloyd's Rep. 593). The owners may, however, be entitled to rely on the exceptions and other terms in the contract under which the cargo is carried: see paragraphs 21.72 to 21.74, below.

Sub-charterers' authority to sign bills of lading for master

6.4 Where there is a liberty to sublet in the head time charter, sub-charterers will generally be authorised to sign bills of lading (either personally or by their agents) in such a way as to bind

the owners. Browne, L.J., said in *The Vikfrost* [1980] 1 Lloyd's Rep. 560, at page 567: ". . . the charterers had the option of sub-letting and no restrictions are imposed as to the terms of the sub-letting. In my view, the owners must have contemplated that, if there was a sub-letting, the sub-charterers would be entitled to require the master to sign bills of lading, and to sign themselves such bills of lading as they were entitled to require the master to sign, and so create a contract between the owners and the holders of the bills of lading." Accordingly he continued: "(1) the head charter expressly authorised sub-letting; (2) by necessary implication the head charter authorised the charterer in case of such a sub-letting to put the sub-charterer in the same position as to signature of bills of lading as the charterer was under the head charter, i.e., to authorise the sub-charterer to require the master to sign bills of lading or to sign them himself. Clause 9 of the sub-charter did so authorise the sub-charterer. . . ; (3) as the ship was trading worldwide, this authority necessarily included authority for the sub-charterer to sign by agents. . . ."

6.5 In that case the owners of a ship, which was trading under a time charter that was subject to Norwegian law and jurisdiction, contended that sub-agents of sub-charterers had no authority to issue, on behalf of the master, bills of lading containing an English jurisdiction clause. It was held that since the head charter contained an option to sublet and permitted the inclusion of a demise clause in bills of lading, the sub-charterers and their agents had implied authority to issue such bills of lading – a term requiring bill of lading claims to be determined in England was not inconsistent with the term that disputes under the time charter had to be determined in Norway. (See further, on questions that arise concerning bills of lading issued pursuant to time charters, chapter 21.)

Payment of freight or hire under sub-charter

6.6 For the circumstances in which the owners may be entitled to bill of lading freight or sub-charter freight or hire in respect of cargo shipped under a sub-charter, see chapter 30.

U.S. Law

Liberty to sublet

6A.1 Under the New York Produce form, the charterer has the right to sub-charter the ship. The charterer, however, remains responsible for the performance of its obligations under the head charter. The sub-charter does not create a contractual relation between the owner and the sub-charterer, and will not relieve the charterer of any of its duties to the owner under the head charter.

6A.2 These principles are illustrated by the decision in *Dampskibs Akt. Thor*. v. *Tropical Fruit Co*., 281 F. 740 (2d Cir. 1922). The head charter was for a period of "about three years," with redelivery of the vessel to be made "at a port in the United States, Atlantic or Gulf of Mexico." The charterer exercised its right to sub-charter, although the sub-charter was not on identical terms with the head charter and called for redelivery "at a port in the United States-Atlantic North of Hatteras".

6A.3 The head charter commenced on May 11, 1915; consequently the charter was to expire "about" May 11, 1918. On May 10, 1918, the ship was in New Orleans, empty of cargo. Instead of making redelivery, however, the charterer allowed a voyage to Cuba and thence to New York which ended on May 24, 1918. The owner then brought a claim for hire at the market rate (which was greater than the rate under the head charter) for the period May 11–24 and the claim was granted. The court found that the voyage to Cuba was an unreasonable overlap, and that as a matter of law the head charter terminated at New Orleans on "about" May 11, 1918. The sub-charter did not set up any contractual relation between the owner and sub-charterer, and did not vary in any way the owner's rights under the head charter.

6A.4 In *The Banes*, 221 F. 416, 418 (2d Cir. 1915), the court held that a sub-charterer was not entitled to a direct recovery from the owner for cargo damage on the ground that the ship was unseaworthy. As stated by the court: "A subcharter, even on the same terms as the original charter, would not constitute any contract relation between the subcharterers and the owners."

6A.5 See also *Saxis S.S. Co*. v. *Multifacs International Traders Inc*., 375 F.2d 577, 582 n.7 (2d Cir. 1967), where the court stated that "the subcharter relationship normally gives the subcharterer no rights against the general owner of a vessel. . .;" *Flat-Top Fuel Co. Inc*. v. *Martin*, 85 F.2d 39, 1936 AMC 1296 (2d Cir. 1936); *Perez* v. *Cia Tropical Exportadora*, 182 F.2d 874, 1950 AMC 1264 (5th Cir. 1950).

6A.6 Even without an express provision granting it the right to do so, charterer may sub-charter the vessel unless specifically prohibited from doing so in the head charter. *The Ely*, 110 F. 563, 570 (S.D.N.Y. 1901), *aff'd*, 122 F. 447 (2d Cir. 1903), *cert. denied*, 189 U.S. 514 (1903) ("The subcharter itself was lawful and no violation of the terms of the original charter. There is no stipulation in the latter forbidding a subcharter, and it was therefore valid."). See also *Hyundai Corp*. v. *Hull Insurance Proceeds of The Vulca*, 800 F. Supp. 124, 127 (D.N.J. 1992), *aff'd*, 54 F.3d 768, 1995 U.S. App. LEXIS 11714 (3d Cir. 1995). (Rules of the Third Circuit Court of Appeals may limit citation of this case as an unpublished opinion.)

6A.7 A sub-charterer may have a lien on the ship in certain circumstances. See discussion at paragraph 30A.97.

Sub-charterers' authority to sign bills of lading for master

6A.8 See discussion at paragraphs 21A.8 to 21A.46.

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CHAPTER 7

Delivery

"18. Vessel to be placed at the disposal of the Charterers, at .....
19. .....
20. in such dock or at such wharf or place (where she may safely lie, always afloat, at all times of tide, except as otherwise provided in clause No. 6), as
21. the Charterers may direct. If such dock, wharf or place be not available time to count as provided for in clause No. 5 . . ."

Delivery

7.1 The ship starts the charter service by being delivered to the charterers. A valid delivery marks both the start of the charter period (see Lines 13 to 14 of the New York Produce form) and the time from which the owners earn hire (see Clause 4, Line 53). (However, as discussed below, the owners' tender of delivery may be invalid for various reasons, in which case the charterers are entitled to treat the ship as still undelivered.)

7.2 For these purposes, 'delivery' means putting the ship at the charterers' disposal; there is no transfer of possession. See further paragraphs I.5 and I.13, above. In *The Madeleine* [1967] 2 Lloyd's Rep. 224, where the ship had been chartered on the Baltime form, Roskill, J., said, at page 238 lhc, "An owner delivers a ship to a time charterer under this form of charter-party by placing her at the charterers' disposal and placing the services of her master, officers and crew at the charterers' disposal, so that the charterers may thenceforth give orders. . . as to the employment of the vessel. . . ." Although under other forms – including the New York Produce form – the owners may be required to do more than put the ship at the charterers' disposal in order to deliver her (for example, serve a notice of readiness), under any time charter, the owners are required to do at least this.

When must the owners deliver the ship?

7.3 Some charters contain an undertaking by the owners that the ship will be delivered at a particular time: see, for example, the Baltime form, Box 16 and Clause 1. In such cases, ordinarily, the owners are guilty of a breach of charter if the ship is not delivered at that time: see, for example, *The Helvetia S* [1960] 1 Lloyd's Rep. 540, *per* Pearson, J., at page 551 (the facts of this case are summarised at paragraph 27.37, below). Indeed, the obligation to deliver the ship by that time is probably a condition of the contract and the charterers will be entitled to terminate the charter if the ship is not delivered by then: see *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478, *per* Sellers, L.J., at page 486. In the case of the Baltime form, however, the owners' obligation to deliver the ship at the time agreed is qualified by Clause 12, which provides, "The Owners only shall be responsible for delay in delivery of the Vessel. . . if such delay. . . has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager."

7.4 Most time charters, however, do not give a specific date for delivery. As Greer, L.J., said

in *Monroe Brothers* v. *Ryan* (1935) 51 Ll.L.Rep. 179, at page 181, "It has been found in the experience of shipowners that it was a little difficult for them to undertake an exact date when the vessel would be ready to load." A trading ship will often be delayed by factors over which the owners have no control, such as congestion or bad weather. Therefore a variety of clauses have been developed which impose on the owners something less than an absolute obligation to deliver the ship by a particular date. These are discussed below.

The effect of a cancelling clause

7.5 Many charters, including the New York Produce form, do not contain a delivery date, but do contain a cancelling clause. In the New York Produce form, the cancelling clause is Clause 14. The primary effect of such a clause is to give the charterers an option to cancel if the ship is not ready for delivery by the specified cancelling date: see chapter 24.

7.6 However, the clause also has another effect: it imposes on the owners an implied obligation to exercise reasonable diligence to deliver the ship by the relevant date.

The *Democritos* was chartered on 8 November 1969, on the New York Produce form, "for about a trip via port or ports via the Pacific, duration about 4 to 6 months". The ship was to be delivered at Durban and the cancelling date was 20 December. The ship had been drydocked for special survey in September, and she had then loaded cargo for Bombay. In the course of discharge at Bombay it was discovered that No. 2 'tween deck had collapsed. The ship left Bombay on 4 December and arrived at Durban on 16 December. The damage to the 'tween deck was such that it could not be repaired before the cancelling date. However, on 18 December the charterers accepted the ship with the damage unrepaired. The charterers subsequently claimed that there was an absolute obligation to deliver the ship in a condition conforming with the charter by the cancelling date. It was held by the Court of Appeal that there was no such absolute obligation: the only obligation on the owners was to exercise reasonable diligence to deliver the ship in a fit condition by the cancelling date and there was no finding that the owners had failed in this respect: see page 152.

The Democritos [1975] 1 Lloyd's Rep. 386 and [1976] 2 Lloyd's Rep. 149 (C.A.).

7.7 In addition, it is thought a clause specifying a cancelling date contains an implicit statement by the owners that the ship is expected to be ready to load by that date, which in turn gives rise to an implied warranty that that expectation is honest and based on reasonable grounds: see *Monroe* v. *Ryan*, above, at page 181 lhc, and paragraph 7.8 below. After the cancelling date has passed, if the charterers have not cancelled, the owners' obligation presumably becomes an obligation to tender the ship for delivery with reasonable despatch: see paragraph 7.16, below.

ETAs

7.8 Some time charters contain an estimated time of arrival at the delivery port or a date on which the ship is "expected ready" for service. Where the parties have agreed a term of this kind, the owners impliedly promise that the ETA or expected ready date is stated honestly and on reasonable grounds. The owners also probably give an implied undertaking either (*a*) that they will exercise reasonable diligence to ensure that the ship arrives by the ETA or (*b*) that the ship will sail for the delivery port at a time when it is reasonably certain that the ship will arrive, ready for the charter service, about the expected date. See further the discussion of this issue at paragraphs 3.58 *et seq*., above.

The effect of an earliest delivery date

7.9 The charter may also specify an earliest delivery date or a date before which the charterers are not obliged to accept delivery. Clause 14, Line 94, of the New York Produce form contains a stipulation of the latter kind; it provides, "if required by Charterers, time not to commence before"

an agreed date. The effect of this provision is that the owners may tender the ship for delivery when they choose, but the charterers have an option to defer the start of the charter period until the agreed date.

7.10 Taken together, the cancelling date and the earliest delivery date define what is sometimes called the 'laycan' or delivery 'window'.

The effect of a laycan narrowing clause

7.11 Some charters may contain an agreement that the laycan is to be narrowed prior to the ship's delivery. This is an agreement that one or other party, but usually the owners, will serve a notice, some days or weeks ahead, narrowing the spread of dates between the earliest delivery date and the cancelling date.

7.12 A clause of this type, requiring the owners to narrow the laycan, was considered in *The Niizuru* [1996] 2 Lloyd's Rep. 66, where Mance, J., held, at pages 69 to 72, that the owners' obligation to serve the required notice was a condition precedent to a valid tender of delivery, although it is suggested a different view might easily have been taken.

The *Niizuru* was time chartered on the New York Produce form for 18 months, 40 days more or less. Clause 14 provided that if required by charterers, hire was not to commence before 20 February and should the ship not be delivered by 28 April, the charter could be cancelled. By an exchange of telexes it was further agreed in regard to Clause 14: "Owners to narrow laycan to a 15 day spread 25 days prior to the narrowed laycan." An additional Clause 29 provided: "Owners to give Charterers 30/20/15/10 days approximate notice of delivery date and probable port. Then 5 days approximate notice of delivery time and exact delivery port. . .."

The owners gave various estimates of the anticipated date and then by a telex received on 17 March gave two alternative laycan spreads, 26 March to 9 April and 22 April to 6 May, and ended their notice: "Pending Charterers' response, we on behalf of Owners give 10 days' notice of vessels delivery. . .". The charterers declined to accept that there could be a valid delivery before 20 April (which they took as 30 days after receipt of the notice of 17 March). The owners nevertheless tendered delivery on 26 March and eventually the charterers, under protest, accepted delivery on 17 April. The owners contended they were entitled to hire from 26 March, but Mance, J., held that hire was payable only from 17 April when the charterers actually accepted delivery. He said, at page 69: "Bearing in mind, firstly, that cl. 14 introduces what are in effect pre-conditions to charterers' liability, and, secondly, that the laycan narrowing provision is intended to redefine those pre-conditions more narrowly, it is natural in my judgment to view compliance with the laycan narrowing provision as a pre-condition to the tendering of delivery."

The Niizuru [1996] 2 Lloyd's Rep. 66.

(For a case on a requirement that the *charterers* narrow the range of *re*delivery dates, see *The Didymi and The Leon* [1984] 1 Lloyd's Rep. 583 (C.A.).)

7.13 Mance, J., in *The Niizuru*, above, considered an argument that the telex received on 17 March should be treated as if it were a 25-day notice for delivery on 11 April. He expressed the view that it could not be effective as such. He said, at page 73: ". . . the fact is that the notice is not a 25-day notice specifying a laycan period commencing on Apr. 11, 1992, nor did charterers ever accept it as such. Where a charter requires a certain period of notice as a pre-condition to delivery or the running of time, only a notice complying with the provision will serve the purpose."

7.14 Where the owners fail to give the required notice narrowing the laycan, but delivery is accepted, the owners are in breach of charter at delivery because it occurs without the required laycan narrowing notice having been given at the proper time: see Rix, J.'s comments in the context of a dispute about redelivery notices in *The Liepaya* [1999] 1 Lloyd's Rep. 649, at page 672. (This may arise even if the charterers are entitled to refuse such a delivery, as charterers may always choose to accept a defective tender of delivery: see generally paragraph 7.53 *et seq*., below.) Similarly, where the owners give notice, but that notice does not satisfy the requirements of the charter (for example, where they give three days' notice instead of seven), there is probably

no breach of charter until the ship is actually delivered: see, again, by analogy, *The Liepaya* at page 672. Where no notice, or no proper notice, is given before delivery, the charterers will be entitled to damages that will put them in the position in which they would have been, if proper notice had been given prior to the actual delivery. In practice, this means that they will probably have to show that they have lost valuable employment opportunities as a result of not being given the required notice: see *The Niizuru* [1996] 2 Lloyd's Rep. 66, *per* Mance, J., at page 73.

7.15 The position may be different where the laycan narrowing clause provides for the *charterers* to narrow the laycan. So, for example, in *Universal Bulk* v. *André* [2001] 2 Lloyd's Rep. 65 (C.A.), a voyage charter case, where a laycan narrowing clause required notice to be given by the charterers to the owners, it was held that this was a provision for the benefit of the charterers and that, unless and until the charterers served a valid laycan narrowing notice, the laycan retained its original breadth. Accordingly, if the charterers failed to give notice narrowing the laycan, that did not prejudice the owners' ability to perform their obligations; on the contrary, they had the benefit of a wider range of dates within which to deliver the ship. For these reasons, the court held that service of a laycan narrowing notice by the charterers was not a condition precedent to the owners' obligation to nominate a ship to perform the charter. If, however, the charter were to contain no laycan, but a provision entitling the charterers to fix it, their notice specifying a laycan would, it is suggested, be irrevocable, as in *P* v. *A* [2008] 2 Lloyd's Rep. 415 (a case concerning a contract of affreightment for six voyages).

No time of delivery provision

7.16 Where a time charter contains neither a stated time of delivery, nor a cancelling clause, nor an ETA, the owners are probably under an implied duty to tender the ship for delivery with reasonable despatch: see the comments of Lord Denning, M.R., in *The Democritos* [1976] 2 Lloyd's Rep. 149 (C.A.), at page 152.

Time of day at which the ship is tendered for delivery

7.17 The parties may stipulate that delivery is only to occur during particular hours. For example, Clause 1 of the Baltime form requires delivery to take place between 9 a.m. and 6 p.m. on a working day or between 9 a.m. and 2 p.m. on a Saturday.

Advance notice of the date of delivery

7.18 It is common for time charters to provide that the owners will give one or more advance notices of the ship's anticipated delivery date. The NYPE 93 form has such a provision in Clause 2. Where the parties have agreed such a provision, the owners implicitly undertake that any notices they give will be given honestly and on reasonable grounds: see, by way of analogy, the owners' implied obligations where the charter contains an ETA (paragraphs 3.58 *et seq*. and 7.8 above).

7.19 Where the owners fail to give the required notices, the question arises whether the charterers may refuse delivery. In other words, must the owners give the stipulated notices before they can deliver the ship? The normal rule, it is suggested, is that the giving of due notice as required by the charter is not a condition precedent to a valid delivery.

7.20 A clause requiring the owners to give advance notice of delivery has some similarity with a laycan narrowing clause, which Mance, J., held was a condition precedent to the owner's right to deliver: *The Niizuru* [1996] 2 Lloyd's Rep. 66, at paragraph 7.12, above. However, in

The Niizuru, the charterers conceded that compliance with an advance notice of delivery clause (also present in that case) was not a condition precedent to a valid delivery and Mance, J., seems to have considered that concession to be correct. He identified a number of differences, which he considered material, between a clause requiring service of notice of delivery and a laycan narrowing clause: see page 72. These distinctions are perhaps not entirely convincing. But it is suggested that that should not cast doubt on the soundness of the concession as to notice of delivery clauses.

7.21 Even on the basis that compliance with any requirement for advance notice of delivery is not a condition precedent to a valid delivery, the charterers may still be entitled to damages if the owners fail to serve the required notices. The question of when breach occurs and the charterers' measure of damages are discussed in paragraph 7.14, above.

Where must the owners deliver the ship?

7.22 It is a condition precedent to a valid delivery that the ship is at the place for delivery stipulated in the charter. If she is not there, the charterers are entitled to refuse the delivery or treat her as not delivered.

7.23 In many cases, the parties agree that the place of delivery will be at sea, for example at a pilot station or on passing a particular place. However, under Lines 18 to 21 of the New York Produce form, it is envisaged that the ship will be delivered at an agreed port of delivery and at such berth or loading place "as the Charterers may direct". But this is then subject to Line 21, which stipulates that the owners shall be entitled to serve notice of readiness even if the dock, wharf or place to which the charterers have directed the ship is unavailable. (The subject of notices of readiness is discussed in paragraphs 7.32 and 7.35, below.) It is thought these provisions work as follows. If the berth or loading place at which the ship is to be delivered is available when the ship arrives at the port, the ship must be delivered at that berth. On the other hand, if the charterers' berth is not immediately available when the ship arrives at port, the ship can be delivered where she lies, provided she is at a place within the port where she is at the immediate and effective disposition of the charterers.

7.24 The concept of a ship being at the immediate and effective disposition of the charterers has been developed in cases relating to laytime under voyage charters. As a general rule, a ship is at the immediate and effective disposition of the charterers if she is at the place within the port where ships usually wait their turn to come to berth: see the speech of Lord Reid in *The Johanna Oldendorff* [1973] 2 Lloyd's Rep. 285 (H.L.), at page 291. (For further discussion of the concept of "arrived ship" in voyage charter cases, see *Voyage Charters*, paragraphs 5.1 *et seq*. and 15.26 *et seq*., and *Laytime and Demurrage*, paragraphs 3.50 to 3.116.)

Baltime

7.25 By contrast, Clause 1 of the Baltime form envisages delivery simply "in such available berth. . . as the Charterers may direct". Where a charter is made on these terms, the owners can tender the ship for delivery only when it has reached the berth to which the charterers have directed her. However, it is an implied term of the charter that the charterers will give directions to their chosen berth no later than when the ship arrives at the port of delivery. It is also an implied term that the chosen berth will be available at all times during the laycan. (For the meaning of the term 'laycan', see paragraph 7.10, above.)

The *Golfstraum* was chartered on the Baltime form with delivery at Sfax. When she arrived off that port it was congested and she had to wait four days before the charterers could obtain a berth for her. Mocatta, J., held that

the charterers were in breach of an obligation to nominate, before or on arrival, a berth immediately available to the ship and the owners were entitled to hire for the waiting period.

The Golfstraum [1976] 2 Lloyd's Rep. 97.

Charterers' options as to place of delivery

7.26 Where the charterers are given an option to select the port of delivery, they are under an obligation to exercise that option and they must do so within a reasonable time, which means early enough to ensure that the delivery of the ship is not delayed by the absence of a nomination: *per* Christopher Clarke, J., in *The Ailsa Craig* [2008] 2 Lloyd's Rep. 384 at [56], approved by the Court of Appeal, [2009] 2 Lloyd's Rep. 371. Where the charterers have an option as to the place of delivery within a particular port, they must exercise that option promptly when the ship reaches the port. If they fail to do so, it is thought that the ship can still be validly tendered for delivery, and notice of readiness served, provided the ship has reached a position within the port where she is at the effective disposal of the charterers: see *The North Sea* [1999] 1 Lloyd's Rep. 21 (C.A.), *per* Hobhouse, L.J., at page 26.

The *North Sea* was time chartered on an amended Asbatime form whilst at the port of Hong Kong. Lines 34 to 45 provided for the ship to be placed at the disposal of the charterers at charterers' berth, Hong Kong, or dropping last outward sea pilot Hong Kong, in charterers' option. The owners argued that since the charterers did not exercise their option to choose between the two places, the owners never came under an obligation to deliver the ship. Therefore, they said, the charterers were not entitled to exercise their right to cancel under the cancelling clause in the charter. Mance, J., at first instance, accepted this argument, holding that the making of delivery depended upon the charterers identifying where delivery was to take place; as they had not done this, the time for delivery never arose and so neither did their right to cancel. The Court of Appeal did not find it necessary to decide this issue as the case was decided on another point. But Hobhouse, L.J., in the Court of Appeal, in a judgment with which the other two members of the court agreed, strongly doubted whether Mance, J.'s analysis of this point was correct, suggesting that a charterer who fails to nominate the berth at which the ship is to be delivered might be taken to have waived his right to insist that the ship proceed to berth before delivery take place.

The North Sea [1997] 2 Lloyd's Rep. 324 and [1999] 1 Lloyd's Rep. 21 (C.A.).

(The other issue in the case concerned bunkers on delivery and the facts relevant to this part of the dispute are set out at paragraph 8.72, below.)

Safely lie, always afloat

7.27 Line 20 of the New York Produce form requires that where the charterers nominate a dock or wharf or other loading place as the place at which the ship is to be delivered, the place they nominate must be one that is safe for the ship to use. The charterers' duty to direct the ship only to safe places is discussed in chapter 10, the comments in paragraphs 10.85 to 10.90 being particularly relevant to Lines 18 to 21. Although Line 20 stipulates that the place of delivery is to be a place where the ship can lie afloat, it is thought this is modified by Clause 6 which permits the charterers to direct the ship to places where the ship will take the ground, provided that "it is customary for similar size vessels to safely lie aground" at that place.

In what condition must the ship be on delivery?

7.28 The New York Produce form requires by line 22 that, at the time of its delivery, the ship is to be "ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service". The Baltime form requires by lines 25 and 26 that the ship is "in every way fitted for ordinary cargo service". These requirements are discussed in detail in chapter 8.

Compliance with these requirements is a condition precedent to a valid delivery. If the ship is not in the required condition, the charterers are entitled to refuse the delivery.

How do the owners effect delivery of the ship?

7.29 The owners deliver the ship to the charterers by putting her at the charterers' disposal: see *The Madeleine* [1967] 2 Lloyd's Rep. 224, at page 238 lhc, quoted at paragraph 7.2 above. Similarly, in a case on the New York Produce form, *The Niizuru* [1996] 2 Lloyd's Rep. 66, Mance, J., said at page 68 that ". . . delivery refers to the placing by the owners of the vessel at the disposal of the charterers. . ."

7.30 Unless the terms of the charter provide otherwise, there is no requirement that notice of delivery be given in any particular form. It is enough that the owners make the charterers aware that the ship is at their disposal.

7.31 Once they have done so, provided the ship is in the required condition and at the required place, the delivery takes effect immediately, unless again the contract says otherwise.

7.32 The position is different, however, under the New York Produce form, in two respects. First, under that form, the owners are required to serve a notice of readiness before they deliver the ship. The obligation to serve a notice of readiness is not stated in terms, but is implicit in Lines 62 to 64 of Clause 5 which reads as follows: "Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to the Charterers or their Agents before 4 p.m., but if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire." (The requirement to serve notice of readiness is also referred to in the cancelling clause, Clause 14.)

7.33 Second, under the New York Produce form, it is thought that delivery takes place not when the ship is first put at the charterers' disposal, but only once time starts to count in accordance with Clause 5. This seems to be implicit in the way the form is drafted. Lines 63 and 64 of Clause 5 define the moment when time starts to count, that is to say the moment from when the charterers come under an obligation to pay hire. Clause 4 meanwhile provides that the charterers' obligation to pay hire starts from the day of delivery. It seems therefore that the day on which time counts is also the day of delivery. That also seems to follow from Branson, J.'s conclusion in *Kawasaki* v. *Bantham Steamship* (1938) 60 Ll.L.Rep. 70, at page 77 (quoted at paragraph 7.41, below) that the charter period starts only when time starts to count under Clause 5. Under Line 13, the charter period starts from "the time of delivery". So Branson, J.'s conclusion again equates delivery with the commencement of time under Clause 5. The question of when time starts to count under Clause 5 is analysed in detail in paragraphs 7.40 *et seq*., below.

NYPE 93

7.34 Clause 10 of NYPE 93 provides simply that hire is payable from the day of the ship's delivery. Clause 1 of the Baltime form is to the same effect. There is no equivalent of the 'Time to count' provision in Clause 5 of the New York Produce form. Clause 3 of NYPE 93, at Lines 40 to 47, also makes specific provision for on and off-hire surveys to establish the "quantity of bunkers on board and the condition of the Vessel" at delivery and redelivery.

Notice of readiness

7.35 The notice of readiness that the charter requires is a written notification of the readiness of the ship to be delivered into the charter service. In this context, "readiness" means that the ship is

in all respects ready for delivery or ready to start the charter service. Under the New York Produce form, the ship is ready for delivery if and only if: (*a*) the ship is in the state described in Lines 21 to 24; and (*b*) she is at the contractual place of delivery.

7.36 The requirements of Lines 21 to 24 are discussed at paragraphs 8.8 *et seq*. It is thought that, in order to be described as 'ready', the ship must be in the condition described in Lines 21 to 24 even if the charter incorporates the United States Carriage of Goods by Sea Act (or another version of the Hague Rules): see further paragraphs 8.25, 8.34 and 8.41 *et seq*., below. The question of when a ship is at the contractual place of delivery is discussed above at paragraphs 7.22 *et seq*.

7.37 For a notice of readiness to be valid, it must be a true statement of present fact – the ship must actually be ready – otherwise it is not a notice of readiness at all. If, when notice is purportedly given, the ship is not ready, the notice is invalid and of no effect: see *The Mexico 1* [1990] 1 Lloyd's Rep. 507 (C.A.) (a voyage charter case). Likewise if the ship is not at the contractual place of delivery: see *The Agamemnon* [1998] 1 Lloyd's Rep. 675 (also a voyage charter case). A notice of readiness is not valid if it states that the ship will be ready at some time in the future: *Christensen* v. *Hindustan Steel* [1971] 1 Lloyd's Rep. 395 (another voyage charter case).

7.38 If the notice is invalid when given, it remains invalid. So, for example, if the notice is invalid because the ship is not in fact ready when the notice is given, it does not become valid if and when the ship is subsequently made ready: see *The Mexico 1*, above.

7.39 Under some charters, the owners are required to serve notice of readiness only on certain days. Under the New York Produce form, it is thought that the owners can serve notice of readiness on any day. Clause 5 does not require notice to be given on a working day: the word "that" in Line 63 means "that *day*" rather than "that *working day*".

When does time start to count under Clause 5?

7.40 Where the owners have served notice of readiness, the time at which delivery takes place is fixed by Lines 62 to 64 of Clause 5 of the New York Produce form, which provides: "Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to Charterers or their Agents before 4 p.m., but if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire".

7.41 The operation of this clause was explained by Branson, J., in *Kawasaki* v. *Bantham Steamship* (1938) 60 Ll.L.Rep. 70, at page 77 as follows: "when the ship arrives, the ship can put upon the charterers the obligation to take delivery by giving [notice of readiness]. They give the notice at 4 p.m., and then, whether the charterers take delivery or not, at 7 a.m. on the next working day the period begins to run; but, on the other hand, the charterers may be very anxious to get possession of the ship, and then there is the alternative that they can come and ask for it, and if they come and ask for it, it is to be handed over at once and loading is to commence at once. But then, of course, with the commencement of loading commences the period of the charter and the obligation to pay chartered hire."

7.42 Where the owners' notice is given after 4 p.m. and the charterers do not make earlier use of the ship, then under Clause 5 time will not count on the following day but from 7 a.m. on the first working day after that. The notice given late on the first day is a notice given before 4 p.m. on the second day, so that second day is the day referred to in Line 63 of Clause 5. Or, possibly, it might be said that the notice is to be regarded as having been given at the start of the second day: compare the voyage charter case of *The Petr Schmidt* [1997] 1 Lloyd's Rep. 284 and [1998] 2 Lloyd's Rep. 1 (C.A.).

7.43 If the charterers exercise their option under Clause 5 to start using the ship at once, the ship is delivered as soon the charterers start using the ship. The charter period starts and then runs

continuously. The phrase "such time used to count as hire" should not be taken as suggesting that hire is only payable for the time that the charterers are making active use of the ship. (In *The Helle Skou* [1976] 2 Lloyd's Rep. 205, a laytime case under a voyage charter, Donaldson, J., held that the phrase time not to count "unless used" meant that only the time actually used by charterers counted towards laytime; but it is not thought that this decision throws any light on the construction of Clause 5.)

Do Lines 18 to 21 qualify Clause 5?

7.44 Lines 18 to 21 of the preamble refer to Clause 5. They stipulate that the ship is to be placed at the charterers' disposal "in such dock or at such wharf or place . . . as the Charterers may direct". Line 21 then continues, "If such dock, wharf or place be not available time to count as provided for in clause No. 5. . .". This wording should not be understood as restricting the effect of Clause 5, so that time is to count as provided for in Clause 5 *only if* the charterers' dock is unavailable. The better view is that: (*a*) Clause 5 deals exhaustively with the time at which delivery takes place; and (*b*) Line 21 is only intended to make it clear that if, on the arrival of the ship, the dock, wharf, or place is not immediately available, the owners are nevertheless entitled to serve a notice of readiness: see paragraph 7.23, above.

The interaction between Clause 5 and the earliest delivery date in Clause 14

7.45 Clause 14, Line 94, stipulates an earliest delivery date, providing, "if required by Charterers, time not to commence before" an agreed date: see paragraph 7.9, above. Clause 5, Lines 62 to 64, on the other hand, produces the result that time will commence the morning after notice of readiness is served, unless the charterers choose to start using the ship sooner. These provisions operate together as follows. If the owners serve notice of readiness at a time when, under Clause 5, the ship would be delivered before the date specified in Clause 14, then the charterers can opt to defer delivery until the date specified in Clause 14. But if the charterers do not do so, then time counts as stipulated in Clause 5.

7.46 Where the charterers choose to start using the ship before the date specified in Clause 14, they must be taken to have chosen not to defer delivery. The charterers cannot both defer delivery and make use of the ship. (The position may be different under a voyage charter: see *Pteroti* v. *National Coal Board* [1958] 1 Lloyd's Rep. 245.)

The effect of tendering an unready ship

7.47 As discussed above, there are two main conditions precedent to a valid delivery of the ship. First, the ship must be in the proper condition, fit and ready for the charter service. Second, she must be in the place required by the charter. What happens, however, if the owners tender the ship for delivery without fulfilling these conditions? The answer depends on what the charterers choose to do. They can reject the ship or they can accept her.

Rejection

7.48 If the charterers reject the owners' non-contractual tender of delivery, the ship is not delivered. The charter service does not start. In *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.), at page 486, Sellers, L.J., said: "By Clause 1 of the [Baltime] charterparty, the shipowners contracted to deliver the vessel at Liverpool "she being in every way fitted for ordinary cargo

service". She was not fit for ordinary cargo service when delivered because the engine-room staff was incompetent and inadequate and this became apparent as the voyage proceeded. . . If, in the present case, the inadequacy and incompetence of the engine-room staff had been known to them, the charterers could have complained of the failure by the shipowners to deliver the vessel at Liverpool in accordance with Clause 1 of the charterparty and could have refused to take her in that condition."

7.49 However, if the charterers reject the owners' tender of delivery, the charter is not at an end. Both parties remain obliged to perform their contract.

7.50 Accordingly, the owners are also still under a duty to work diligently to deliver the ship, at the right place, in the right condition, before the cancellation date: see paragraph 7.6, above. Furthermore they can and must re-tender the ship for delivery if they become able to do so and, if they refuse to do so, their conduct may amount to a repudiation of the charter. Sellers, L.J., in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478, at page 486, continued immediately after the passage in his judgment quoted above at paragraph 7.48: "If [after the charterers had refused to take delivery of the ship] the shipowners had refused or failed [to bring the engine-room staff into suitable strength and competency], their conduct and not the unseaworthiness would have amounted to a repudiation of the charterparty and entitled the charterers to accept it and treat the contract as at an end."

7.51 Equally, if the owners succeed in making the ship ready for delivery before the cancelling date, the charterers must then accept her: see Mance, J.'s comments comparing tender of delivery under a time charter with tender of documents under a sale contract in *The Niizuru* [1996] 2 Lloyd's Rep. 66, at page 70. However, if the owners do not manage to make the ship ready for delivery before the cancellation date, the charterers will become entitled to cancel the charter: see chapter 24.

7.52 Further, the charterers have, at common law, the right to treat the charter as discharged if at the time of being tendered for delivery the ship is unseaworthy and cannot be made seaworthy within such time as will prevent the charter from being frustrated. In the leading voyage charter case of *Stanton* v. *Richardson* (1875) 45 L.J.Q.B. 78, the charterers were held by the House of Lords to be released from all obligation to load a ship which was unfit to receive the contractual cargo and, as found by the jury, could not be made fit before such a time as would have frustrated the object of the venture: see also the judgment of Brett, J., to the same effect in the subsequent time charter case of *Tully* v. *Howling* (1877) 2 Q.B.D. 182.

Acceptance

7.53 On the other hand, the charterers may accept the owners' tender of delivery. They may do so expressly or by conduct. If they do so, the ship is delivered and the charter period starts. By choosing to accept the ship, the charterers are taken to have made an election, waiving their right to reject the tendered delivery.

7.54 This general rule is subject to one qualification, namely that the charterers must usually be aware of the facts which give rise to the right to reject. But this is not always so, because even in a case where the charterers are not aware of the facts that make the ship unready, they may be taken to have elected to accept the ship once they have had a reasonable opportunity to ascertain her condition. See, for statements of the general principles applicable, *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391, *per* Lord Goff at page 398.

7.55 However, by delivering the ship at a place or in a condition different from that stipulated in the charter, the owners are guilty of a breach of charter, even if the charterers have chosen to accept her. They have promised that the ship will be in a particular place and ready for service on delivery

(or at least that they will have exercised due diligence to make her so: see paragraphs 8.22 to 8.25). If she is not (or if they have not exercised diligence), they have broken their contract. Where the charterers accept a non-contractual tender of delivery, they are not taken to have waived their right to damages for that breach, merely because they have accepted the ship. In *The Democritos* [1975] 1 Lloyd's Rep. 386, the facts of which are set out at paragraph 7.6, above, Kerr, J., said at pages 397 and 398, "the mere fact of accepting the vessel amounts to no more than a waiver of the right to cancel; viewed in isolation it cannot, or at any rate does not by any means necessarily, carry with it a waiver of the right to claim damages".

7.56 Furthermore, even if the charterers have waived their right to reject the owners' tender of delivery, the charterers will still have the right to terminate the charter if the owners' failure to deliver the ship in accordance with the contract has the effect that the charterers are deprived of substantially the whole benefit of the charter: see for examples, *Snia* v. *Suzuki* (1924) 18 Ll.L.Rep. 333 (C.A.), summarised at paragraph 8.45, below, where the ship was delivered with a latent defect in its propeller which became apparent only after the ship's first voyage, and *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.), summarised at paragraph 8.44 below, where the ship was delivered with an incompetent and insufficient crew.

7.57 As stated in paragraph 7.55, above, charterers who accept a non-contractual tender of delivery ordinarily do not lose the right to claim damages. However, that is not always the case. Charterers may waive their right to damages through the application of either of two principles: (*a*) waiver, meaning here the principle that prior to the deadline for its performance, a party to a contract can excuse the other party to the contract from having to perform an obligation that is solely for the first party's benefit (see *The Happy Day* [2002] 2 Lloyd's Rep. 487, *per* Potter, L.J., at page 506 and *The Bunga Saga Lima* [2005] 2 Lloyd's Rep. 1, *per* Gloster, J., at [29] – [32]); or (*b*) estoppel.

7.58 The application of either principle will require the owners to show that the charterers made an unequivocal representation, by words or conduct. Further, estoppel requires some action by the owners in reliance upon that representation rendering it unfair for the charterers to go back on it.

7.59 The representation required for waiver is, here, a representation prior to the cancelling date that the owners do not have to deliver the ship in accordance with the contract in the relevant respect. Estoppel would require either that same representation, or a representation, made after the fact, that the charterers will not enforce their right to damages. As already noted, however, mere acceptance of delivery does not amount to any relevant representation. In *The Democritos*, Kerr, J., quoted in paragraph 7.55, above, went on to say that "a waiver of the right to claim damages. . . can only be implied from something in the nature of an agreement on the part of the charterers to give up their potential claims for damages". In *The Bunga Saga Lima* [2005] 2 Lloyd's Rep. 1, at page 11, Gloster, J., held that the arbitrators had been entitled to find that the charterers had waived any claim for damages, or were estopped from making any such claim, in a case where the ship had been delivered with dirty holds.

Owners time-chartered the *Bunga Saga Lima* on the New York Produce form for a trip of two or three laden legs. The charter required the ship's holds to be grain clean on delivery and permitted the charterers to put the ship off-hire at the delivery port until the holds had been made clean. The ship was delivered to the charterers at anchorage at Sepetiba, Brazil, where she was to load a cargo of iron ore, with her holds still dirty from her previous cargo of coal. The charterers accepted the ship and a first laden leg was performed. Before loading her second cargo, the ship spent time, on hire, cleaning the holds. The charterers claimed the cost of the time spent cleaning as damages for owners' failure – in breach of charter – to deliver the ship with clean holds. The arbitrators had found as a matter of fact that, "By accepting the vessel without qualification or demur and by failing to exercise the right to insist upon the cleaning to a grain standard or place the vessel off hire. . . , in circumstances where they were fully aware of the condition of the vessel, charterers represented unequivocally that there was no need for the owners to comply with the grain clean requirement", that at that

time her holds could have been cleaned ready for grain before the cancelling date and that the owners had relied on the charterers' representation by conducting themselves accordingly, that is to say by not cleaning at the delivery port (see [29]). Gloster, J., held that the arbitrators were therefore entitled, in law, to conclude that the charterers had waived the need to be grain clean or were estopped from complaining that the ship had not been.

The Bunga Saga Lima [2005] 2 Lloyd's Rep. 1.

Effect of a non-contractual tender of delivery under the New York Produce form

7.60 The general principles set out above apply to a non-contractual tender under a charter made on the New York Produce form. However, because this form of charter requires the owners to tender the ship for delivery by serving a notice of readiness, some additional points are relevant. If the owners serve notice of readiness tendering the ship for delivery, but in fact the ship is not ready, or is not at the place of delivery, any notice of readiness is invalid and of no effect: see paragraphs 7.37 *et seq*., above. An invalid notice of readiness does not trigger the start of the charter service under Clause 5. However, the charterers may accept a non-contractual tender of delivery in either of two ways. They may represent unequivocally, by words or conduct, that they regard the notice of readiness as validly tendered: see, for example, *The Shackleford* [1978] 1 Lloyd's Rep. 191 and [1978] 2 Lloyd's Rep. 154 (C.A.) (a voyage charter case). Alternatively, they may simply start to use the ship. In that case the charter period will commence in accordance with Clause 5, which stipulates ". . . if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire". *Kawasaki* v. *Bantham Steamship* (1938) 60 Ll.L.Rep. 70 is an example of such a case: the owners tendered the ship without serving a notice of readiness, but the charter period was held to start from the time at which the charterers started using the ship. In either case, it is thought that the charterers may not subsequently cancel the ship under Clause 14.

U.S. Law

Time to count

7A.1 See discussion under Clause 5 of the New York Produce form at paragraph 17A.1.

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CHAPTER 8

State of the Ship on Delivery

"21. . . . Vessel on her delivery to be
22. ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and
23. donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same
24. time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), . . . "

General

8.1 A time charter almost always includes terms requiring the ship to be in a particular condition at the time of delivery. In the New York Produce form, Lines 21 to 24 of the preamble contain a series of requirements as to the condition and quality of the ship's cargo spaces, hull, machinery and crew. In the Baltime form, Clause 1 stipulates more shortly that the ship is to be delivered "in every way fitted for ordinary cargo service". The NYPE 93 form adopts the words of the Baltime form: see Lines 34 and 35.

8.2 These requirements have two functions.

8.3 First, fulfilment of these requirements is usually a condition precedent to the owner's right to deliver the ship into the charter service. So, if the owners tender the ship for delivery, but she is not in the required condition, the charterers have the right to reject her and the charter period will not start. If this happens, and if the owners are not able to rectify the condition of the ship before the cancelling date, the charterers may become entitled to cancel the charter: see chapter 24.

8.4 Second, where the charterers accept the delivery of the ship, these terms constitute the owners' undertaking that the ship was in the required condition at the time of delivery. So, if the ship was not in that condition, the owners may be liable in damages. In an extreme case, where the owners' failure to deliver the ship in a proper condition has deprived the charterers of effectively the whole benefit of the contract, the charterers may be entitled to terminate the charter. (It should be remembered, however, that the specific obligations in Lines 21 to 24 are often modified by the Hague or Hague-Visby Rules, see paragraphs 8.21 *et seq*., below.)

8.5 The undertakings contained in Lines 21 to 24 of the New York Produce form, and in Clause 1 of the Baltime form, apply only to the condition of the ship at delivery. After delivery, the owners come under separate obligations with respect to the ship's maintenance: see chapter 11.

8.6 This chapter is divided into two parts. The first part deals with several general questions relating to the condition of the ship at delivery; the second part deals with requirements applying to particular parts of the ship.

The general condition of the ship

8.7 At the time of delivery, the ship must usually comply with three general requirements, which overlap: she must be *fit*; she must be *seaworthy*; and she must be *ready*. These three requirements are discussed below.

"Fitted" for the charter service

8.8 The New York Produce form and the Baltime form both require that the ship be "fitted' for the service: see paragraph 8.1, above. In these contexts, the phrase "fitted for" should be understood to mean "fit for" or "suitable for. . .", and not merely "possessing fittings appropriate for. . .": see, for example, the comments of Sellers, L.J., in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478, at page 486 (a case concerning the Baltime form), or of Greer, J., in *New York and Cuba Mail* v. *Eriksen and Cristensen* (1922) 27 Com. Cas. 330, at page 336 (a voyage charter case). Indeed, some modern charterparty forms use the word "fit" in place of "fitted": see, for example, Clause 1(c) of the Shelltime 4 form.

8.9 On the other hand, in order to be fit for the service a ship must also have fittings appropriate for the service: see *Rederi Unda* v. *Burdon* (1937) 57 Ll.L.Rep. 95, *per* Lord Wright M.R., at page 99. See further the discussion at paragraph 8.12, below.

Fitness implies seaworthiness

8.10 The requirement that the ship be fit for, or "fitted for", the charter service imposes on the owners an obligation to ensure that the ship is seaworthy on delivery. In *The Madeleine* [1967] 2 Lloyd's Rep. 224, summarised below, a case concerned with a charter on the Baltime form, Roskill, J., held, at pages 240 to 241, that the words "in every way fitted for ordinary cargo service" constituted "an express warranty of seaworthiness". This, he said, had clearly been assumed by the Court of Appeal in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478. Likewise, in *The Derby* [1985] 2 Lloyd's Rep. 325 (C.A.), Kerr, L.J., held, at page 331, that the phrase used in the New York Produce form, "in every way fitted for the service", imposes the same requirement.

The *Madeleine* was time chartered for three months on the Baltime form which required her, upon delivery at Calcutta, to be "in every way fitted for ordinary cargo service". Roskill, J., held that the lack of a deratisation certificate prevented a good delivery being made at Calcutta as, without that document, the ship could not sail to a port outside India. Thus the charterers were entitled to exercise their right under the cancelling clause in the charter.

Roskill, J., held that the phrase "in every way fitted for ordinary cargo service" was an express undertaking of seaworthiness and that seaworthiness required that the ship possess the documents necessary to enable it to sail.

The Madeleine [1967] 2 Lloyd's Rep. 224.

(See also *New York and Cuba Mail* v. *Eriksen and Cristensen* (1922) 27 Com. Cas. 330, at page 336 (a voyage charter case).)

8.11 Indeed, it would seem that, even in the absence of an express term that the ship be fitted for the service, a warranty that the ship is seaworthy on delivery would be implied into a time charter: see *Giertsen* v. *Turnbull*, 1908 S.C. 1101 and *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478, *per* Upjohn, L.J., at page 489.

Fitted or fit for the service implies more than seaworthiness

8.12 However the obligation to provide a ship that is "in every way fitted" for the charter service creates an obligation that goes beyond seaworthiness: the ship must also be suitable for the

particular service which the ship is to perform. In *The Derby* [1985] 2 Lloyd's Rep. 325 (C.A.), at page 333, Sir Denys Buckley said, "Counsel have tended throughout the argument to treat 'seaworthy' and 'seaworthiness' as synonyms or perhaps as convenient forms of shorthand for the requirement at Lines 21 and 22 of the charter-party that the ship should be 'in every way fitted for the service'. I do not suggest that such a course is inappropriate, but it seems to me to be wiser in deciding whether the owners ought to be held liable for a breach of that requirement to pay regard to the precise language used and to ask what is the significance of the words 'the service' in this context. . . For my part, I feel no doubt that 'the service' referred to at Line 22 is that service which the owners became bound under the charterparty to render to the charterers."

8.13 Accordingly, he held, still at page 333, that "fitness" or "fittedness" entails not only that the ship is seaworthy, but also that it is properly equipped, certified and authorised to perform the service: "To discharge their obligations under this charterparty the owners were bound to provide a vessel which was physically fit to encounter all such perils as would be reasonably foreseeable on any voyage the charterers could legitimately require the ship to make, and to carry safely to its destination any cargo which the charterers could properly specify; they had to man the ship with a master and crew competent and sufficient for the purposes of any such voyages; they had to ensure that the ship was furnished with all such plant, tackle and equipment as might be reasonably necessary for those purposes, all in good mechanical order, and with all appropriate navigational aids, such for example as charts. They had, moreover to ensure that the ship would be free to sail from any port from which the charterers might require it to set out and to enter any port which they might properly require it to enter without undue interference or delay. For these purposes the owners had to furnish the ship with all necessary documentary certificates or authorizations, or be able to ensure that any necessary document of that nature would be obtainable when required. They were under an obligation to ensure that the ship would be competent to reach a proper point of discharge in accordance with proper instructions from the charterer and to tender the cargo there for delivery to the charterers or their consignees."

8.14 Similarly Webster, J., in *The Arianna* [1987] 2 Lloyd's Rep. 376, at pages 389 and 390, commented on how the requirement to provide a ship properly equipped for the service might extend beyond what seaworthiness alone requires: "although it seems probable to me that there is rarely any practical difference between seaworthiness and fittedness. . . they are not necessarily the same thing". In *The Arianna*, the question was whether the ship was rendered unfitted by reason of the owners' failure to provide the number of operable tank cleaning machines that were required by the charter. The judge held that that was the type of deficiency which would not render the ship unseaworthy, but might make it unfit. At page 390, he said: "while seaworthiness and fittedness may often overlap, and while a ship can never be fitted if she is unseaworthy, nonetheless a vessel may be unfitted even though seaworthy. . ."

The limits of fitness

8.15 There are however some limits on the requirement to be fit or fitted for the trading that the charterers are to undertake, particularly where the charter allows the charterers a wide range of ports and cargoes. In *The Derby* at first instance, [1984] 1 Lloyd's Rep. 635, Hobhouse, J., commented at pages 641 to 642: "When one is concerned, as here, with a charter-party which is going to run for a considerable period of time and gives to the charterer very wide options as to the orders he may give to the owners, questions arise as to the extent to which the owners are required, at the time of delivery, to anticipate and provide in advance for every contingency. The Baltime charter-party escapes from this problem by referring to 'ordinary cargo service' . . . With regard to 'fitness for the service', as used in the NYPE form, the fitness must be fairly generally construed

as otherwise one may be laying the owners open to having to fulfil conflicting and inconsistent obligations depending on which contingency is taken into account. So. . . I do not accept. . . that any subsequent delay or any necessity to make some alteration to the vessel or its equipment, etc., automatically shows an initial lack of fitness." See also the discussion of the limits of the owners' obligation to deliver a ship that is legally fit for the service, at paragraph 8.53, below.

Seaworthiness

8.16 As discussed above in paragraphs 8.10 and 8.11, the owners' obligation to deliver a ship that is fit for the service carries with it an obligation to deliver a seaworthy ship. The classic definition of seaworthiness is that stated in *Carver on Carriage by Sea*, which was approved by Scrutton, L.J., in *F.C. Bradley & Sons* v. *Federal Steam Navigation* (1926) 24 Ll.L.Rep. 446: "The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it should be made good before sending his ship to sea, had he known of it?"

8.17 More specifically, Griffiths, L.J., in *The Aquacharm* [1982] 1 Lloyd's Rep. 7 (a voyage charter case) at page 11, said, "there are two aspects of seaworthiness. The first requires that the ship, her crew and her equipment shall be in all respects sound and able to encounter and withstand the ordinary perils of the sea during the contemplated voyage. The second requires that the ship shall be suitable to carry the contract cargo".

8.18 A ship is unseaworthy if "there is something about it which endangers the safety of the vessel or its cargo or which might cause significant damage to its cargo or which renders it legally or practically impossible for the vessel to go to sea or to load or unload its cargo. . .": see *The Arianna* [1987] 2 Lloyd's Rep. 376, *per* Webster, J., at page 389.

8.19 Seaworthiness entails that the ship is cargoworthy. That is, its cargo spaces must be fit for the reception of cargo and any machinery used for preserving the cargo must be fit for that purpose: see *Maori King* v. *Hughes* [1895] 2 Q.B. 550.

8.20 However, as McNair, J., held in *M.D.C.* v. *Zeevaart Maatschappij* [1962] 1 Lloyd's Rep. 180, at page 186, "The test in a case of this kind, of course, is not absolute: you do not test it by absolute perfection or by absolute guarantee of successful carriage. It has to be looked at realistically. . ." The fact that some minor or routine damage to cargo may result during the carriage does not necessarily render the ship unseaworthy.

The effect of a Clause Paramount on owners' seaworthiness obligation

8.21 Where a charter is made on the New York Produce form, it will (unless the form is amended) include the Clause Paramount in Clause 24. A Clause Paramount is a clause that incorporates the Hague Rules in one form or another. Clause 24 incorporates the United States Carriage of Goods by Sea Act 1936 (U.S. COGSA). A general discussion of the effect of Clauses Paramount, including Clause 24, is contained in chapter 34. However, in this context, the effects of the incorporation of U.S. COGSA (or of the Hague Rules in another form) are as follows.

Sections 3(1) and 4(1)

8.22 Section 3(1) of US COGSA (or, as it may be, Article III, rule 1 of the Hague Rules) requires the owner to exercise due diligence "before and at the beginning of the voyage" to make

the ship seaworthy; to ensure she is properly manned, equipped and supplied; and to make the cargo spaces fit for the reception of cargo.

8.23 The phrase "before and at the beginning of the voyage" is apt to embrace the whole period of the charter before the first cargo-carrying voyage: see *The Fjord Wind* [2000] 2 Lloyd's Rep. 191 (C.A.) (a voyage charter case, discussed at paragraph 3.45 above). Therefore it is probably right to say that Section 3(1) imposes on the owners an obligation to exercise due diligence to make the ship seaworthy when the ship is delivered, even if delivery takes place some time earlier than the start of the first cargo-carrying voyage.

8.24 The positive duty to exercise due diligence in Section 3(1) is complemented by an exclusion of liability in Section 4(1). This provides that the owners are not liable for loss caused by unseaworthiness unless the unseaworthiness was caused by the owners' failure to use due diligence to make the ship seaworthy as required by Section 3(1).

8.25 It is thought that the net effect of these provisions is that the owners are not under an absolute duty to deliver the ship in a seaworthy condition. They are in breach of contract only if they fail to exercise due diligence to make the ship seaworthy as required by Section 3(1). (Nevertheless, it is thought that the owners can serve notice of readiness only if the ship complies strictly with the requirements of Lines 21 to 24, even where the Hague Rules have been incorporated. It follows that the incorporation of the Hague Rules does not affect the charterers' right to refuse delivery of a ship that does not comply with the requirements of Lines 21 to 24 and, consequently, does not have any impact on the charterers' right to cancel under Line 96, discussed in chapter 24, below.)

What the exercise of due diligence requires

8.26 The exercise of due diligence requires the owners to satisfy two requirements. First, the owners must carry out any inspections, repairs or other preparations which, in the circumstances, a skilled and prudent shipowner would reasonably carry out; and second, any work in fact carried out must be done with reasonable skill, care and competence: see Lord Evershed's comments on the issue of inspection in *Union of India* v. *Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223 (H.L.), at page 231 (a bill of lading case).

8.27 The owners' duty to exercise due diligence is not fulfilled simply by engaging competent contractors to perform the necessary work. It is discharged only if the necessary work has actually been properly performed. Accordingly, the owners have not performed their contract unless due diligence in the work has been shown by every person to whom any part of the work has been entrusted, whether employees, agents or independent contractors: *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57 (H.L.) (a bill of lading case, in which the carrier was held liable for the negligence of a shiprepairers' employee).

8.28 The owners are not liable for any failure to exercise diligence by any person who has worked on it before it has come into the owners' "orbit", that is, into their ownership, possession or control. However, they are liable for any defect in the ship which is reasonably discoverable when the ship comes into their orbit: *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57 (H.L.), *The Happy Ranger* [2006] 1 Lloyd's Rep. 649, *per* Gloster, J., at page 653. In *The Muncaster Castle*, above, Lord Radcliffe said, at page 85, "The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put it right. . . But if the bad work that has been done is 'concealed' and so cannot be detected by any reasonable care, then the lack of diligence to which unseaworthiness is due is not to be attributed to the carrier."

8.29 For the owners' obligation under Section 3(1) with respect to crewing the ship, see *The Makedonia* [1962] 1 Lloyd's Rep. 316.

The limited protection given by Sections 3(1) and 4(1)

8.30 The replacement of an absolute warranty by an obligation to exercise due diligence relieves the owners from responsibility for latent defects in the ship, that is, defects which are not reasonably discoverable. In *The Muncaster Castle*, above, Lord Keith said, at page 87, "The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common-law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence."

8.31 In the case of other defects, however, Sections 3(1) and 4(1) offer the owners no protection. In *Smith*, *Hogg* v. *Black Sea & Baltic General Insurance* (1939) 64 Ll.L.Rep. 87 (C.A.), at page 89, MacKinnon, L.J., quoted with approval a statement in *Scrutton on Charterparties* that the protection of Section 3(1) is not "of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness but of so latent a nature that due diligence could not have discovered it) are not likely to occur often."

Readiness

8.32 The terms "ready" and "readiness" are used in two contexts in the New York Produce form: first in Line 22, which requires that the ship be ready to receive cargo; and second, in the context of the requirement that the owners serve a notice of readiness, as envisaged by Clauses 5 and 14.

Ready to receive cargo

8.33 Line 22 requires that the ship be "ready to receive cargo with clean-swept holds". In this context, the word "ready" requires that the ship has been prepared so that she is able to commence cargo operations without delay. In the voyage charter case of *Groves*, *Maclean* v. *Volkart* (1884) C. & E. 309, Lopes, J., held: "A ship to be ready to load must be completely ready in all her holds so as to afford the merchant complete control of every portion of the ship available for cargo." In another voyage charter case, *The Tres Flores* [1973] 2 Lloyd's Rep. 247, at page 252, Roskill, L.J., held, "A ship in order to be ready. . . must be ready to obey the charterer's orders whenever they are given" (see the summary of the facts below). He approved a statement in *Scrutton on Charterparties* that "the ship need not be absolutely ready (e.g. by having all her gear fixed up for the work) at a time when the charterers or consignees are not in a position to do any of their part of the work, so long as the ship can be absolutely ready as soon as they are". However, he qualified this by saying, "a short delay after berthing while the vessel carries out the usual preliminaries for loading or discharging will not affect her readiness if she is otherwise ready". On the subject of the documents that the ship must obtain before she can be said to be ready to receive cargo, see paragraph 8.54, below; for further discussion of the requirements applicable to the ship's hatches, cargo gear and lighting, see paragraph 8.62.

The *Tres Flores* was chartered for a voyage carrying maize. Notice of readiness to load was given at a time when the ship still required fumigation. The owners argued that the ship was ready, for the purpose of the charter, because, although not immediately ready, she was capable of being made ready within so short a period of time that the charterers would suffer no delay. "Readiness", they argued, did not require immediate physical readiness. It was sufficient that the things that remained to be done to make the ship ready could be done without causing the charterers delay. The Court of Appeal rejected that argument. In order to be ready to receive cargo, a ship must be ready to obey the charterers' orders whenever they may be given (although a ship can be ready even if it still has to carry out usual preliminaries to loading).

Roskill, L.J., said, at page 252: ". . . in this class of case, where not only questions of laytime and demurrage arise, but also the right of a charterer to cancel because a ship is not ready by a stated date, it is of crucial importance that the basic principle must be able to be simply applied to the given facts of a particular case. [Otherwise] what would be the position where. . . notice of readiness was given in the expectation that a particular defect making the ship unfit to load might be remedied within a matter of hours, but this prediction was falsified in the event? What is the position of the parties to be if that defect has not in the event been remedied before the cancelling date? Is the notice of readiness, *prima facie* good on [the owners'] argument, suddenly to become retrospectively bad because of an unexpected turn of events? The complications of such a situation are endless. The sure way of avoiding such complications is to have a rule which can be applied with absolute certainty."

The Tres Flores [1972] 2 Lloyd's Rep. 384 and [1973] 2 Lloyd's Rep. 247 (C.A.).

Ready for the purpose of serving notice of readiness

8.34 As discussed in paragraphs 7.32 *et seq*., under the New York Produce form, the owners are required to serve a notice of readiness. In this context, 'readiness' means readiness for delivery and hence embraces both the ship's condition and her location; that is, the owners must be able to say that the ship is (i) in the required condition and (ii) in the required place. Both statements must be true for the notice of readiness to be valid: see the discussion at paragraphs 7.35 *et seq*.. In order to be said to be 'ready', the condition of the ship must comply with all the requirements of Lines 21 to 24. The parties may also agree other requirements that must be satisfied before the charterers can be obliged to accept the delivery of the ship. In such cases, these further requirements must also be satisfied before the ship can be said to be 'ready' for delivery. It is thought that this remains the case even if the charter incorporates U.S. COGSA (or the Hague Rules in any other form): see paragraph 8.25, above.

NYPE 93

8.35 Clause 16 of the NYPE 93 form stipulates that the charter can be cancelled if the ship is not "ready for delivery" by the cancelling date. It is thought that readiness in this context has the meaning discussed in paragraph 8.34, above.

Clauses requiring the condition of the ship to satisfy a surveyor

8.36 Parties sometimes agree that, when tendered for delivery, the ship must be in a condition which satisfies either a surveyor, usually one appointed either by the charterers, or a particular shipper. In such a case, the obligation to satisfy the surveyor is imposed in addition to, and not in substitution for, the obligation in Lines 21 to 24 to deliver the ship in every way fit for the service. Therefore the fact that the ship has been accepted by the relevant surveyor does not excuse a failure to deliver the ship in every way fit for the service: see *Petrofina* v. *Compagnia Italiana* (1937) 57 Ll.L.Rep 247 (C.A.), *per* Lord Wright, M.R., at page 253.

Judging fitness and readiness

Questions to be judged commercially

8.37 The questions of readiness and fitness have to be looked at from a commercial perspective. Where a defect is of little practical or commercial significance, it is unlikely to cause the ship to be unfit for the charter service. Thus in the context of a long-term time charter, a deficiency in tank-cleaning equipment which might never, or only seldom, give rise to a problem – and then only of a minor nature – may not render the ship unfit.

The *Arianna* was time chartered for a period of 10 years on the Essotime form for worldwide trading with general products. The charter provided by one of its additional clauses that six tank-cleaning machines should be capable of being run simultaneously at a given temperature and pressure. The charterers had the right to cancel if the ship was not ready and in every way fitted for the service by the cancelling date. In fact the ship could not run six tank-cleaning machines simultaneously while in port and while at the same time heating cargo destined for other ports. But the pattern of trading under the charter might have been such that this situation would never have arisen and, even if it did, the ship could always run four cleaners simultaneously so that the only consequence of the deficiency would have been some minor delay.

The charterers purported to cancel on the ground that the ship did not comply with the charter requirements. Arbitrators held that, despite the breach of the charter term regarding tank-cleaning machines, the ship was fitted for the service and the cancellation was unjustified. Webster, J., upheld the award. He said that a deficiency which had no effect on the safety of the ship or the security or integrity of the cargo did not necessarily, as a matter of law, render the ship unfit; whether it did so or not depended upon the significance of the defect and it was implicit in the arbitrators' award that they regarded the deficiency in this case as of no real significance in a commercial sense.

The Arianna [1987] 2 Lloyd's Rep. 376.

8.38 Similarly it has been held in the context of a voyage charter that a ship may not be unfitted if she has insignificant defects which require correction before sailing, but which will not delay loading. In the case that follows, the ship was in fact affected by substantial defects. However, Greer, J., gave an indication of the sort of defects he considered might be ignored.

The *Waco* was chartered for a voyage under a charter which provided that the ship should be "tight, staunch and strong, and in every way fitted for the intended voyage" and that "should the steamer not be ready to load by 6 p.m. on Nov. 25, 1920, charterers shall have the option of cancelling this charterparty". At the time the master gave notice of readiness to load, which was 4 p.m. on 25 November, the ship's boilers were in need of repairs which would take at least 10 days to effect. It was held by Greer, J., that the express provision amounted to an undertaking of seaworthiness, that the ship was unseaworthy at the time the notice of readiness was given, and that the charterers were entitled to cancel.

Greer, J., said: "She is to be fit to commence her chartered enterprise which consists of going to her loading berth, loading, sailing and unloading. If she be, in fact, fit to lie afloat and take in cargo, but has some small defects, which can, with reasonable certainty, be made right during the loading and without interfering with the due course of loading, she would, in my judgment, be in every way fitted for the intended voyage, notwithstanding those small defects."

New York and Cuba Mail Steamship v. *Eriksen & Christensen* (1922) 27 Com. Cas. 330.

8.39 However, whatever other defects may be permissible, a ship is not ready or fitted if she is affected by a deficiency which will delay the start of cargo operations: see *The Tres Flores* [1973] 2 Lloyd's Rep. 247 (discussed at paragraph 8.33, above).

Prima facie question of fact

8.40 The question whether the ship is "fitted" for service is, *prima facie*, one of fact. Webster, J., in *The Arianna* [1987] 2 Lloyd's Rep. 376, dealing at page 390 with the charterers' argument that it was a question of law, summarised his conclusions as being "first, questions of seaworthiness and

fittedness, etc., are *prima facie* questions of fact. . .". Another way of expressing this might be to say that it is a mixed question of fact and law.

Readiness and fitness are conditions precedent to the charterers' duty to accept delivery

8.41 It is a condition precedent to a valid tender of delivery of the ship that she complies with Lines 21 to 24 of the New York Produce form or Clause 1 of the Baltime form. In other words, the charterers can reject the ship if she is not fitted and ready when tendered for delivery. If the charterers choose to reject, the ship has not been delivered and therefore the owners are not guilty of a breach of Lines 21 to 24. The owners do not commit a breach of Lines 21 to 24 merely by tendering for delivery an unready ship; a breach of Lines 21 to 24 occurs only if the charterers accept the ship, so that delivery is completed, in that condition. (If the ship is not accepted in an unready condition, and the charterers ultimately cancel the charter, there is not, without more, a breach by the owners: see paragraphs 7.5 to 7.7, above.)

8.42 In *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478, a case concerning the Baltime form, Sellers, L.J., said at page 486: "By Clause 1 of the [Baltime] charter-party, the shipowners contracted to deliver the vessel at Liverpool 'she being in every way fitted for ordinary cargo service'. She was not fit for ordinary cargo service when delivered because the engine-room staff was incompetent and inadequate. . . If, in the present case, the inadequacy and incompetence of the engine-room staff had been known to them, the charterers could have complained of the failure by the shipowners to deliver the vessel at Liverpool in accordance with Clause 1 of the charterparty and could have refused to take her in that condition." For a more general discussion of the consequences that may follow from the owners tendering for delivery a ship that is unfit or unready, see paragraphs 7.47 *et seq*.

Breach of owners' obligation to deliver a ship fit for the service

8.43 In Lines 21 to 24 of the New York Produce form and in Clause 1 of the Baltime form, the owners promise that when the ship is delivered, she will be in a fit condition to perform the charter service. If the ship is delivered when she is not fit or not seaworthy, the owners will be in breach of this undertaking and may be held liable in damages, unless any defence exists, for example, under the Clause Paramount.

8.44 If the owners are in breach, they will be potentially liable in damages. However, the owners' undertaking that the ship will be fit for service on delivery is not a condition of the charter. So the mere fact that the ship has been delivered in an unfit or unseaworthy state is not by itself enough to give the charterers the right to terminate the charter. Rather, the owners' undertaking that the ship is fit for the service is an intermediate term. Consequently, the question whether a breach of that undertaking gives the charterers the right to treat the charter as discharged must be answered by considering the nature and consequences of the breach. Only a breach which deprives the charterers of substantially the whole benefit of the charter will justify the charterers in terminating the charter. Minor breaches are not sufficient.

The *Hongkong Fir* was chartered on the Baltime form for 24 months, one month more or less. Her engines at the time of delivery were in a reasonable condition but, because of their age, required careful attention. The engineers employed by the owners on delivery were insufficient in number and also incompetent. Consequently, there was, on the very first charter voyage, a succession of serious engine failures. That voyage, from Liverpool to Osaka, included five weeks off hire for repairs and was followed by 15 further weeks of repairs at Osaka. Before the ship was again ready for sea, the charterers purported to terminate the charter and the owners claimed damages on the ground that the purported termination was wrongful.
It was held by Salmon, J., and the Court of Appeal that:

(1) the owners were in breach of the undertaking of seaworthiness having regard to the incompetence of the engine room staff;
(2) the owners were not protected by the Baltime exceptions clause (then Clause 13) since the incompetence of the engine room staff was attributable to the owners' want of due diligence in their selection;
(3) seaworthiness was not a condition and breach of the undertaking of seaworthiness did not in itself give the charterers the right to repudiate;
(4) the charterers could justify their purported termination only if the breach of the undertaking of seaworthiness went to the root of the contract;
(5) the breach of the undertaking had resulted in considerable delays, but this could not be regarded as going to the root of the contract or as depriving the charterers of substantially the whole benefit of the contract unless the delays were such as to frustrate the charter;
(6) having regard to the length of the charter (24 months) and to the fact that off-hire periods could by its terms be added to extend the period, the delays were not such as to frustrate the charter and therefore the charterers' purported termination was wrongful.

At page 495, Diplock, L.J., said: ". . . the mere occurrence of the events that the vessel was in some respect unseaworthy when tendered or that such unseaworthiness had caused some delay in performance of the charterparty would not deprive the charterer of the whole benefit which it was the intention of the parties he should obtain from the performance of his obligations under the contract – for he undertakes to continue to perform his obligations notwithstanding the occurrence of such events if they fall short of frustration of the contract. . ."

The Hongkong Fir [1961] 1 Lloyd's Rep. 159 and [1961] 2 Lloyd's Rep. 478 (C.A.).

8.45 On the other hand, where the unseaworthiness of the ship at the time of delivery causes or is likely to cause delay that will frustrate the commercial object of the charter, the charterers may treat the contract as discharged.

The *Yuri Maru* was time chartered for nine months. She was, when delivered, to be in every way fitted for ordinary cargo service. Although a new ship, her propeller was insufficiently strong and it began to lose blades after less than three months of the charter. After the owners had spent over two months trying without success to remedy this defect, the charterers cancelled the charter. It was held by the Court of Appeal that the unseaworthiness of the ship had prevented performance of the contract for such time as to frustrate the charter and that the charterers were entitled to act as they did. Bankes, L.J., said:
"I think it is impossible to contend that, in a case like this of a time-charter, the charterer, simply because the vessel is off-hire, is bound to wait an interminable time (if I may use that expression) without getting his vessel, and yet have no right to terminate the contract under circumstances which make it not only absolutely impossible for him to use the vessel, but quite conclusively certain that he never will be able to make use of it for the purpose contemplated by both parties at the time they entered into the contract."

Snia v. *Suzuki* (1924) 18 Ll.L.Rep. 333.

8.46 Commenting on *Snia* v. *Suzuki* in *The Hongkong Fir* [1961] 1 Lloyd's Rep. 159, Salmon, J., said, at page 174: "The facts of that case were exceptional. The charterers, after the failure of repeated efforts of the owners to make the vessel seaworthy, had good reason to believe that the shipowners would never be able to do so."

8.47 Where initial unseaworthiness is not sufficiently serious to allow the charterers to treat the charter as discharged, a refusal or failure on the part of the owners to rectify the deficiency may show an intention no longer to be bound by the charter, giving the charterers the right to terminate. Sellers, L.J., in *The Hongkong Fir* continued after the passage in his judgment quoted at paragraph 8.42 above: "If the shipowners had refused or failed [to bring the engine-room staff into suitable strength and competency], their conduct and not the unseaworthiness would have amounted to a repudiation of the charter-party and entitled the charterers to accept it and treat the contract as at an end." This should not be taken too far, however. Where the defect in the ship is one which, left unremedied, does not make the ship unseaworthy or deprive the charterers of substantially the whole benefit of the charter, the owners' refusal to remedy it will not, without more, amount to a repudiation.

The *Hermosa* was chartered on the New York Produce form for a period of two years with options to extend the period for a further four months in certain circumstances. She was sub-chartered by the head charterers on the same form for a similar period. Following delivery in December 1974 there was serious damage to the cargo carried on her first voyage, as a result of unseaworthiness. Because of the repairs which were then carried out, and which took from mid-January to the end of March 1975, the sub-charterers lost their next employment for the ship. On the subsequent ballast voyage in April the ship was in collision and had to put into Curaçao for repairs. The owners had refused to allow the sub-charterers to survey the ship after the first voyage, but since the sub-charterers could obtain no satisfactory reassurances as to the time the further repairs would take to complete, or as to their efficacy, they obtained a court order to survey the ship on 9 August 1975. This survey revealed that deficiencies in the ship's hatch covers, which were the cause of the damage to the cargo on the first voyage, still remained unrepaired and that the ship was in bad condition in other respects. Having received no firm assurances from the head charterers (who were without information from the owners) that these defects were being satisfactorily dealt with, the sub-charterers purported to terminate the sub-charter on 29 August 1975. Unknown to the sub-charterers the owners had arranged for the repair of these defects prior to 29 August and the repairs were properly completed by 22 October. It was held by Mustill, J., and the Court of Appeal that:

(1) the sub-charterers were not justified in treating the charter as discharged by reason of the ship's unseaworthiness because the remaining defects were capable of being put right within a relatively short time and thereafter the sub-charter would still have had 16 to 20 months to run;

(2) there was no repudiation of the charter by the head charterers, because their conduct was not such as to lead a reasonable person to conclude that they did not intend to fulfil their part of the contract. The sub-charterers were justifiably suspicious that the hatch covers might not be properly repaired; but that was not enough, and their action was premature.

The Hermosa [1980] 1 Lloyd's Rep. 638 and [1982] 1 Lloyd's Rep. 570 (C.A.).

Particular features of the ship

Documents, certificates and permissions: legal fitness

8.48 The courts have long recognised that a ship may need certain certificates or documents in order to be able to perform the charter service. This requirement, however, is probably only a component of a wider requirement that the ship is "legally fit" to perform the charter service.

8.49 Kerr, L.J., in *The Derby* [1985] 2 Lloyd's Rep. 325 (C.A.), said at page 331 that: "the vessel must carry certain kinds of documents which bear upon her seaworthiness or fitness to perform the service for which the charter provides. Navigational charts which are necessary for the voyages upon which the vessel may be ordered from time to time are an obvious illustration". However, this category of document also includes "certificates bearing upon the seaworthiness of the vessel. The nature of such certificates may vary according to the requirements of the law of the vessel's flag or the laws or regulations in force in the countries to which the vessel may be ordered, or which may lawfully be required by the authorities exercising administrative or other functions in the vessel's ports of call pursuant to the laws there in force".

8.50 Thus, in *Levy* v. *Costerton* (1816) 4 Camp. 389, it was held that the owners under a voyage charter requiring the ship to be "tight, staunch and strong. . . and furnished with everything needful and necessary for such a ship, and for the voyage" from England to Sardinia, were in breach because the ship did not have a "bill of health" which, as was well known to persons engaged in the trade, was required by the law of Sardinia, even though it was not required by English law. Chief Justice Gibbs held, at page 390, that the owner "was bound to provide the ship with all the documents which owners or captains usually procure, and which were necessary to perform her voyage with reasonable expedition". See also *Ciampa* v. *British India Steam Navigation* [1915] 2 K.B. 774 (ship unfumigated and lacking clean bill of health after calling at a plague port held to be unseaworthy) and *The Madeleine*, below.

The *Madeleine* was time chartered for three months on the Baltime form which required her, upon delivery at Calcutta, to be "in every way fitted for ordinary cargo service". Roskill, J., held that the lack of a deratisation

certificate prevented a good delivery being made at Calcutta as, without that document, the ship could not sail to a port outside India.

Roskill, J., said, at page 241: "There was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel."

The Madeleine [1967] 2 Lloyd's Rep. 224.

8.51 In *The Elli and The Frixos* [2008] 1 Lloyd's Rep. 262, a case about a charter on the Shelltime 4 form, Cooke, J., at first instance, described this requirement as being not simply a matter of documentation, but, more broadly, a requirement of "legal fitness". (The facts are summarised at paragraph 11.16, below.) He said, at pages 272 and 273, "A vessel which is not 'legally fit' to carry a permitted cargo. . . cannot properly be described as being 'in every way fit' to do so. Nor can a vessel be 'in every way fit for the service' if she is not legally fit to carry cargo. . . which is part of the specified service. . . The words 'in every way'. . . cannot be restricted to the vessel's physical state. . . Legal fitness is just as important as physical fitness and the line between the two is not always easy to draw, especially where the legal incapacity results from the physical characteristics of the vessel." In the Court of Appeal, the case was decided on narrower grounds. Cooke, J.'s formulation was not disapproved, but neither was it endorsed: see Longmore, L.J.'s discussion of the authorities in paragraphs 17 to 20 of his judgment, [2008] 2 Lloyd's Rep. 119, at pages 124 to 126, focusing on *The Derby*, below.

8.52 In *The Derby*, the Court of Appeal held that the ship only had to possess: (*a*) any documents customarily required; and (*b*) those "documents. . . which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call": *per* Kerr, L.J., at page 331. An International Transport Workers Federation ("I.T.F.") blue card or certificate was not in either category. Further, there was no evidence that it was customary for owners to obtain an I.T.F. blue card or certificate. In *The Elli and The Frixos*, above, Longmore, L.J., commented, in paragraph 19 of his judgment, that "documents required by an officious outside body could not be regarded as documents relating to the seaworthiness of the vessel. . ."; and in *The Silver Constellation* [2008] 2 Lloyd's Rep. 440, David Steel, J., held, at [35], that approval of a Capesize bulker under the RightShip commercial vetting system was not required by a charter on the New York Produce form, though such approval was of great commercial importance to the charterers, because, following *The Derby*, "the focus is upon requirements legally imposed either by the law of the flag, the law of the country to which the vessel has been ordered or by the laws of the port of call".

The Cypriot flag *Derby* was chartered under the New York Produce form for a period of 11 to 13 months. She carried a Filipino crew on terms which were normal for such crews but which did not meet with the approval of the I.T.F. Certain countries were excluded from the charter's trading limits because they were known to be countries where the I.T.F. was specially active. It was provided by an additional clause that, if the ship was delayed by labour stoppages due to flag or crew or payment of crew, any time lost was to be for the owners' account. In the course of the charter the ship called at Leixoes in Portugal, which country was not among those excluded from the trading limits. However, an I.T.F. representative there made enquiries which revealed that the ship did not hold an I.T.F. blue card and the stevedores refused to discharge the ship. By the time a settlement had been negotiated with the I.T.F. and work had resumed, a total of 21 days' work had been lost. The owners acknowledged that the ship was off-hire for these 21 days under the additional labour stoppages clause, but the charterers claimed that they were entitled, in addition, to damages arising from the consequent cancellation of a sub-charter.

It was held by Hobhouse, J., and the Court of Appeal that, although the obligation in Lines 21 to 24 amounted to a warranty of seaworthiness and included an obligation to have the documents necessary for proper performance of the charter service and a competent and adequate crew, this did not extend to having an I.T.F. blue card or to complying with I.T.F. manning or crew pay requirements. The I.T.F. intervention affected the working of the ship by the stevedores and they were the charterers' responsibility: there was no failure on the part of the owners to perform any of the services they were obliged to perform. Further, there was no

evidence that it was customary for owners to obtain an I.T.F. blue card. Consequently the owners were not liable for any of the damages claimed.

The Derby [1984] 1 Lloyd's Rep. 635 and [1985] 2 Lloyd's Rep. 325 (C.A.).

8.53 Moreover, there are also some limits on the owners' obligation to obtain official or administrative certificates and permissions. Under a time charter, the ship can often be traded to a wide range of ports. In such a case, the owners are not required to have obtained at the time of delivery every certificate or permission that may be required to perform the charter service. Much depends on what documents are customarily obtained by ships engaged in the relevant kind of trading and on whether there is a reasonably foreseeable risk of delay if a particular document is not obtained. (See also the comments at paragraph 8.15 above on the limits of the owners' obligation to provide a ship fit for the service.)

The *Pencarrow* was time chartered on the Baltime form for a Baltic round voyage from the United Kingdom. She was obliged to be "in every way fitted for ordinary cargo service". At the time, in order to be allowed to use Swedish ports, the ship had to have a Swedish measurement certificate. However, the ship did not have such a document and on her arrival at Stockholm to discharge the charterers obtained and paid for this certificate. There was no evidence that such a certificate was usually obtained prior to sailing on a Baltic round voyage or that the lack of one in this case had caused delay to the ship at or off Stockholm. Acton, J., held that there had been no breach by the owners in not having this certificate at the start of this voyage.

Chellew Navigation v. *Appelquist* (1933) 45 Ll.L.Rep. 190.

Documents necessary to start loading operations

8.54 There have been a number of voyage charter cases dealing with the question of what permissions or other documents relating to port entry a ship must have obtained before she can be said to be ready for loading. The rule recognised in such cases is that where the obtaining of an official document or permit is a mere formality and where the absence of such document or permit does not interfere with the ship's ability to perform the charter service, the lack of it will not prevent the ship being ready.

The *Aello* was required, under local law, to have a police permit. It was held by the House of Lords that the ship could give a valid notice of readiness before obtaining one, since it was "little more than a formality" and its absence would not delay the loading of the ship.

The Aello [1960] 1 Lloyd's Rep. 623 (H.L.).

The *Delian Spirit* had not obtained free pratique at the time she gave notice of readiness under her voyage charter. It was held by the Court of Appeal that since there was no reason to suppose that the ship would have any difficulty or delay in getting free pratique on reaching her berth, the fact that she had not obtained free pratique did not prevent her being "ready".

The Delian Spirit [1971] 1 Lloyd's Rep. 506 (C.A.)

8.55 In *The Delian Spirit*, above, Lord Denning, M.R., distinguished, as "a very special case", *The Austin Friars* (1894) 10 T.L.R. 633. There, charterers under a voyage charter had the right to cancel if the ship had not arrived at the port of loading and was not ready to load by midnight on 10 October. The ship arrived at 2300 hours on 10 October, but the health officer did not visit the ship until the following day, and, in the meantime, the charterers had no access to the ship at all. It was held that the charterers were entitled to cancel.

Crew

8.56 It was held by the Court of Appeal in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478, that a ship was not "fitted for ordinary cargo service" under the Baltime form where it was found

that the engine room crew were both incompetent and inadequate in number. It was held by the Court of Appeal in *The Derby* [1985] 2 Lloyd's Rep. 325 that the words "in every way fitted for the service" in the New York Produce form should in this respect be construed in the same way, requiring sufficient and competent crew to operate the ship for the purposes of the charter service: *per* Kerr, L.J., at page 331. On the subject of the owners' obligation to exercise due diligence with respect to the appointment of a competent crew where the charter contains a Clause Paramount, see paragraph 8.29, above.

8.57 But the owners do not thereby undertake that the rates of pay and conditions of employment of the crew will comply with the requirements of a self-appointed and extra-legal organisation such as the I.T.F.: see *The Derby*, summarised at paragraph 8.52, above.

8.58 In some cases, local law makes specific requirements about the crewing of a ship for particular types of trading. For example, in order to undertake voyages between ports within the same country, the ship may have to have a crew including some nationals of that country. A ship is not necessarily unfit for the charter service merely because crew changes must be made in order to comply with such rules: see the general comments at paragraph 8.15, above.

The holds and cargo spaces

8.59 Under the New York Produce form, the ship is to be delivered "ready to receive cargo with clean-swept holds". This wording is discussed at paragraph 8.33, above. It is implicit in Clause 1 of the Baltime Form that the ship is to be delivered in like condition.

8.60 The whole of the chartered space must be at the charterers' disposal: see further paragraph 17.4.

8.61 The holds must be clean and in a fit state to receive cargo. Some defects may be discounted as *de minimis*. However, in *The Tres Flores* [1973] 2 Lloyd's Rep. 247, see paragraph 8.33, above, the Court of Appeal refused to apply the *de minimis* principle to a case where the ship still required to be fumigated – even though the fumigation would take only very little time.

Hatches, cargo gear and equipment, lighting

8.62 A ship may be ready to receive cargo even if it still has to perform usual formalities on arrival at the berth, including opening hatches and rigging cargo gear.

The *Elizabeth Van Belgie* arrived at her discharge port under a voyage charter but no discharging berth was available and she moored at buoys to wait. The question arose whether the ship could there give a valid notice of readiness before removing her hatches and rigging her unloading gear. It was held by the Court of Appeal that the ship was ready in a business sense and that the removal of hatches and the rigging of gear at the buoys would have been an "idle formality".

Scrutton, L.J., said, at page 212: "I should be surprised to find that in practice it was ever thought necessary for the ship as soon as she entered the dock to rig her discharging gear, and get men to do her part of the discharging on board, before her time could begin to run, though it was well known that, at the place where she was, discharging would not take place. Such a requirement would be quite unbusinesslike."

Armement Adolf Deppe v. *Robinson* [1917] 2 K.B. 204 (C.A.).

(See also the comments on this case by Roskill, L.J., in the Court of Appeal in *The Tres Flores* [1973] 2 Lloyd's Rep. 247, at page 252.)

8.63 In the case of voyage charters, a distinction has been drawn between the state of readiness of the ship's holds and the state of readiness of gear and equipment. It has been held that, for the purposes of the cancelling clause, gear and equipment may not necessarily have to be in the same state of readiness as the ship's holds.

The *San George* was chartered for a voyage with grain under the Centrocon form, the charterers being obliged to bring the cargo alongside and the shipowners to load it. The charterers had the option of cancelling if the ship was not ready to load by 6 p.m. on 27 December. The ship gave notice of readiness on 27 December at 10.30 a.m. At that time, the ship was without her mainmast and after derricks. However, the ship's gear was not needed for the loading of the cargo, unless some bags had to be taken on board from lighters (a "somewhat remote contingency") in which event there was nothing to suggest that some temporary equipment could not have been devised. The charterers cancelled. It was held that they acted wrongfully in doing so. Devlin, J., held that they were entitled to no more than the reasonable cooperation of the shipowners in selecting and working the most convenient method of loading, and the evidence of the absence of mainmast and after derricks was inadequate to discharge the onus on the charterers of showing that the defects in the ship's equipment were such that she would probably be unready or unable, when the time came, to employ any reasonable method of loading which might then be decided upon. This judgment was affirmed by the Court of Appeal.

Noemijulia Steamship v. *Minister of Food* (1950) 83 Ll.L.Rep. 500 and (1950) 84 Ll.L.Rep. 354 (C.A.).

8.64 However, it is doubtful whether this decision would apply to a time charter on the New York Produce or similar form. That is because such charters contain an express requirement that the ship is upon her delivery to be in every way fitted for the service. In *Noemijulia Steamship* v. *Minister of Food*, Devlin, J., at first instance, made the following remark, which seems to cast doubt on the applicability of that decision to the usual forms of time charter (at 83 Ll.L.Rep. 500, page 507): "I have not here to deal with a charter-party which expressly gives to the charterer the right to use any part of the ship's gear: in such a case it might well be argued that all such gear must be in readiness. Nor have I to deal with a charter-party which prescribes any particular method of loading or allows the charterer to select a method; in such a case it might be argued that any ship's gear required for such method must be in readiness." However, compare this last comment with what is said in paragraphs 8.37 *et seq*., above, and 8.66 *et seq*., below.

8.65 Further provisions with respect to the ship's gear and winches, as well as lighting for cargo operations, are contained in Clauses 22 and 23 of the New York Produce form.

Special equipment

8.66 Under the New York Produce form, the ship is required to be "fitted for the [charter] service". Since the terms of any particular charter may permit the carriage of cargoes requiring special equipment, are the owners obliged to deliver the ship with all potentially necessary special equipment? As a general rule, they are not. Clause 2, Lines 45 and 46, places upon the charterers the duty to provide "necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo". The same result holds under Clause 1 of the Baltime form, as it only requires the ship to be fitted "for ordinary cargo service".

8.67 But these provisions are not easy to apply to a case where a ship is chartered specifically for the purpose of carrying a particular cargo that requires special equipment. In such a case it may be that the words "special trade or unusual cargo" in the New York Produce form are inapt to describe a cargo which is the very subject of the charter; and that the "ordinary cargo service" of the Baltime form must include carriage of that cargo. If that is right, the owners will have to deliver the ship with any necessary special equipment.

8.68 In a case where the owners undertake to provide a ship fit for the service, but there is no equivalent of Clause 2, Lines 45 to 46, of the New York Produce form, it may be necessary to refer to Hobhouse, J.'s comments in the *The Derby* [1984] 1 Lloyd's Rep. 635, at pages 641 and 642, concerning the nature of the owners' obligation to make the ship ready for a service that may involve a wide range of alternative cargoes, which are quoted in paragraph 8.15, above.

Other specific features of the ship

8.69 In addition to imposing on the owners an obligation to tender the ship fit and ready for the charter service, the charter will often make further, more specific, stipulations about the condition or description of the ship, either at the time the charter was concluded or at delivery. The general rule is that such stipulations are not conditions precedent to the owners' right to deliver the ship, unless the owners' failure to comply with those stipulations has rendered the ship unfit for the charter service when she is tendered for delivery: see *The Arianna* [1987] 2 Lloyd's Rep. 376 and *The North Sea* [1999] 1 Lloyd's Rep. 21 (and in particular Hobhouse, L.J.'s remark at page 25, which is quoted in paragraph 8.73, below). Therefore, if the ship does not comply with some aspect of its description in Lines 3 to 11 when it is tendered for delivery, that is not necessarily sufficient to give the charterers the right to reject the ship.

8.70 However, it will often be the case that compliance with a particular additional stipulation is essential to make a ship fit and ready for the charter service.

The *Vendémiaire* was time chartered for 12 months. The charterers intended to use the ship for carrying molasses and the owners knew that that was the case. Carrying molasses is a special trade, requiring the ship to have pipes of large diameter and to have heating coils as close as possible to the bottom of the tanks. The *Vendémiaire* had not been designed for carrying molasses, but, by the terms of the charter, the owners guaranteed that the ship had pipelines of no less than 30 cm diameter and heating coils "right at bottom of tanks". In fact, the ship's pipelines were at points less than 20 cm wide and its coils were around 30 cm above the tank tops. These defects made the ship unfit for the carriage of molasses and the charterers were held entitled to reject the ship. The ship as presented was "a different thing in substance" from the ship as described. Branson, J., held: "I am satisfied that nobody would, as an ordinary commercial proposition, charter such a vessel as the *Vendémiaire* for use in the molasses trade."

Pennsylvannia Shipping v. *Compagnie Nationale de Navigation* (1936) 55 Ll.L.Rep. 271.

8.71 A particular additional stipulation may also be construed as a condition precedent to the charterer's duty to accept delivery of the ship if the stipulation in question is expressly or impliedly linked to the delivery requirements in Lines 21 to 24 of the New York Produce form: see the comment made by Hobhouse, L.J., in *The North Sea* [1999] 1 Lloyd's Rep. 21 (C.A.), at page 25 (the facts of this case are summarised in paragraph 8.72, below).

Bunkers

8.72 As a general rule, the fact that the ship may have less than the minimum quantity of bunkers required on delivery under Clause 3 of the New York Produce form (or more than the stipulated maximum) will not entitle the charterers to refuse to accept delivery, provided that the deficiency or excess does not make the ship unfitted for the service within the meaning of Lines 21 to 24: see by analogy *The North Sea* [1999] 1 Lloyd's Rep. 21 (C.A.), below. However, if a stipulation as to the quantity of bunkers on delivery were expressly or impliedly linked to the delivery requirements of Lines 21 to 24, then it would have to be complied with before the ship could validly be tendered for delivery: see *The North Sea*, below, *per* Hobhouse, L.J., at page 25 of the Court of Appeal report, and paragraphs 8.41 *et seq*., above. It is suggested, however, that in the case of a long-term time charter, the courts will be reluctant to draw the inference that such a provision is a pre-condition for delivery where the link to Lines 21 to 24 has not been made explicitly.

The *North Sea* was time chartered for a trip on the Asbatime form. Lines 34 to 45 provided for the ship to be placed at the disposal of the charterers at charterers' berth, Hong Kong or dropping last outward sea pilot Hong Kong in charterers' option, the ship to be on her delivery "in every way fitted for container service". Clause 3 (the Bunkers on Delivery and Redelivery clause) provided "The vessel shall be delivered with: See

Clause 56". Clause 56 required the ship to be delivered with certain stipulated quantities of bunkers. In the cancelling clause (Clause 14) the notice of readiness provision was deleted and it was provided instead that the charterers should have the option of cancelling "should vessel not have been delivered on or before 10th August 1995 1200 hours".

Notices of delivery were duly given that the ship, which was already at Hong Kong, would be delivered at 1000 hours on 10 August, but, despite requests, the charterers never stated where they required delivery to be made. At 12 noon on that day, when the ship was still at anchor at Hong Kong, taking on bunkers, the charterers cancelled on the grounds that the ship was at neither of the places stipulated for delivery, nor had she on board the required quantity of bunkers. However, although the ship did not have on board the quantities of bunkers required by Clause 56, the arbitrator found that she did have on board sufficient bunkers to sail from Hong Kong in safety and to reach her next intended port of call where further bunkers could have been taken on.

As regards the bunkers, it was held by the Court of Appeal, affirming Mance, J., on this point, that since the ship complied fully with the requirements of Lines 34 to 45 and was "in every way fitted for container service", the charterers were not entitled to cancel. The fact that the ship did not have on board the quantities of bunkers required by Clauses 3 and 56 was irrelevant, because as a matter of construction of the charter, Clauses 3 and 56 were not linked to the delivery provisions of Lines 34 to 45 and by 1000 hours, as well as by 1200 hours on 10 August, the ship had sufficient bunkers to enable her to sail in safety for her next port. The ship may have been in breach of Clause 56 but that could give rise only to a claim in damages.

The North Sea [1997] 2 Lloyd's Rep. 324; [1999] 1 Lloyd's Rep. 21 (C.A.).

8.73 In rejecting the charterers' argument in *The North Sea* that compliance with the requirements of Clause 56 was necessary before the ship could be validly tendered for delivery, Hobhouse, L.J., at page 25 of the Court of Appeal report, said: "The charterers" argument has to carry through the terms of cl. 3 and cl. 56 into the primary delivery provision. As the Judge pointed out, if that is to be done, no latitude is to be allowed beyond that permitted by the use of the word "about" (*The Tres Flores* [1973] 2 Lloyd's Rep. 247 at p. 252, per Lord Justice Roskill). An excess of any of the categories of fuel will be equally as fatal to owners' rights as will be a shortfall. Further, if one applies this reasoning to cl. 56, there are other clauses in the charter-party which are equally susceptible to the same argument. An acceptable and appropriate construction to place upon this charter-party is that lines 41 to 45 [the requirements as to the state of the ship on delivery] are to be the critical provisions and provided that they are complied with in all respects that suffices for the purposes of effecting delivery." Hobhouse, L.J., noted (also at page 25) that parties could provide for the service of a notice of readiness which implicitly required the ship to have satisfied the delivery bunker clause before she could be tendered for delivery. However, it is not thought that is the effect of the notice of readiness provisions of Clauses 5 and 14 of the New York Produce form, or that Hobhouse, L.J., was suggesting that it was.

NYPE 93

8.74 The NYPE 93 form includes a special clause providing for on- and off-hire surveys to establish upon delivery and upon redelivery the "quantity of bunkers on board and the condition of the Vessel": see Clause 3, Lines 40 to 47.

U.S. Law

Readiness to load

8A.1 To be ready to load, all of the ship's holds must be ready in all respects. *Crow* v. *Myers*, 41 F. 806 (E.D. Va. 1890). In *Rudolf A. Oetker* v. *Koninklijke Nederlandsche Stoomboot-Maatschappij N.V.*, SMA 508 (Arb. at N.Y. 1970), unknown to the owner, the ship was infested with Khapra beetles when she was delivered to the charterer. The panel held that notwithstanding its lack of knowledge of the latent condition, the owner was in breach of its duty to provide a "cargoworthy" ship. According to the panel: "The Owner is bound to make the holds of the vessel fit for the reception of the cargo to be carried under the Charter." The panel held that the owner was obligated to fumigate the ship once the condition was discovered, and that the ship went off-hire while the fumigation was performed. The owner's contention that its duty to fumigate was waived by the charterer's acceptance of a delivery certificate was rejected.

8A.2 In *The Endeavor*, 1978 AMC 1742 (Arb. at N.Y. 1977), the panel held that the owner was obliged to install new ladders in the cargo holds to meet the local requirements of an Australian trade union. The charterer had the right to direct the ship to Australia, and this right would have been impeded if the ship were not fitted with the special ladders. See further discussion at paragraph 11A.11.

8A.3 In *The EmmanuelC*, SMA 1575 (Arb. at N.Y. 1981), the panel held that the ship was not ready within the meaning of Lines 21/22 of the charter when a routine pre-loading inspection by the National Cargo Bureau inspector revealed rust in all the cargo compartments. The cargo the charterer intended to load was bulk diammoniam phosphate, which was a permissible cargo under the charter. The cargo would have been contaminated by exposure to rust and the ship, therefore, was not ready to receive permissible cargo. The ship was held to be off-hire while the rust was removed.

8A.4 The holds need be ready only for general cargo, however, and unless the charter contains an express provision to the contrary, the owner need not have the holds ready for cargoes that require special treatment. See *Disney* v. *Furness*, 79 F. 810, 815 (D. Md. 1897), holding that "the readiness required was a reasonable readiness, and not a special readiness to gratify particular requirements established by the [charterer]." Similarly, in *Greenwell* v. *Ross*, 34 F. 656 (E.D. La. 1888), the court held that where the ship was in all respects ready to load "lawful merchandise," as required by the charter, the charterer was not justified in cancelling the charter because the ship was not ready to load a cargo that required special preparations. The charterer had not given the owner any advance notice of the cargo it intended to load, and the ship could easily have been prepared to load it. See also *The Stolt Lion*, SMA 1188 (Arb. at N.Y. 1977).

8A.5 If it is contemplated that the ship will be transporting goods that require special care, such as perishable cargo, the ship must be equipped to do so. The leading American case is *Martin* v. *The Southwark*, 191 U.S. 1 (1903). In that case, a bill of lading was issued for a cargo of meat for shipment from Philadelphia to Liverpool. The meat arrived in damaged condition because the refrigeration apparatus had broken down prior to the ship's departure from Philadelphia. The court held for the cargo owner, finding that the owner had failed to exercise due diligence to make the ship seaworthy when she broke ground on the voyage.

8A.6 The bill of lading in *Martin* v. *The Southwark* was governed by the Harter Act. According to the court, the test of seaworthiness was whether the ship was fit to carry the cargo of meat:

> As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect. But for the special

appliances furnished by the vessel, perishable cargoes, such as dressed beef, could not be shipped on long voyages in hot weather. [191 U.S. at 9.]

The same rule would apply if the charter incorporated COGSA or in the unusual situation where a charter did not include a Clause Paramount based on the owner's duty to provide a seaworthy ship.

8A.7 Similarly, where the charter contained a cargo clause enumerating clean petroleum products the ship could carry, owner was in breach when the ship's tanks were not clean enough to carry one of the permitted cargoes. *The Marilee*, SMA 3487 (Arb. at N.Y. 1998). The panel ruled that the fact that charterer accepted the ship with the knowledge that there were stains in the tanks did not constitute a waiver of owner's obligation to deliver the ship in fit condition to load and carry the cargoes specified in the cargo clause.

8A.8 Material defects may preclude an effective delivery. In *Oneida Nav. Co*. v. *L. Richardson & Co*., 282 F. 241 (2d Cir. 1922), the ship was described in the charter as an auxiliary schooner, or a schooner with auxiliary engines. On the cancelling date, her auxiliary engines were inoperative, and it was uncertain how soon they could be repaired. While recognizing that cancellation would probably not have been allowed if it had been known at the time that the necessary repairs could have been completed in eight or nine days, the court held that the charterer's cancellation was proper. According to the court, on the cancellation date, the "vessel chartered as an auxiliary schooner [was] not an auxiliary schooner. . .." See discussion at paragraphs 3A.1 to 3A.38 and 8A.11 to 8A.15.

With clean-swept holds

8A.9 In *The Van Hawk*, 1975 AMC 254 (Arb. at N.Y. 1975), the panel held that the owner was not liable for extra cleaning expenses incurred by the charterer to make the holds ready to load a cargo of sulphur where under the New York Produce form the charter required the ship's holds to be "swept-clean" and the ship had been accepted by the charterer after an on-hire survey.

8A.10 See also *The Augvald*, 1965 AMC 1614 (Arb. at N.Y. 1965), holding that the charterer was entitled to reject the owner's tender of the ship because the owner had not obtained "weevil free certificates" and the ship was therefore not in all respects ready to load. The owner knew that the charterer intended to load a cargo of grain. According to the panel:

> The Arbitrators are of the opinion that Owners were obligated to tender the vessel to the charterers with all cargo spaces clean and ready to receive a cargo of bulk and/or bagged grain. . . In the panel's opinion it was incumbent upon the Owners to tender the vessel with all cargo spaces free of live insects or weevils injurious to a grain cargo. [1965 AMC at 1616–1617.]

Tight, staunch, strong

8A.11 These words state an express warranty that the ship will be seaworthy at the time of delivery to the charterer. *Work* v. *Leathers*, 97 U.S. 379 (1878); *Munson S.S. Line* v. *The Miramar S.S. Co*., 166 F. 722, 724 (2d Cir. 1908); *Iligan Int'l. Corp*. v. *The John Weyerhaeuser*, 372 F. Supp. 859, 1974 AMC 1719 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 68 (2d Cir. 1974), *cert. denied*, 421 U.S. 956. In the absence of language such as that contained in Clause 1 of the New York Produce form, which imposes on the owner a continuing obligation to maintain the ship in a seaworthy condition, the warranty will be satisfied if the ship is in a seaworthy condition at the time of delivery.

8A.12 In *The Captain John*, 1973 AMC 2005 (Arb. at N.Y. 1973), where the charter stated that the ship would be "tight, staunch and strong so far as these can be attained by the exercise of due diligence," it was held that the owner was under a duty to exercise due diligence throughout the charter term. As stated by the panel:

We interpret this as an express undertaking that due diligence would be exercised to make the vessel seaworthy at the commencement of each voyage. [1973 AMC at 2009.]

8A.13 In *The Grand Explorer*, SMA 551 (Arb. at N.Y. 1963), the charterer was held entitled to refuse to accept the ship because the No. 5 hold had not been floored over with a sugar platform, as required by the charter. Similarly, in *Coca-Cola Co*. v. *The Norholt*, 333 F. Supp. 946, 1972 AMC 388 (S.D.N.Y. 1971), the court stated:

The charter party specifically provided that Owner warranted that the vessel's deep tanks were suitable for dry or liquid cargo. A vessel owner gives an implied warranty of seaworthiness of the chartered vessel at the commencement of every voyage. . . The owners must provide a vessel with equipment and tanks to safely store and transport the various cargoes, or the warranty has been breached. [333 F.Supp. at 948–949]

8A.14 A ship may be unseaworthy, i.e., not reasonably fit for the service, if she is not properly equipped to perform the safe carriage of the cargo under normal or reasonably expected conditions. In *Demsey & Assoc*. v. *The Sea Star*, 461 F.2d 1009 (2d Cir. 1972), the court held that a ship chartered to carry steel was unseaworthy because her 'tween deck hatch boards were not capable of supporting the weight of the cargo.

8A.15 In *The Golden Dolphin*, SMA 2797 (Arb. at N.Y. 1987), the panel found that the owner failed to exercise due diligence to furnish a competent and adequately trained crew. The owner was held liable for the loss of bunkers on board which belonged to the charterer and were destroyed when the ship sank following an explosion.

8A.16 In *M/T Perla*, SMA No. 4152 (SMA Arb. at N.Y. 2011) (Blake, Textor, Siciliano), a cargo hold bulkhead failed, resulting in the contamination of cargo in the holds separated by the bulkhead. The panel found the failure was the result of an exothermic reaction caused by the mixing of methanol cargo with sulfuric acid trapped in the void space created by defective welds in the bulkhead. The panel rejected owner's contention that the failure was caused by a latent defect, for which liability was excepted in the charter, finding instead that Owner had failed to exercise due diligence in view of the ship's and some sister ships' experiencing similar failures in the past.

CHAPTER 9

Lawful Merchandise

"24. . . . to be employed, in carrying lawful merchan-
25. dise, including petroleum or its products, in proper containers, excluding .....
26. (vessel is not to be employed in the carriage of Live Stock, but Charterers are to have the privilege of shipping a small number on deck at their risk,
27. all necessary fittings and other requirements to be for account of Charterers), . . .

Unlawful cargoes

9.1 Lawful merchandise may include military stores and munitions. But goods will not be lawful merchandise if their loading amounts to a breach of the local law nor if they cannot lawfully be discharged at the nominated discharge ports. It is suggested they must also be lawful under the law of the ship's flag and the governing law of the charter. The prohibition upon unlawful merchandise is 'absolute': "the charterer is taken to warrant the lawfulness of the cargo and not merely [to give] an undertaking. . . that the cargo is lawful to the best of his belief. . . . In other words, this is an absolute warranty" (*The Greek Fighter*, below, *per* Colman, J., at [283]).

The *Dodecanese* was chartered on the Baltime 1920 form for employment "in lawful trades for the conveyance of lawful merchandise". She was loaded at various Mediterranean ports with ammunition and other explosives and ordered to discharge these to the British forces at Adabiya in Egypt, although the charterers knew this was prohibited by the Egyptian authorities. Having obeyed these orders and been blacklisted by the Egyptian authorities for so doing, the ship loaded again, at Port Tewfik, with military stores for Aqaba, but she broke down before sailing. Because she was blacklisted, the authorities delayed her repairs so that they took 26 days longer than they should have done. Pilcher, J., held that, as the goods loaded for Adabiya could not be discharged at the nominated port without a breach of local law, they were not "lawful merchandise" and the charterers were, therefore, liable to pay damages for the delay caused (effectively restoring the loss to the owners from the ship being off-hire during the 26 days).

Leolga v. *Glynn* [1953] 2 Lloyd's Rep. 47.

(See also *Vanderspar* v. *Duncan* (1891) 8 T.L.R. 30, described by Pilcher, J., in the case above as "only an authority upon 'usage' applied to its own particular facts".)

The *Greek Fighter* was anchored off Khorfakkan, UAE, as a floating oil store under a time charter on the Shelltime 4 form. The charterers directed her to load cargo from the *Gulf Prince* that had been exported from Iraq in breach of UN sanctions. Under UAE law, the UN sanctions were enforced by the Coastguard. Receipt by *Greek Fighter* in the UAE of cargo exported from Iraq in breach of the sanctions rendered *Greek Fighter* liable to confiscation, whether or not her owners or charterers were aware of the contraband nature of the cargo.

Colman, J., held that the charterers were in breach of Clause 4 – "Owners agree to let and Charterers agree to hire the vessel. . . for the purpose of carrying all lawful merchandise. . .", and Clause 28 – "No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments". They were liable in damages for the loss of the ship by confiscation (she was ultimately sold at auction for the account of the UAE authorities) and for loss of hire (the parties varied the charter, following the detention of the ship and without prejudice to the owners' damages claim, to provide for hire to be payable during the detention but at below the charter rate).

Colman, J., went on to consider, *obiter*, whether the charterers would have been liable had the cargo not been contraband. On that hypothesis:

(a) The owners' claim under Clause 13 of the Shelltime 4 form for an implied indemnity against the consequence of compliance with the charterers' orders failed. If the cargo had been lawful, then the ship had been confiscated unlawfully by the UAE Coastguard acting on unjustifiable suspicions. Such conduct broke the chain of causation.

(b) There was no breach of the charterers' safe port undertaking. The express promise of safety in the fixture recap ("FOR TRADING ALWAYS AFLOAT WITHIN IWL VIA SAFE PORTS/ANCHORAGES AG/GULF OF OMAN AREA") was an absolute undertaking. It overrode the lesser due diligence obligation in Clause 4 of the Shelltime 4 form. It was not displaced by an Addendum providing "Vessel only to perform storage operations in the Khorfakkan area". A risk of loss due to confiscation without justification and the absence of an effective remedy under the local justice system could amount to unsafety. However, Khorfakkan was not prospectively unsafe in that respect when the ship was ordered to operate there.

(c) The ship was off hire under Clause 21(a) of the Shelltime 4 form during her detention until the variation referred to above came into effect, which superseded the original hire and off-hire regime and under which hire was payable despite the detention but at a revised rate (see further on this aspect paragraph 37.110, below).

The Greek Fighter [2006] EWHC 1729 (Comm), [2006] 1 Lloyd's Rep. Plus 99.

Excluded cargo

9.2 The concept of excluded cargo requires little elaboration. Cargo identified as excluded is cargo the owners have not agreed to carry, i.e. cargo the charterers have no right to cause to be shipped. It is therefore a breach of the contract for the charterers to ship goods excluded by the charter and the master may properly refuse an order to load such cargo. The employment clause, putting the master under the charterers' orders, does not negative that proposition. In *The Sussex Oak* (1949) 83 Ll.L.Rep. 297, Devlin, J., said at page 307: "I cannot think that the clause in a time charter-party which puts the master under the orders of the charterers as regards employment is to be construed as compelling him to obey orders which the charterers have no power to give."

9.3 It was argued in *Chandris* v. *Isbrandtsen-Moller* [1951] 1 K.B. 240, that the shipment of any quantity of excluded cargo (unless so small a quantity as to be *de minimis*) would entitle the owners to treat the charter as repudiated. Devlin, J., recognised the problems that such a contention presented when he said, at page 251: "If it be the law that an owner who at the end of a voyage discovers that a small portion of cargo (enough to be above *de minimis*) outside the contract description has been shipped, albeit with the knowledge of the master, can tear up the whole contract, it may result in some practical inconvenience. No such question arises for my consideration here, since the owner himself chose to affirm."

9.4 It is suggested that a court today would not regard the term as to excluded cargo as such a term that *any* breach of it entitles the owners to treat the contract as discharged. Only those breaches which are so serious as to go to the root of the charter should be regarded as having that consequence. That is to say, in the terminology now typically used, the obligation not to ship excluded cargo would be regarded as an intermediate term.

Effect of acceptance of excluded cargo

9.5 If the charterers order the master to load excluded cargo and the owners are either unaware of this or instruct the master to accept it under protest, the owners may be entitled to additional remuneration based on the current market rate for carriage of the excluded cargo (see paragraphs 5.19 to 5.23, above), as well as damages if loss is caused.

Dangerous cargo

9.6 The New York Produce form contains no provision which forbids the shipment of dangerous cargo, by contrast to the Baltime form, Lines 32 to 36 of which read: "No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) shall be shipped." It is, however, usual for the parties to agree some such exclusion in the space provided in Line 25 of the New York Produce form.

9.7 Whether or not dangerous goods are proscribed in Line 25, the New York Produce form, by Clause 24, incorporates the United States Carriage of Goods by Sea Act (U.S. COGSA), Section 4(6) of which will apply to all shipments under the time charter (not only shipments to or from the United States), see paragraphs 34.5 to 34.10 below. Moreover, it is very common nowadays for the parties to add a more general Clause Paramount applying the Hague or Hague-Visby Rules to shipments under the time charter. Section 4(6) of U.S. COGSA (Article IV, rule 6 of the Rules) concerns dangerous cargo.

NYPE 93

9.8 The 1993 revision of the New York Produce form contains a special Dangerous Cargo clause. The first part permits the carriage of dangerous cargo when in accordance with the requirements of specified national authorities, save for "livestock of any description, arms, ammunition, explosives, nuclear and radioactive materials". The second part limits the amount of IMO-classified cargo that may be carried and obliges the charterers to provide reasonably-required evidence of compliance with the IMO regulations: see Clause 4, Lines 49 to 69.

Wide meaning given to "dangerous"

9.9 A particular cargo may be dangerous, despite the fact that cargoes of its type are not usually so regarded, if its own particular characteristics, including where relevant its own packaging, endanger the ship or other cargoes on board. This is true both at common law and under Section 4(6) of U.S. COGSA (or Article IV, rule 6 of the Hague or Hague-Visby Rules). See, for example, these cases mentioned below: *The Athanasia Comninos* (unusually gassy coal); *Micada* v. *Texim* (iron ore concentrates with an unusually high moisture content); *The Fiona* (fuel oil emitting flammable vapours); *The Giannis NK* (groundnut pellets infested with khapra beetle); *The Atlantic Duchess* (butanised crude oil alleged to pose particular risks not known to the carrier, although here the claim failed on the facts).

9.10 It was accepted in *The Giannis NK* [1998] 1 Lloyd's Rep. 337 (H.L.) that goods can be dangerous under Section 4(6) if they endanger other goods even though they do not endanger the ship; see *per* Lord Lloyd at page 341. That is also the case at common law (indeed, the leading common law authority, *Brass* v. *Maitland* (1856) 6 E. & B. 470, was itself such a case). In this context the threat to other cargoes does not have to be direct. Thus in *The Giannis NK* itself, see paragraph 9.25 below, there was no risk of the infestation spreading from the groundnut pellets to the other cargo on the ship and thus damaging it directly; it was enough that the presence of infestation in the pellets was liable to cause the other cargo to be condemned at a discharge port along with the pellets themselves and so be dumped at sea. (Whether the ship herself had been "damaged" by the infestation, which required her to be chemically fumigated, did not have to be decided in that case (see the comment from Lord Lloyd mentioned above); Longmore, J., thought she had not and in the Court of Appeal Hirst, L.J., was inclined to agree but left the point open. See also *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.).)

Lack of warning to the master

9.11 A cargo that can be carried safely if the master is made aware of its particular characteristics may be dangerous if he is not given that information.

The *Agios Nicolas* was chartered on the Baltime form, excluding the shipment of "dangerous goods". A cargo of iron ore concentrate was loaded, but the master was misled as to its moisture content and was not informed (despite all reasonable enquiries made by him) that the moisture content was such that shifting boards should have been fitted. Shifting boards were not fitted and, as a result of the cargo shifting, the ship developed a list and had to put into a port of refuge. The time charterers were held to be in breach for shipping dangerous cargo.

Donaldson, J., said: "In a word, what [the master] was being offered was a wet wolf in a dry sheep's clothing and there was nothing to put him on notice that the cargo was something radically and fundamentally different from that which it appeared to be. In those circumstances it seems to me that the cargo was dangerous beyond all argument."

Micada v. *Texim* [1968] 2 Lloyd's Rep. 57.

Normal precautions and exceptional cargoes

9.12 There are numerous cargoes which cannot safely be classified in advance, simply by reference to their type, as "safe" or "dangerous". As Mustill, J., pointed out in *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277, the facts of which are set out at paragraph 19.30, it is not possible to say in the abstract that coal is either a dangerous or a safe cargo. It is well known that coal may emit methane gas which can combine with air to produce an explosive mixture. The shipowner may, however, argue that while he appreciated this danger and took appropriate precautions, he could not be expected to anticipate or to accept the risk of the particular shipment being gassy to an unexpected and quite extraordinary degree. Mustill, J., said that, in such a case: "I consider that it is not correct to start with an implied warranty as to the shipment of dangerous goods and try to force the facts within it; but rather to read the contract and the facts together, and ask whether, on the true construction of the contract, the risks involved in this particular shipment were risks which the [owners] contracted to bear." He went on to suggest that the risks which the owners should be regarded as having contracted to bear were those which would be avoided by appropriate methods of carriage for goods of the relevant type – the owners being expected to take reasonable steps to keep up to date with the correct methods but not to have the knowledge of an expert chemist. He said: "This approach will be sufficient to deal with most problems relating to dangerous cargoes, for in respect of the great majority of goods, the 'normal' precautions will suffice to eliminate the risk of carrying normal goods of the description stated in the contract. Leaving aside casualties from wholly extraneous causes, one can say that proper carriage and 'dangerous' nature are opposite sides of the same coin." (In that regard, there is a parallel with the definition of an unsafe port, see paragraphs 10.3, 10.46 and 10.47, below.)

9.13 Of course, the appropriate or "normal" methods of carriage might turn out in practice to be inadequate to prevent an accident, despite the normality of the cargo for its described type. This risk Mustill, J., considered fell upon the owners, at least under a bill of lading or voyage charter for the carriage of goods of that type. Where, however, the risks produced by the particular cargo were 'of a totally different kind (whether in nature or degree) from those attached to the carriage of the described cargo', they should fall on the shippers or charterers rather than upon the owners. See also *The Atlantic Duchess* [1957] 2 Lloyd's Rep. 55. However, the proposition that an accident in a cargo that is neither excluded nor unusual (for its type) is at owners' risk, even though not caused by any fault on the part of ship or crew, cannot be accepted without qualification. There

will remain the possibility of a claim by the owners under the implied indemnity considered in paragraphs 19.15 *et seq*., below. Indeed, precisely such a claim succeeded, in *The Athanasia Comninos*, in relation to the cargo carried on the *Georges Chr. Lemos* ([1990] 1 Lloyd's Rep. 277, see page 296), since the charterers had not proved the "normality" of the cargo or demonstrated in any other way that the damage resulted from a risk the owners had consented to bear (see paragraph 19.17 below).

Extension of the common law meaning of "dangerous"

9.14 At common law, goods that present no physical threat, direct or indirect, to the ship or to other cargo are probably still to be classified as dangerous if they threaten to trigger legal obstructions that will cause the ship or other cargo to be delayed or detained (although not, in the absence of legal obstacles, if they merely threaten delay: *The Darya Radhe* [2009] 2 Lloyd's Rep. 175). Although the House of Lords did not find it necessary to confirm this in *The Giannis NK*, the courts below accepted that it was established by cases such as *Mitchell Cotts* v. *Steel* [1916] 2 K.B. 610. It is suggested that this goes beyond the United States Act/Hague(-Visby) Rules notion of dangerous cargo (as Hirst, L.J., held, *obiter*, in *The Giannis NK*, and Tomlinson, J., held in *The Darya Radhe*, above, at [25]), a view shared by *Voyage Charters*, paragraphs 6.62, 85.431 and 85.434, and *Scrutton on Charterparties*, page 445 and n. 284, although the contrary view is expressed in *Bills of Lading*, paragraph 10.323.

Absolute obligation

9.15 In *The Athanasia Comninos*, above, Mustill, J., expressed the view that the weight of authority supported the proposition that the obligation of the shipper was 'absolute', that is to say it does not depend upon whether he himself knew or should have known of the dangerous characteristics of the relevant cargo. The absolute nature of the shipper's obligation was confirmed by the House of Lords in *The Giannis NK* [1998] 1 Lloyd's Rep. 377. Although this was technically *obiter*, the House presented it as a decision and after hearing full argument on the point: see *per* Lord Lloyd at pages 344 and 345. Again, it seems that this should also be true of the obligation when it is placed upon the charterers under a time charter.

United States Carriage of Goods by Sea Act (U.S. COGSA)

9.16 In the New York Produce form, the provisions of U.S. COGSA are incorporated by Clause 24. As noted above, that is also very often overridden or supplemented by an incorporation of the Hague or Hague-Visby Rules. Article IV, rule 6 of the Rules is identical to Section 4(6) of the Act. In the discussion that follows, Section 4(6) is referred to throughout, for the sake of brevity and since it is the Act that comes in under the New York Produce form. The principles referred to will apply equally, however, in cases involving the Hague Rules.

9.17 Section 4(6) of the Act provides as follows:

> Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

9.18 This provision falls into three parts. *The first part* allows the owners to land, destroy or render innocuous inflammable, explosive or dangerous goods to the shipment of which they have not consented with knowledge of their nature. As noted above (paragraph 9.14) it is thought this does not extend to goods with a propensity to cause (only) delay to the ship. *The second part* makes "the shipper" liable for all damages and expenses arising out of such shipment. *The third part* concerns shipment of such cargoes to which the owners have consented with knowledge of their nature but which become a danger to the ship or its cargo, and gives the owners the rights listed in the first part.

Applicability to charterers

9.19 Applying the principles set out at paragraphs 34.5 *et seq*., there is no reason why the first and third parts of Section 4(6) should not have full effect as between owners and charterers under the New York Produce form. It is not so clear that the second part should be equally effective, because this involves reading "the shipper" as "the charterer". But it is submitted that in the context of the New York Produce form this is the correct approach (see paragraphs 34.6 and 34.7) and that consequently the second part of Section 4(6) does have effect in that context.

Applicability to claims by owners

9.20 Section 4(6) can be used by the owners not only to defend claims made against them, for example for landing dangerous goods short of destination, but also to support claims made by them in respect of damage caused by such cargo, including delay to their ship: see *The Giannis NK*, below, and the Canadian case of *The Irwin Schroder* [1970] Ex. C.R. 426. (This relates to delay resulting from the dangerous nature of the goods. A propensity to cause (only) delay to the ship does not itself make the goods dangerous under Section 4(6), see paragraphs 9.14 and 9.18, above.)

Relationship with the common law

9.21 In relation to claims by the owners, Section 4(6) effectively supersedes the common law obligation referred to in paragraph 9.28, below, where it overlaps it, namely in relation to physically dangerous goods. However it probably leaves it intact where there is no overlap, namely in relation to goods which are not physically dangerous but are "legally" dangerous in that they are liable to cause delay to the ship or to other cargoes. Hirst, L.J., supported this view in giving the judgment of the Court of Appeal in *The Giannis NK* [1996] 1 Lloyd's Rep. 577, at page 587, although the House of Lords did not find it necessary to consider the point. (Remarks by Judge Diamond, Q.C. in *The Fiona*, below, as to the exclusivity of the code created by Section 4(6), must now be read in the light of *The Giannis NK*.) This accords with the statement of Devlin, J., in *Chandris* v. *Isbrandtsen-Moller* [1951] 1 K.B. 240, that U.S. COGSA was not intended as a comprehensive code altogether supplanting the contract of carriage; on topics not covered by the Act the parties remain free to make their own provisions and the courts to imply terms in the usual way.

Unseaworthiness contributing to damage

9.22 A claim by the owners under Section 4(6) of U.S. COGSA will be defeated if they are in breach of their obligation, under Section 3(1), to exercise due diligence to make the ship seaworthy and fit and safe to receive the cargo, even if their breach would not have caused damage had it not been for the dangerous nature of the cargo shipped.

There was an explosion in a cargo tank of the *Fiona* when a surveyor inserted into it an unearthed temperature probe. Unknown to the surveyor, explosive gases had built up in the tank. These gases came partly from a cargo of fuel oil, which was being carried in that tank on Hague Rules terms, and partly from residues of a previous cargo of natural gas condensate which the shipowners had failed to wash away before loading the fuel oil. The shipowners claimed to be indemnified by the shippers of the fuel oil in respect of loss and damage caused by the explosion.

In the Commercial Court, Judge Diamond, Q.C., found that the shipment of this particular fuel oil, which had emitted flammable vapours in a manner that the master had no reason to expect from this type of cargo, and the failure to wash away residues of the earlier cargo were both contributory causes of the explosion, but for which it would not have occurred. He held that the shipowners were therefore precluded from recovering an indemnity from the shippers under Article IV, rule 6 because they had failed to discharge their obligation under Article III, rule 1. This decision was upheld by the Court of Appeal.

The Fiona [1993] 1 Lloyd's Rep. 257 and [1994] 2 Lloyd's Rep. 506 (C.A.).

9.23 The facts of a particular case may allow a distinction to be drawn between damage to which the owners' breach of Section 3(1) did contribute and damage to which their breach did not contribute, so as to preserve their indemnity in respect of the latter under Section 4(6).

The *Kapitan Sakharov* loaded containers under deck including eight tank containers of isopentane in spaces lacking adequate ventilation for such a highly flammable liquid. She also loaded containers on deck. At sea there was an explosion among the containers on deck, causing a fire which first caused damage on deck and then spread below deck into the space partly occupied by the isopentane containers, became more intense and eventually led to the sinking of the ship.

Clarke, J., found that the initial explosion had been within a sealed container of undeclared dangerous cargo. He also found that the consequent fire would not have led to the sinking of the ship had her owners not negligently stowed the isopentane containers where they did, in breach of their obligation under Article III, rule 1. He therefore held that the owners could recover under Article IV, rule 6, from the shippers of the container of undeclared dangerous cargo in respect of the on-deck damage, but not in respect of damage caused and liabilities incurred in the subsequent under-deck fire and eventual sinking of the ship with her remaining cargo, to all of which their breach of Article III, rule 1, had contributed.

His judgment was upheld by the Court of Appeal. In dealing with the argument that the unseaworthiness caused by the stowage of the isopentane would have had no adverse consequence but for the dangerous cargo on deck, Auld, L.J., said, at page 269: "The essential question was whether [the owner's] lack of due diligence in the stowage of the isopentane – breach of contract – causing unseaworthiness in the vessel was *an* effective cause of the fire in hold 3 and her loss. The judge held that it was and that, therefore, [the owner] was not entitled to rely on Article IV, rule 6, to seek an indemnity against [the shippers of the container of undeclared dangerous cargo] in respect of loss caused by that breach. It is immaterial that there was another cause or as to which of them was the dominant cause or their respective timings."

The Kapitan Sakharov [2000] 2 Lloyd's Rep. 255 (C.A.).

9.24 It is suggested the same results would follow if the owners' causative breach was of Section 3(2) of the Act, as the reasoning in *The Fiona* was not limited to the overriding nature (as it is sometimes described) of the seaworthiness obligation under Section 3(1) (and this was the view of Christopher Clarke, J., in *The Aconcagua*, below). It is familiar law that an indemnity will generally not be construed to cover loss caused by the beneficiary's own negligence, nor can damages be recovered in respect of loss caused by the claimant's own breach. It is also suggested that in both cases (breach of Section 3(1) and breach of Section 3(2)), it will be for the owners to prove (once their breach has been established) what loss or damage did not result from their own breach if they are to recover anything: see *The Panaghia Tinnou* [1986] 2 Lloyd's Rep. 586 applying *Government of Ceylon* v. *Chandris* [1965] 2 Lloyd's Rep. 204. However, if a casualty is caused by the combination of the shipment of dangerous cargo and an act or omission (including fault) on owners' side, liability for which is excluded by the charter, the owners should still be entitled to their indemnity: *The Aconcagua* [2010] 1 Lloyd's Rep. 1, *per* Christopher Clarke, J., *obiter*, at [373] – [374] (the point did not arise in the Court of Appeal [2011] 1 Lloyd's Rep. 683).

Absolute obligation

9.25 In *The Giannis NK*, below, it was suggested that the liability to owners that may be imposed on shippers by the second part of Section 4(6) is reduced from an 'absolute' obligation to an obligation of due diligence by Section 4(3) of the same Act, which provides: "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants". Some cases in the U.S. suggested that the obligation is so reduced, but this was rejected so far as concerns English law by the House of Lords in *The Giannis NK*, which decision was subsequently approved by the U.S. Second Circuit, see paragraphs 9A.10 *et seq*., below.

The *Giannis NK*, having loaded wheat pellets in holds 2 and 3 at Lome and Abidjan, loaded at Dakar a cargo of groundnut pellets in hold 4 under a bill of lading incorporating the Hague Rules. Unknown to the shippers and to the shipowners this groundnut cargo was already infested with khapra beetle. There was no danger of the infestation spreading from hold 4 and thus damaging cargo in the other holds. Part of the wheat was discharged at San Juan, Puerto Rico, and the ship sailed to Rio Haina in the Dominican Republic where the infestation in hold 4 was discovered. She then returned to San Juan where, on the orders of the U.S. Department of Agriculture, the groundnut cargo and also the remaining wheat were dumped at sea. Thereafter the empty ship had to be fumigated before she could resume trading. The shipowners claimed that the infested cargo was dangerous and therefore sued the Dakar shippers for delay to the ship and for the cost of fumigation both under Article IV, rule 6 of the Hague Rules and under a term to be implied at common law.

The House of Lords upheld the decision of Longmore, J., and the Court of Appeal that the shipowners were entitled to succeed. It was not disputed that "dangerous" in Article IV, rule 6 was to be given a broad meaning and therefore covered goods which endangered other cargo even if they did not endanger the ship herself.

The House of Lords held that:

(a) the threat to other cargo did not have to be of direct physical damage, in this case of infestation; it was sufficient that the other cargo became exposed to being condemned at a port of discharge and so to being dumped at sea;

(b) the strict liability imposed on the shipper under Article IV, rule 6, was not modified by Article IV, rule 3, so as to require proof of fault or neglect on his part; the shipper could be liable despite not knowing or having the means of knowing that the cargo was infested when shipped;

(c) the shipper was not divested of this liability by the Bills of Lading Act 1855 when property passed to the receiver of the groundnut cargo;

(d) the common law liability of a shipper for shipping dangerous goods does not depend on his knowledge or means of knowledge that the goods are dangerous (as with his Hague Rules liability; see (b) above). Although technically *obiter*, this last point was given as the decision of the House after hearing full argument upon it.

The Giannis NK [1994] 2 Lloyd's Rep. 171; [1996] 1 Lloyd's Rep. 577 (C.A.); [1998] 1 Lloyd's Rep. 337 (H.L.).

Constructive knowledge

9.26 It has been said that the words in Section 4(6) "with knowledge of their nature and character" include knowledge which the owners and their crew ought reasonably to have had, even if they did not. In *The Athanasia Comninos*, above and paragraph 19.30 below, Mustill, J., said, *obiter*, "the words quoted must include knowledge which the carrier and crew ought to have, as well as that which they actually have: otherwise, there would be a premium on ignorance". Judge Diamond, Q.C., also *obiter*, expressed agreement with this statement in *The Fiona*: see paragraph 9.22, above. It could be argued, however, that this is an unjustified gloss on the language of Section 4(6), which appears perhaps to place the premium on obtaining the owner's fully informed consent. If that view were taken, it could be said the risk that the ramifications or implications of known facts, or of information provided by the charterers, do not hit home should be with the charterers. A definitive answer must await full consideration of the point in the courts, if there should be a case which turns on it.

Consent of the master

9.27 The liability of the charterers under the second part of Section 4(6) arises only where the dangerous shipment was effected without the informed consent of the owners, master or owners' agent. It was argued in *Chandris* v. *Isbrandtsen-Moller* [1951] 1 K.B. 240 that, the master having consented to the shipment in question, the owners had no claim. Devlin, J., rejected the argument and held that, by consenting, the master was not waiving the rights of the owners in respect of the shipment. The judge pointed out that the silence of the third part of Section 4(6) as to liability of the shipper (or, by incorporation, the charterers) could not be used as a defence to the claim of the owners for breach by the charterers of an express exclusion in the charter of such cargo. The Act was not intended as a comprehensive code altogether supplanting the contract of carriage; rather, it controlled certain topics and remained silent on others, including the consequences of shipping excluded cargo with the consent of the master, which the parties remained free to regulate for themselves by the terms of their contract. To be entirely clear, it is suggested that there was plainly no claim under Section 4(6) even if that fact did not exclude a claim otherwise arising. Where informed consent has been obtained, it will be necessary for the owners to show either that the cargo fell outside the limits articulated in the charter or that they can claim under the implied indemnity referred to below and considered further in paragraphs 19.15 *et seq*., below.

The common law

9.28 Where U.S. COGSA or the Hague or Hague-Visby Rules do not apply, the question may arise whether an undertaking is to be implied that the charterers will not load dangerous goods or will not do so without giving notice of their dangerous nature. It has been said there may be such an implied term (see paragraph 9.30, below), but it is suggested that under a time charter the matter is better considered by reference to the charterers' primary duties to ship cargo only within the cargo limits defined in the charter and to give all requisite instructions. The owners consent by the charter to carry cargo within the defined limits and it cannot be a breach to ship such cargo. However, in deciding what those limits are, the general rule should be that any permission given to the charterers, by the charter, to order carriage of particular cargoes, or particular cargoes of stated types, is implicitly on the basis that the master and owners will be given sufficient information about each cargo nominated to enable it to be shipped, carried and discharged safely. That general rule must, in principle, yield to sufficiently clear express language, but such cases will be rare.

9.29 The common law rule as to dangerous cargo originated in early cases dealing with the obligations of shippers of goods to common carriers. Mustill, J., in *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277 said: "It has been established for more than a century that a shipper, party to a contract of carriage, is under certain contractual obligations as to the suitability for carriage of the goods which he ships, and as to the giving of warnings concerning any dangerous characteristics of the goods: *Williams* v. *East India Co*. (1802) 3 East. 192; *Brass* v. *Maitland* (1856) 6 E. & B. 470. These obligations are not confined to cases where the goods are tendered to a common carrier, but are capable of applying, in appropriate circumstances, to all contracts for the carriage of goods by sea". As just indicated (paragraph 9.28, above), it is suggested that may not be the right analysis under a time charter, albeit the result is likely to be the same.

9.30 At common law, the gist of the breach is in shipping goods of a dangerous nature without proper notice. The question therefore arises as to what is proper notice. If the purpose of the obligation is to ensure that the charterers always obtain the fully informed consent of the owners to the shipment, notice that should have made the owners aware of the danger, but for some reason did not in fact do so, ought not to be sufficient. If, rather, the purpose is to afford the owner a

reasonable opportunity to take appropriate precautions, then the giving of information sufficient to enable an ordinarily competent carrier to appreciate the nature of the risks and guard against them should be enough. In relation to the duties of a shipper under a bill of lading or a charterer under a voyage charter, the law seems to be the latter: see *Bills of Lading*, paragraphs 10.318 to 10.319; *Voyage Charters*, paragraphs 6.49 and 6.53; *Scrutton on Charterparties*, Article 67. It is not clear that the analysis should be the same under a time charter.

9.31 Again, it is suggested that the better analysis under a time charter is slightly different, even if the result is substantially the same. Under a time charter the correct approach should be to ask, first, whether by the terms of the charter the owners have consented to carry the cargo shipped (or proposed to be shipped, if the question is the legitimacy of the charterers' orders). If they have not, therein lies charterers' breach. If the owners have consented, but only on the basis that they will be given sufficient information about any particular cargo nominated by the charterers for safe shipment, carriage and discharge (paragraph 9.28, above), the charterers may yet be in breach of their obligation to give all requisite instructions (Clause 11 of the New York Produce form). It is therefore neither possible nor desirable to formulate as a rule of law that a certain degree or quality of notice concerning the characteristics of the cargo proposed to be shipped determines the issue of liability. All will depend on the precise terms of the charter and the full facts of each case.

9.32 Moreover, where cargo carried pursuant to a time charter has caused damage to the ship, a debate about the nature or extent of the charterers' obligations concerning dangerous cargo may be sterile. For the owners' most natural claim in those circumstances is for an indemnity against the consequences of having complied with the charterers' orders (here, the order to load the particular cargo). In such a claim, it is suggested, the burden is on the charterers to show that the damage resulted from a risk the owners had agreed to bear (see paragraph 9.13 above and 19.17 below). The owners, therefore, will not need to prove whether the cargo was of a dangerous type or was an unusual cargo of a type not automatically classified as dangerous.

9.33 Where it is possible to segregate the damage caused by the charterers' orders from damage resulting from other causes, the owners may be indemnified in respect of the former.

The *Marie H* was fixed on the New York Produce form for a time charter trip from Germany to East Africa. An additional clause allowed explosives to be shipped subject to certain conditions "at Charterer's risk without any liability to owners for loss of or damage to cargo and/or ship howsoever caused".

General cargo was loaded at Hamburg and Antwerp, including seven containers and a crate of explosives. The ship then encountered a violent storm in the Bay of Biscay and had to put into Lisbon where she was repaired and her cargo was repacked. Precautions made necessary by the presence of explosives among the cargo prolonged the time taken by this work and also increased its cost.

The sole arbitrator, relying on Clause 8 and the additional explosive cargo clause, held that the owners were entitled to an implied indemnity arising from their obedience to the charterers' orders to load the explosives, covering a refund of deducted off-hire/damages for delay and expenses at Lisbon but only to the extent that the delay and expense had been exacerbated by the presence of the explosives. His approach was approved by Timothy Walker, J., in the Commercial Court.

Deutsche Ost-Africa-Linie v. *Legent Maritime* (*The Marie H*) [1998] 2 Lloyd's Rep. 71.

Baltime form

9.34 Lines 32 to 36 of the Baltime form provide: "No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar or any of their products) shall be shipped." The words in brackets beginning "such as" do not restrict the full and natural meaning of the words that precede them; "such as" in this clause means "for example" and not "namely": see *Micada* v. *Texim* [1968] 2 Lloyd's Rep. 57, and paragraph 9.11, above.

Limitation of liability

9.35 Time charterers come within the category of persons entitled to limit their liability under the 1976 Convention on the Limitation of Liability for Maritime Claims (tonnage limitation) (as do 'slot' charterers; see *The MSC Napoli* [2009] 1 Lloyd's Rep. 246) and in this regard it is not necessary for them to show that they were acting "as an owner" in incurring the relevant liability: *CMA CGM* v. *Classica Shipping* [2004] 1 Lloyd's Rep. 460 (C.A.). But, although this right to limit covers a claim for an indemnity brought by the owners in respect of cargo claims that they have had to pay in the first instance, it does not extend to claims for or consequential upon damage to the chartered ship herself as these are not within the category of claims against which the Convention grants limitation: *CMA CGM* v. *Classica Shipping*, above, and *The Darfur* [2004] 2 Lloyd's Rep. 469.

U.S. Law

Lawful merchandise

9A.1 It is customary to include in the charter a clause concerning the type of cargoes to be carried. If such a clause is included, the owner is obliged to load only cargoes of the type provided for. In the absence of a cargo exclusion clause, the only limitation on the charterer's right to ship cargo is that it be "lawful merchandise."

9A.2 In *The Wismar*, SMA 1454 (Arb. at N.Y. 1980), the charter included a cargo exclusion clause which provided in relevant part:

Clause 45A: Excluded Cargoes
Asphalt and pitch in bulk, acids, nuclear and radioactive material, livestock, hides, turnings, and motorblocks. Arms, ammunition and explosives and any other injurious and inflammable and dangerous cargo unless packed, labelled, loaded, stowed and discharged according to IMCO Regulations/U.S. Coast Guard Regulations.

9A.3 The ship was sub-chartered on identical terms, and the sub-charterer directed the master to load a cargo of direct reduced iron ore pellets ("DRIP"). The owner instructed the master to refuse to load the cargo because of reports that DRIP gives off hydrogen gas and generates heat when it comes in contact with water, and was, therefore, dangerous within the meaning of the cargo exclusion clause quoted above. The panel majority concluded that in determining whether DRIP was in fact a dangerous cargo, IMCO [now IMO] and United States Coast Guard regulations were especially relevant since those were the regulatory bodies expressly referred to in the charter. DRIP was not then listed in the IMCO Dangerous Goods Code, and was not classified by the United States Coast Guard as a dangerous cargo, although precautions for the loading of DRIP were prescribed by the Coast Guard. Moreover, the Canadian Coast Guard had approved the loading of DRIP provided certain guidelines were followed. Because the cargo was not officially classified as "dangerous," the panel majority held that it was not dangerous under Clause 45A of the charter, notwithstanding a considerable body of expert testimony to the effect that the material was explosive and inflammable in the presence of water.

9A.4 In *The Witfuel*, SMA 1381 (Arb. at N.Y. 1979), the ship was chartered under a tanker time form for the carriage of "crude oil and/or dirty petroleum products." The panel held that the charterer was in breach of the charter for loading a clean or refined product, and was liable for damages resulting therefrom, including the cost of repairs, and a pollution fine. The panel noted that in deciding whether the cargo was excluded under the charter, it "was guided by the general understanding of clean and dirty products, i.e., refined on the one hand, and crude or residual on the other, in the industry, as distinct from elaborate definitions, founded on criteria of which vessel operating and chartering personnel usually have little knowledge."

9A.5 *The Maria K.*, SMA 1324 (Arb. at N.Y. 1979), involved the question whether petroleum coke ("Petcoke") was an excluded cargo. The charter was on the New York Produce form and Line 22 contained no express reference to Petcoke. The panel held that Petcoke was a lawful cargo, and that the owner's refusal to load it was a breach of charter. See also *The Pacduke*, SMA 2586 (Arb. at N.Y. 1989), awarding charterer damages caused by owner's wrongful refusal to load a Petcoke cargo; *The Sarah*, SMA 2671 (Arb. at N.Y. 1990), holding that "defatted fishmeal/fish protein concentrate" was a harmless and lawful cargo permitted under the charter; *The Fernglen*, 1971 AMC 213 (Arb. at N.Y. 1970), discussed at paragraph 14A.2.

9A.6 In *The Mercandian Supplier II*, SMA 2509 (Arb. at N.Y. 1988), arbitrators noted that marijuana is not lawful merchandise.

Controlled substances

9A.7 In 1986, the Maritime Drug Law Enforcement Act was enacted, 46 U.S.C. §§ 1901–1904. Among other things, the Act makes it unlawful for any person on board a United States flagship or a ship otherwise subject to the jurisdiction of the United States to manufacture or distribute a controlled substance. The penalties provided for include the seizure and forfeiture of any ship on which illegal controlled substances are found. 46 U.S.C. § 1904.

Dangerous cargo

9A.8 Under the general maritime law, a cargo owner is under a duty to advise the carrier of any dangers in the cargo of which it is or ought to be aware and of which the carrier is not and cannot reasonably be expected to be aware. *International Mercantile Marine Co*. v. *Fels*, 170 F. 275, 277 (2d Cir. 1909).

Dangerous cargo—strict liability under the Carriage of Goods by Sea Act § 4(6)

9A.9 Where COGSA governs, either by statute or by contract, COGSA § 4(6) is the starting point in the analysis of whether a shipper may be liable for shipment of dangerous cargo. That provision sets forth circumstances where the shipper may be strictly liable for loss or damage caused by its cargo. The loss or damage covered by this rule may be to the ship, other cargo, or property carried onboard the ship, such as containers. In particular, the shipper shall be strictly liable where the cargo was shipped without the carrier's "consent" and "knowledge of [the] nature and character" of the dangerous cargo. Several Second Circuit rulings highlight the application of this rule.

9A.10 In *Senator Linie GmbH & Co. Kg* v. *Sunway Line, Inc*., 291 F3d 145 (2d Cir. 2002), the Second Circuit considered whether "a shipper may be held strictly liable for damages and expenses resulting directly or indirectly from shipments of inherently dangerous goods when neither the shipper nor the carrier had actual or constructive preshipment knowledge of the goods' dangerous nature." *Id*. at 147–148. *Senator Linie* involved a fire aboard the M/V Tokyo Senator which was determined to have started in a container of thiourea dioxide ("TDO"). The court accepted testimony that an exothermic reaction occurred within the container of TDO drums, but it did not identify a specific cause. At the time of the shipment, TDO was not considered a hazardous or dangerous cargo in the IMDG Code or the DOT's Hazardous Materials Table, nor was the TDO shipment listed on the ship's hazardous cargo manifest. The shipper had provided one FMC report which identified a possible dangerous reaction if the TDO had contact with other reducing agents; however, the court ultimately concluded that neither party was aware of any relevant dangerous propensities of TDO.

9A.11 The court observed that COGSA § 4(6) "sets forth a risk-allocating rule that renders a shipper strictly liable for damages in the event that neither the shipper nor the carrier knew or should have known that shipped goods were inherently dangerous." *Id*. at 148. Thus, the shipper should be strictly liable for shipping dangerous goods unless the carrier knew or should have known of their dangerous nature. *Id*. at 157–158. The court further made clear that COGSA § 4(6) supersedes "otherwise inconsistent general maritime law regarding liability for shippers of dangerous goods." *Id*. at 166.

9A.12 The outcome will be different, however, where the carrier was on notice of the dangerous nature of the cargo. *Contship Containerlines* v. *PPG Industries*, 442 F.3d 74 (2d Cir. 2006), involved a cargo of Calcium Hypochlorite (Cal-Hypo) stored in drums loaded in containers. At the time of the shipment, cal-hypo was listed on the IMDG Code as an oxidizing substance, meaning that although

it was not itself considered combustible it was known to increase the risk and intensity of fire in other materials because it tended to yield oxygen when heated. The IMDG Code required that Cal-Hypo be stored away from sources of heat where temperatures in excess of 55ºC will be encountered for periods of 24 hours or longer, and recommends generally that cargos be stored in conditions at least 10ºC cooler than their critical temperature. In the event, the cargo was stowed in a hold directly above the bottom center fuel tank, which was a heated tank. Moreover, the court found that during the voyage the crew heated the fuel to abnormally high temperatures. These two factors exposed the cargo to temperatures in excess of 47ºC for a period of 18 days. The court found that this caused the Cal-Hypo to suffer thermal runaway, which occurs when the cargo generates heat more quickly than it can dissipate. As a result, the cargo spontaneously combusted, causing a major fire.

9A.13 The *Contship* court framed the legal question this way: "Is a strict liability claim available to a carrier that knew the cargo was flammable but had reason to think that it was safe enough under the conditions of stowage?" The court ruled no, finding that a carrier cannot invoke strict liability if it "knows that a cargo poses a danger and requires gingerly handling or stowage, and nevertheless exposes the cargo to the general condition that triggers the known danger, regardless of whether the carrier is aware of the precise characteristics of the cargo."

9A.14 But what about the case where the generally dangerous nature of the cargo is known to both parties, but the shipper is uniquely aware of some additional factor that would render the cargo even more dangerous than normal? This was the question posed in *DG Harmony*, 533 F.3d 83 (2d Cir. 2008), which also involved a cargo of Cal-Hypo, on similar facts to those in *Contship*. The particular cargo of Cal-Hypo at issue in *DG Harmony*, however, had been packaged in drums within 36 hours after manufacture, in a way that inhibited the ventilation of the cargo, thereby preventing the cargo from cooling down. Thus, the evidence was that the safe storage temperature for this particular cargo was closer to 40ºC, rather than the 55ºC listed in the IMDG Code. On the other hand, as in *Contship*, the cargo was stowed in close proximity to the ship's heated bunker tanks, though the evidence was that the temperature never exceed 40ºC.

9A.15 On these facts, the court found that, as in *Contship*, the carrier was on general notice that Cal-Hypo had dangerous qualities, even if it did not know of the specific risk which led to the fire. Consequently, the shipper could not be strictly liable under Section 4(6). Because of the manner in which the Cal-Hypo had been packaged, however, the shipper had created an additional danger about which the carrier could not reasonably be expected to know. Consequently, the shipper had a duty to warn the carrier of this heightened risk. By failing to give proper warning, the shipper had breached its duty to the carrier. The court had to consider the further issue of causation, however, because the shipper contended that the actual cause of the casualty was the proximity of the cargo to the heated bunker tanks. The court rejected this argument, finding that the temperature in the hold had never exceeded 40ºC, which was well within the requirements and recommendations of the IMDG Code.

9A.16 In *In Re M/V Rickmers Genoa Litig*., 622 F. Supp. 2d 56, 56 (S.D.N.Y. 2009), *mot. dismiss den., Chem One, Ltd*. v. *M/V Rickmers Genoa*, 660 F.3d 626 (2d Cir. 2011), *aff'd*, 502 Fed. Appx. 66, 66 (2d Cir. 2012), ESM purchased a chemical compound, SS-89, from its wholly-owned subsidiary in China, ESMT. The goods were tested and found to comply with U.S. Hazardous Material Regulations "dangerous when wet" criteria. 622 F. Supp. 2d at 62. Upon delivery of the cargo to its Non Vessel-Operating Common Carrier (NVOCC), ESMT apparently did not supply an MSDS or otherwise inform the NVOCC of the cargo's dangerous propensities. The NVOCC, in turn, contracted with the carrier, Rickmers, and supplied it with the Harmonized Tariff System ("HTS") Commodity Code number that corresponded to a description of the chemical properties of SS-89. The Rickmers employee who received the request for booking the cargo understood the HTS number to mean that SS-89 was a magnesium-based cargo; however, because he could not

authorize receipt of the cargo he forwarded the information to a subsequent employee to finalize the booking but without the HTS information. Instead, he sent a much more general description of the cargo. On the voyage the ship collided with another ship and flooding occurred in the hold carrying the SS-89. The cargo reacted with water, exploded, and a fire ensued. The master of the ship was unaware that the cargo at issue contained magnesium, but was aware that "magnesium, plus seawater, that means hydrogen." *Id*. at 384.

9A.17 Citing *DG Harmony* and *Contship*, the court granted summary judgment denying Rickmers' strict liability claim "because Rickmers either actually or constructively knew that the SS-89 cargo had certain dangerous propensities and nevertheless exposed the cargo to the condition that activates those dangerous propensities". *Id*. at 386. The court based its finding of Rickmers' knowledge on: "the information it received from [NVOCC], the IMDG Code, and the prior knowledge of the [ship's] master." *Id*. at 387. Additionally, and further solidifying carriers' inability to prevail on claims for strict liability in instances where dangerous cargo results in a casualty, the Second Circuit clarified that all carriers are "charged under applicable law with knowledge of the. . . IMDG Code." *Id*. at 388.

Dangerous cargo—shipper's negligence under COGSA § 4(3)

9A.18 If the shipper is not strictly liable, liability may still arise where the "act, fault, or neglect of the shipper, his agents, or his servants" caused or contributed to the casualty. COGSA § 4(3) provides that "[t]he shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants." A shipper's failure to adequately inform a carrier of the foreseeable dangers posed by cargo can constitute a negligent failure to warn under [COGSA § 4(3)]. *Contship*, 442 F.3d at 78; *DG Harmony*, 553 F.3d at 94. To prevail on a claim of negligent failure to warn, a carrier must demonstrate "(1) that [shipper] failed to warn [carrier] about dangers inherent in the cargo of which the stevedore and ship's master could not reasonably have been expected to be aware; and (2) that an absent warning, if given, would have impacted stowage." *Id*.

9A.19 In *Contship*, for instance, the court concluded that "[p]rofessional carriers might be reasonably expected to exercise caution and not stow flammable compounds in the hottest hold on a ship, at temperatures exceeding 47°C—that is, 115 °F." 442 F.3d at 78. The court observed that the IMDG Code gives notice to carriers that Cal-Hypo is dangerous at temperatures approaching 55°C. The Second Circuit, therefore, found that the District Court properly dismissed Contship's claim for negligent failure to warn under § 4(3) of COGSA.

9A.20 In the *DG Harmony* line of cases, on the other hand, the Second Circuit affirmed the District Court's finding that the cargo shipped by PPG caused the explosion and fire, that PPG had a duty to warn the carrier of the risks, and that PPG breached that duty. It remanded the case for a determination of whether, had PPG given adequate warning to the carrier, the carrier would have altered its stowage decision. *DG Harmony*, 533 F.3d at 97. On remand, the District Court concluded that if PPG had given special instructions concerning the hazardous nature of the Cal-Hypo, "the carrier would have changed its stowage decision, and the explosion would have been averted." *Harmony VI*, 2009 WL 3170301, at *6 (S.D.N.Y. 2009). The court stated:

> . . .the stowage decisions here flowed directly from the information provided by PPG. As discussed above, the vessel personnel and stow planners relied on the information provided by PPG. They believed that it was safe to stow the cal-hypo below deck, in temperatures one would ordinarily expect to find in cargo hold 3. . . . If PPG had advised Cho Yang [carrier] that the cal-hypo in this configuration could only be stored above-deck or otherwise required special handling. . . the vessel personnel would have complied with those instructions or rejected the cargo.

9A.21 The distinguishing factor between these two similar cases is that the Cal-Hypo at issue in *Contship* was properly identified and shipped in a manner consistent with the IMDG Code under which it was classed. In contrast, the DG Harmony shipper "should have warned that the IMDG Code for UN 2880 was not proper for cal-hypo shipped in the manner it was shipped here. By designating the cal-hypo as UN 2880, PPG was representing that the cargo was safe to be loaded below deck." *Id*. at *6.

9A.22 It follows, therefore, that a carrier is tasked with knowledge pertaining to the IMDG Code, and by reason of inference, DOT Hazardous Material Table stowage requirements, but only in so far as the cargo is being shipped in accordance with the method intended by said regulations. In *Rickmers*, the court held that the shipper "had no duty to warn Rickmers of any specific dangers because the SS-89 presented no dangers of which Rickmers could not reasonably have been aware," and clarified that the distinction in *DG Harmony* was that there were "undisclosed hazards present that required a warning" from the shipper. 752 F. Supp. 2d at 391.

9A.23 In *Ionmar Compania Naviera*, *S.A*. v. *Olin Corp*., 666 F.2d 897, 904 (5th Cir. 1982), the court held that a shipper had a duty to warn a carrier of the foreseeable hazards inherent in the cargo of which the ship's master could not reasonably have been expected to be aware. However, the shipper had no duty to warn the carrier of hazards of which the shipowner was aware or could reasonably have been expected to be aware.

9A.24 In *Boykin* v. *Bergesen D.Y. A/S*, 835 F. Supp. 274 (E.D. Va. 1993), the court considered whether a shipper of coal was negligent in "misrepresenting the character of the cargo which ultimately caused the explosion [ ] and for failing to warn of the dangerous nature of the cargo." *Id*. at 276. There, the issue centered on whether USS, the shipper of the coal, properly identified it as Category A coal, which was "a type that can be identified as having a history of shipment under similar circumstances without problems arising. . .," or whether the coal should instead have been identified as Category B coal which is coal that "has shown itself liable, or may be liable, to emit methane in quantities sufficient to create a hazard." *Id*. at 277. The court noted that "[u]nder the IMO Code, it was the duty of the 'shipper or his appointed agent' to designate the category of a given shipment of coal and provide this information to the ship's master. It was the duty of the master to 'satisfy himself that he has received the shipper's designated category of the coal prior to accepting the material.' In all aspects of cargo handling and ship's operations, it was then the master's duty to observe certain precautions which dealt with the unique risks associated with that particular category of coal." *Id*. (internal citations omitted). The court noted that USS "had specific information in its possession in 1989 which, even in the absence of other objective facts, should have led the company to the conclusion that Pinnacle should be categorized as 'B' coal." *Id*. at 280. Consequently, the *Boykin* court held that "the facts presented at trial make clear that the explosion was caused by the existence of dangerous levels of methane, but that the source of ignition cannot be ascertained with any degree of probability. Therefore the Court finds that the Steel defendants [USS] were negligent in failing to warn of the existence of Category B coal in the Number Three hold, and for misrepresenting that coal as Category A coal. . .." *Id*. at 285.

9A.25 The basic question whether a given cargo is dangerous is one of fact and will depend entirely on the circumstances arising in a given case. For example, in *Westchester Fire Ins*. *Co*. v. *Buffalo Housewrecking & Salvage Co*., above, a barge was destroyed by fire when its cargo of turnings and borings overheated. The bill of lading for the shipment contained the provision that the shipper should be liable in the event that the cargo was dangerous, unless full written disclosure of its character was made to the barge owner. In dealing with the threshold issue of whether the cargo was "dangerous," the court stated that turnings, as such, are not explosives or dangerous goods. The court noted, however, that turnings may become dangerous if they contain an excessive amount of moisture or waste material such as oily waste and rags. On the facts before it, the

court held that the turnings were dry and free of waste materials when loaded, and, therefore, not "dangerous."

9A.26 In *The Kapetan Antonis*, 1989 AMC 551 (Arb. at N.Y. 1988), a case involving a voyage charter, it was held that charterer was liable for damages resulting from a fire in a cargo of turnings. The arbitrators ruled that charterer had a duty to owner "to furnish a safe and transportable cargo," 1989 AMC at 561, and breached that duty by negligently loading unsafe turnings. But see *The Gyda*, 1971 AMC 2070, 406 F. 2d 1039 (6th Cir. 1969), holding that the shipper of a cargo of turnings was not liable to owner under Section 4(6) of COGSA where the master was aware of the hazard presented by turnings prior to loading.

9A.27 In *Poliskie Line Oceanic* v. *Hooker Chemical Corp*., 499 F. Supp. 94, 1980 AMC 1748 (S.D.N.Y. 1980), it was held that the shipper of a cargo of sulphur dichloride was liable to the owner for damages resulting from its improper stowage of the hazardous material in a sealed container without complying with government regulations.

9A.28 In *The Wismar*, above, a majority of the panel held that a cargo of direct reduced iron ore pellets was not "dangerous" because it was not officially classified as such by either the United States or Canadian Coast Guards or IMCO [now IMO].

9A.29 See also *International Mercantile Marine Co*. v. *Fels*, 170 F. 275 (2d Cir. 1909), involving an explosion caused by vapor emitted from a cargo of soap. The court held that while the soap was dangerous when stored in a poorly ventilated place, the owner was at fault since the charterer had made the required full disclosure of its nature and qualities.

9A.30 In *The Stylianos Restis*, above, the ship suffered damage when spontaneous combustion of the cargo of fishmeal caused a fire in the holds. The court found that the cargo's susceptibility to spontaneous combustion was an inherent vice of the commodity. The cargo was being shipped under a voyage charter which expressly stated that fishmeal would be the cargo and contained warranties as to the conditions of shipment. The court found that the master had full knowledge of the inherent characteristics of fishmeal. Moreover, since the master had consented to the loading of the cargo with the express approval of the owner, the court held that there was no basis for holding the shipper or voyage charterer liable under Section 4(6) of COGSA.

9A.31 Whether a cargo can be carried safely is an issue committed to the sound discretion of the master, upon whom the responsibility for safe carriage rests. *Boyd* v. *Moses*, 74 U.S. 192 (1869). As stated in *A & D Properties Inc*. v. *The Volta River*, 1984 AMC 464, 471 (E.D. La. 1983): "when the master rejects a cargo based on a well-founded concern for the safety of the vessel, after due consideration of all of the circumstances, his decision will not be judged with hindsight."

9A.32 To the same effect, see also *Drummond Coal Co*. v. *Interocean Shipping Co*., 1985 AMC 1152, 1162 (S.D. Ala. 1985).

9A.33 In *The Kartini*, SMA 1958 and 2196 (Arb. at N.Y. 1984 and 1985), charterer was held responsible for damages arising from the spontaneous heating and fire in a coal cargo. The charterer had loaded an amount of "pond solids," a coal by-product which is highly flammable, along with the regular coal. However, the master had not been warned of the propensities of the "pond solids." The panel rejected charterer's contention that the master was acting for the owner regarding this cargo because it affected the safety and seaworthiness of the ship. Instead, the panel held that the charterer was responsible for loading and those acts performed by the master in this respect were as agent of the charterer. See, generally, the discussion at paragraphs 20A.1 *et seq*. concerning Clause 8.

9A.34 In *Boykin* v. *China Steel Corporation*, 73 F.3d 539, 1996 AMC 920 (4th Cir. 1996), the ship was carrying a cargo of coal which was incorrectly described by the shipper as being Category A (the most common type of coal, which is not dangerous), when, in fact, it was Category B, a highly volatile coal which requires ventilation. Because of the misdescription, the cargo was not

ventilated. This resulted in a methane explosion which killed the captain and four crew members. The charter was governed by English law. The court ruled that charterer was liable to indemnify owner based on its breach of an implied warranty that the cargo was fit for ordinary carriage and did not present any hazardous characteristics. The indemnity covered all property damage, personal injury, debt settlements and loss of hire.

9A.35 However, in *Maersk Line Ltd*. v. *CARE*, 271 F. Supp. 2d 818, 823, 824–825, 2003 AMC 1878 (E.D. Va. 2003), the court ruled that the carrier could not pursue tort claims against the shipper and supplier of an insect-infected cargo that had resulted in delay and fumigation costs. While the court upheld the carrier's claims against the shipper that were predicated on the parties' voyage charter, it ruled that the negligence-based claims against the shipper were duplicative of those contract claims. With regard to the negligence-based claims asserted against the supplier of the cargo, the court ruled that the claims were not cognizable in tort because they sought to recover economic losses that did not result from an injury to a proprietary interest of the carrier.

Other United States legislation

9A.36 The Carriage of Explosives or Dangerous Substances Act, 46 U.S.C. § 170 (1970) was repealed in 1983 by Pub. L. 98–89, § 4(6), 97 Stat. 600–605. The repeal of Section 170 was part of a partial overhaul of numerous maritime laws. New provisions were adopted to cover the carriage of dangerous or hazardous materials and are codified at 46 U.S.C., §§ 2101, 3701–3718.

9A.37 In addition, Coast Guard Regulations govern the loading of dangerous cargo and hazardous materials. See 46 C.F.R. §§ 30–40, 98, 146–154, 171–176. The Coast Guard Regulations are extensive, and cover the transportation and storage of military explosives on board ships, the use of dangerous articles as ship's stores and supplies, dangerous solids in bulk, and dangerous liquid and gas cargoes.

CHAPTER 10

Safe Ports and Berths

"27. [Vessel. . .. . .to be employed] . . . . in such lawful trades, between safe port and/or ports in British North
28. America, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or
29. Mexico, and/or South America ..... and/or Europe
30. and/or Africa, and/or Asia, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River St. Lawrence between
31. October 31st and May 15th, Hudson Bay and all unsafe ports; also excluding, when out of season, White Sea, Black Sea and the Baltic,
32. .....
33. .....
34. .....
35. as the Charterers or their Agents shall direct, on the following conditions:"

General

10.1 The primary obligation on the charterers is to order the ship only to ports which, at the time when their order is given, are prospectively safe. That does not mean the owners must proceed to or continue to use a port that has become unsafe for the ship at some time after the order was given. In that event, the ship may avoid the danger and the charterers must give fresh orders. The meaning of safety is discussed in this and the following paragraphs; the concept of prospective safety at paragraphs 10.50 *et seq*. For comment on "lawful trades", in Line 27, see paragraph 5.5, above.

NYPE 93

10.2 The 1993 revision of the New York Produce form, while requiring that trading be "between safe ports and safe places", replaces the somewhat antiquated lists of permitted and excluded areas in Lines 27 to 31 of the 1946 version with spaces to be filled in by the parties: see Clause 5, Lines 72 to 76.

Meaning of safety

10.3 The classic definition of a "safe port" is that of Sellers, L.J., in *Leeds Shipping* v. *Société Française Bunge* (*The Eastern City*) [1958] 2 Lloyd's Rep. 127, at page 131: "a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship. . ." That this remains the classic definition was confirmed by Teare, J., in *The Ocean Victory* [2014] 1 Lloyd's Rep. 59 at [99]. While the focus is usually on the ship, it is suggested that risks to her crew can render a port unsafe even where there is no risk of damage to the ship herself.

10.4 Roskill, L.J., in *The Hermine* [1979] 1 Lloyd's Rep. 212, agreed with Sellers, L.J.'s definition, and remarked, at pages 214 to 215, that ". . . it is now quite unnecessary, in these unsafe

port or unsafe berth cases, to refer back to the multitude of earlier decisions. . . There is the law clearly stated. What has to be determined by the tribunal of fact in each case is whether, on the particular facts, the particular warranty of safety has or has not been broken." But Mustill, J., in *The Mary Lou* [1981] 2 Lloyd's Rep. 272 drew attention to the fact that points of law could arise which were not covered by the general principles laid down by Sellers, L.J., and that it might then be helpful to consult the earlier authorities, albeit that the conclusion of the court on such points of law should be consistent with those general principles. An important example of such a further clarification of the principles came in *The Polyglory* [1977] 2 Lloyd's Rep. 353, *per* Parker, J., at page 365: ". . . *The Eastern City*. . . does not lay down, even in general, that a port must be safe if a vessel could only come to *harm* through negligence. The proposition is that the port must be safe if a vessel will only be *exposed to danger* through negligence. The two are different. If there is a dangerous obstruction in the port but with ordinary care and skill the vessel will never be at risk of collision with it, the port is in ordinary parlance safe. On the other hand if the situation in the port is such that even with ordinary care and skill there will still be a risk of collision, the matter is quite different. The vessel will then be exposed to danger despite the use of care and skill. It may not in fact come to harm and if it does it may be because some negligence has occurred but again in ordinary parlance it appears to me that a port is not safe if it is, despite ordinary prudent and skilful navigation and handling, such that a vessel will be at risk."

10.5 A port may be unsafe for the particular ship at all times or only at certain times.

The *Eastern City* was chartered for a winter voyage from "one or two safe ports in Morocco" to Japan. The charterers ordered the ship to load at Mogador, where she arrived and anchored on 26 December. Two days later the weather deteriorated and the master, fearing that his anchor was dragging, tried to put to sea. But the ship was caught by a strong gust of wind and driven on to rocks adjacent to the anchorage.

It was held by the Court of Appeal that the port was unsafe because, during the winter, it was exposed to sudden southerly gales which could not be predicted and which were liable to cause the ship to drag her anchors in the unreliable holding ground of the restricted anchorage area.

The Eastern City [1958] 2 Lloyd's Rep. 127 (C.A.).

10.6 The fact that for tidal, meteorological or other reasons, the ship may have to wait for a time before entering the port does not, in itself, make that port unsafe. For example, a ship may have to wait for high water to clear a bar in the approach to the port or for a storm to abate before entering, but as Devlin, J., said in *The Stork* [1954] 2 Lloyd's Rep. 397, at page 415: "The law does not require the port to be safe at the very time of the vessel's arrival. Just as she may encounter wind and weather conditions which delay her on her voyage to the loading port, so she may encounter similar conditions which delay her entry into the port, and the charterer is no more responsible for the one than for the other." Indeed, the port may be safe even if at certain times or during certain conditions ships already in it have to put to sea for safety: see paragraph 10.29, below.

Burriana in Spain was found as a matter of fact to be a safe loading place although it was necessary for ships which loaded in the roadstead there to keep up steam so as to be ready to put to sea in certain weather conditions.

Smith v. *Dart* (1884) 14 Q.B.D. 105.

(See also *The Daffodil B* [1983] 1 Lloyd's Rep. 498 and *The Ocean Victory* [2014] 1 Lloyd's Rep. 59)

10.7 In such cases, however, the port will not be safe unless the information available to visiting masters and the systems in place at the port are such that ordinary good seamanship by the master should be sufficient to keep the ship safe (see also paragraph 10.25, below). So, for example, in *Smith* v. *Dart*, if there had been no system in place at the port requiring ships to maintain a state of immediate readiness to put to sea and the need for such readiness would not have been manifest to an ordinarily competent master, the result should have been different. Nowadays, in an age when the information available about the physical and meteorological characteristics of ports is

substantial, the focus of unsafe port arbitrations is very often on the systems in place for dealing with known physical risks, as much as or rather than on the physical risks themselves.

10.8 In *The Saga Cob* [1992] 2 Lloyd's Rep. 545, see paragraphs 10.27 and 37.43, below, the Court of Appeal considered that events subsequent to the charterers' order were relevant to deciding whether Massawa was a prospectively safe port. That is surely correct as regards (but only as regards) later events that, by their nature, cast light on how things in fact stood, in or concerning the port, at the time of the order.

10.9 Gatehouse, J., implicitly questioned this approach in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, at page 519, in that: (*a*) he doubted the Court of Appeal's further (*obiter*) view that subsequent events were also relevant to deciding whether the charterers had exercised due diligence in respect of the prospective safety of the port under Clause 3 of the Shelltime 3 form; and (*b*) he said he could see no logical distinction between that and the relevance of subsequent events to the question of prospective safety itself. It is submitted that Gatehouse, J., was right in principle as to (*a*), although that will have little practical importance, but wrong as to (*b*) (see paragraph 37.44, below). On the question of safety, therefore, it is suggested the law is indeed as stated in paragraph 10.8, above.

Temporary dangers

10.10 It is sometimes said that purely temporary dangers will not make a port unsafe. But temporary dangers may be an important element of unsafety, particularly if the existence of the danger is not known to the master of the ship. Thus the temporary failure or temporary absence of navigational aids in a port, such as lights or buoys, may very well render the port unsafe if, because of the temporary nature of the deficiency, the master is unaware of the failure or absence of the navigational aids. (See generally on this point the judgments of Mustill, J., in *The Mary Lou* [1981] 2 Lloyd's Rep. 272, at page 279, and of Toulson, J., in *The Count* [2008] 1 Lloyd's Rep. 72 at [22]). In this context the time at which safety is to be judged may be particularly important, as to which see paragraphs 10.50 to 10.53, below.

10.11 Weather conditions may also render a port unsafe even though of short duration. For example, a port may be unsafe if ships are liable to be trapped inside it and damaged by unpredictable storms even if the storms are of short duration: see *The Eastern City* above; but not if there is no difficulty about getting away whenever circumstances might warrant it: see *The Daffodil B* above.

10.12 Therefore, the proposition that temporary dangers will not make a port unsafe is accurate only in the limited sense considered in paragraph 10.6 above, namely that known or evident dangers which temporarily delay the ship in reaching the port, while remaining in it or in leaving it, will not make the port unsafe. These are what Toulson, J., in *The Count* [2008] 1 Lloyd's Rep. 72, called, at [22], "some temporary evident obstruction or hazard". In that case damages were awarded for the ship being ordered to a port that was unsafe because access channel buoys were incorrectly placed (and because there was no monitoring system in that regard), to compensate for a four-day delay caused to that ship's sailing from the port by the grounding in the channel of another ship.

Delays

10.13 Delays caused by patent dangers or obstructions may, however, render a port unsafe if the delays are of sufficient duration.

10.14 In *Knutsford* v. *Tillmanns* [1908] A.C. 406 (H.L.), a ship on a voyage from Middlesbrough was held up by ice 40 miles from Vladivostock. She tried to get through the ice but, after three days, went to Nagasaki and discharged her cargo there. The owners sought to rely on a term in the

bill of lading that if a port should be inaccessible on account of ice, or if a port should be deemed by the master unsafe, it should be competent for the master to discharge the goods at some other safe port or place. Lord Loreburn, dealing with the meaning of "unsafe", said that it "does not mean unsafe at the moment, but it means unsafe for a period which would involve inordinate delay". It was accordingly held by the House of Lords that the owners were not justified in discharging the cargo at an alternative port after a delay of only three days on such a long voyage.

10.15 An argument was advanced in *The Sussex Oak* (1949) 83 Ll.L.Rep. 297, that the exceptionally heavy ice encountered by the *Sussex Oak* on a voyage up the Elbe to Hamburg was only a temporary danger. The ship in that case was time chartered on the Baltime form and Devlin, J., in supporting the arbitrator's decision against the charterers on this point, said: ". . . It is the law that the danger must be operative for a period which, having regard to the nature of the adventure and of the contract would involve inordinate delay: see in particular *S.S. Knutsford Ltd*. v. *Tillmanns & Co*. [1908] A.C. 406. The period of the ice danger compared with the duration of the charter-party and the shortness of the voyage to Hamburg clearly justifies [the arbitrator's] conclusion." The ship was on a voyage from London and the arbitrator had found that ice conditions in the Elbe that winter were of exceptional severity and duration.

10.16 The meaning of "inordinate delay" was explained by the Court of Appeal in *The Hermine*, below. It must be such a period of delay as would frustrate the charter; a danger or obstruction which resulted in a delay to the ship of any shorter duration would not render the port unsafe.

A charter was entered into on the Baltimore Form C, for ships to be nominated, for three voyages from the U.S. Gulf to north Europe. The *Hermine* was nominated for one of the voyages and was ordered to Destrehan, a port on the Mississippi River about 140 miles from the open sea. Having proceeded safely up river to Destrehan, loaded there and departed again without suffering any damage, the *Hermine* was held up about 115 miles down river from Destrehan because of silting at the Southwest Pass. The usual time to reach the open sea from Destrehan was 10 to 12 hours, but because of the silting the ship was held up for about 30 days.

It was held by the Court of Appeal that, assuming a port could be regarded as unsafe because of an obstruction more than 100 miles from it (a question which was left undecided), delay caused by an obstruction could constitute unsafety only if it was so long as to frustrate the adventure. The delay suffered by *The Hermine* was acknowledged to be insufficient to amount to frustration.

Unitramp v. *Garnac Grain* (*The Hermine*) [1979] 1 Lloyd's Rep. 212 (C.A.).

(See also on the question of frustration chapter 26 below and, on the problem of an obstruction a long distance from the port, *The Mary Lou* [1981] 2 Lloyd's Rep. 272 and paragraph 10.38, below.)

Political unsafety

10.17 The most common dangers are those of topography, such as shallows and sandbanks, and of exposure to certain weather conditions such as high winds, swell and ice. But a port may also be unsafe because of danger created by a political situation or an existing state of war.

A voyage charter provided that the ship was to proceed with cargo to a safe port in Chile. The charterers ordered the ship to discharge at Carrisal Bago, which the Chilean Government had declared closed because of a rebellion. So far as concerned its marine characteristics, Carrisal Bago was a safe port, but had the ship proceeded there she would have been liable to confiscation. Blackburn, J., said, in holding that the port was unsafe: "Now, in the absence of all authority, I think that, on the construction of this charterparty, the charterers are bound to name a port which, at the time they name it, is in such a condition that the master can safely take his ship into it: but, if a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charterparty."

Ogden v. *Graham* (1861) 1 B. & S. 773.

(See also *Palace Shipping* v. *Gans Line* [1916] 1 K.B. 138, below; *The Teutonia* (1872) L.R. 4 P.C. 171; *The Lucille* [1984] 1 Lloyd's Rep. 244; *The Saga Cob* [1992] 2 Lloyd's Rep. 545 (C.A.); and *The Chemical Venture* [1993] 1 Lloyd's Rep. 508.)

10.18 In *The Evaggelos Th* [1971] 2 Lloyd's Rep. 200, a ship was chartered for trading in the Red Sea which was, at all material times during the period of the charter, a war zone. A term as to safety was nevertheless implied in the charter by the court, the charter containing no express obligation as to safety.

10.19 In *The Evia* (*No. 2*), below, the House of Lords rejected an argument by the charterers that Clause 2 of the Baltime form applied only to physical unsafety; the obligation applied to political unsafety as well. In *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, Gatehouse, J., made the same decision in respect of Clause 3 of the Shelltime 3 charter. In *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, summarised in paragraph 9.1, above, Colman, J., accepted, *obiter*, that a port could be unsafe if there was a risk of unjustified confiscation of the ship by the local coastguard and the political and legal system provided no effective remedy in respect of such an unlawful seizure.

Safe for the particular ship

10.20 The fact that the port would be safe for ships of different size or characteristics is not relevant. The port must be safe for the particular ship chartered.

The *Sagoland* was ordered under a voyage charter to discharge at Londonderry. She was the largest ship ever to go there and, because of the narrow winding approach to the port, was unable to enter without tugs. There were no tugs at Londonderry and the ship was obliged to call for tugs from the Clyde. The owners claimed to recover the cost from the charterers. Roche, J., in holding that the cost was recoverable, affirmed the finding of the umpire that Londonderry was unsafe for that particular ship, but he added: "Let not the findings of the umpire be misunderstood. It was not a finding that the Port of Londonderry was not an entirely safe port for 99 out of 100 or an even larger proportion of the ships which may seek to resort thereto, but merely that it was not a safe port for the ship in question, the *Sagoland*."

Brostrom v. *Dreyfus* (1932) 44 Ll.L.Rep. 136.

The port must also be safe for the particular ship, laden as she is at the relevant time. Roche, J., in *Brostrom* v. *Dreyfus*, above, said: "The test of whether a port is safe in the physical sense or in the political sense is whether it is safe for the particular ship (laden as it is contemplated that she will be laden and as she is in fact laden under the particular contract of carriage in question) to enter and load or unload in the port in question." (See also *Hall* v. *Paul* (1914) 19 Com. Cas. 384 and *The Archimidis* [2007] 2 Lloyd's Rep. 101, approved on appeal [2008] 1 Lloyd's Rep. 597 (C.A.) (both laden) and *Limerick* v. *Stott* (1920) 5 Ll.L.Rep. 190 (light).)

Dangers also to other ships or property

10.21 The charterers' warranty is that the port will be safe for the chartered ship. Where that warranty is broken, the features of a port which make it dangerous for the chartered ship may also make it dangerous for other ships or property. In such a case, if the danger results in damage to other ships, and if that damage in turn causes the owners loss, they may be entitled to damages, if their loss is caused in a sufficiently direct way by the relevant danger: see *The Polyglory* [1977] 2 Lloyd's Rep. 353, summarised at paragraph 10.46 below (where the chartered ship damaged an underwater pipeline, resulting in the owners being exposed to liability to the owners of the pipeline); *The Count* [2008] 1 Lloyd's Rep. 72, at [32] (where a ship under voyage charter was ordered to a port whose access channel was unsafe; another ship went aground there; and the owners were entitled to recover damages for the consequent delay); *The Vine* [2011] 1 Lloyd's Rep. 301, at [79] – [85] (where a voyage chartered ship was ordered to discharge at a dangerous berth; another ship damaged the berth whilst loading there; and the owners recovered for the consequent delay).

Safety of approach

10.22 The ship must be able to reach the port in safety.

The *Sussex Oak* was time chartered under the Baltime form and was ordered to proceed to Hamburg in January 1947. On her passage up the Elbe ice was encountered, but the pilot considered it safe to proceed. When the ship was nearing the approaches to Hamburg she was stopped by a large ice floe. The ship was then in a part of the river in which she could neither turn, go astern nor anchor in safety and on the advice of the pilot forced her way through the ice, sustaining damage in consequence. It was found as a fact that the master acted properly in proceeding without ice-breaker assistance and held that the charterers were liable for the damage on the ground that Hamburg was then an unsafe port. Devlin, J., said: "In my judgment, there is a breach of Clause 2 if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety."

Grace v. *General Steam Navigation* (*The Sussex Oak*) (1949) 83 Ll.L.Rep. 297.

10.23 A port will be unsafe if the approach to it is such that the ship cannot reach the port in safety without dismantling part of her structure.

The *Vanduara* was time chartered for the period of a voyage to a safe port in the United Kingdom. It was held by the Court of Appeal that Manchester was an unsafe port for the *Vanduara* because she could not reach Manchester without passing Runcorn Bridge (24 miles from the port) and to do that she would have to dismantle her masts.

Re Goodbody and Balfour, *Williamson* (1899) 5 Com. Cas. 59.

10.24 It has also been held that a port is unsafe if, in order to enter it, the ship must lighten some of her cargo.

The *Peerless* was employed under a voyage charter which required that she should discharge at a safe port. She was ordered to discharge at King's Lynn but her draft was too great to allow her to enter on any tide with her full cargo of maize. Sankey, J., held that the port was unsafe for her and that the owners were entitled to recover the cost of lighters.

Hall v. *Paul* (1914) 19 Com. Cas. 384.

(See also *The Alhambra* (1881) 6 P.D. 68.)

10.25 A port may be unsafe because it lacks a proper system to monitor the safety of channels leading to and from it and to warn traffic of such underwater dangers as may exist: see *The Marinicki* [2003] 2 Lloyd's Rep. 655, in which the ship was damaged by an obstruction in a dredged approach channel. In an unsafe port claim, her owners failed to show that the obstruction was there when the relevant voyage order was given, but their claim succeeded because the port lacked a proper system for monitoring the safety of the channel and reporting hazards accordingly. The owners also claimed under the implied indemnity discussed in paragraphs 19.15 *et seq*., below, but as the unsafe port claim had succeeded it was not necessary to consider that claim and the judge declined to do so. (It is suggested the claim would probably have succeeded—see paragraphs 10.94 *et seq*., below.)

10.26 The risk of hostile seizure or attack en route to the port nominated may make the port unsafe.

The *Frankby* was time chartered under a charter which provided that the ship should be employed between safe ports within a certain limited area. The ship was ordered to Newcastle at a time when the German Government had declared that hostile merchant ships would be sunk in the waters around Great Britain. It was held that the risk of being sunk by submarines was a matter to be taken into account in considering whether Newcastle was a safe port. But, on all the facts, the port was safe at the material time.

Sankey, J., said: ". . . the port must be both physically and politically safe, and I think that the action either of nature or man may render a port unsafe."

Palace Shipping v. *Gans Line* [1916] 1 K.B. 138.

(See also *The Teutonia* (1872) L.R. 4 P.C. 171.)

10.27 But the risk of attack must be a characteristic of the port to which the charterers have ordered the ship.

Saga Cob, while time chartered on the Shelltime 3 form, safely carried out 20 voyages with petroleum products from Assab to Massawa between January and August 1988. On 26 August she was again ordered to Massawa and while anchored in the roads was attacked and damaged by Eritrean guerillas in motor boats. Since April there had been sporadic guerilla artillery attacks on Massawa and during that month an oil refinery near Assab had been attacked by shells from a guerilla boat. In May there had been an isolated instance of an attack by guerilla boats on a convoy, including *The Saga Cob*, 65 miles from Massawa. War risks underwriters imposed additional premiums on ships in the area in January 1990 and in February guerillas captured Massawa itself. The Court of Appeal held that the charterers were not in breach: in August 1988 the risk of such an attack was not a normal characteristic of the port. Such an attack was a foreseeable possibility. But that did not make the risk of attack a normal characteristic of the port and did not prevent the actual attack from being an abnormal and unexpected event.

Parker, L.J., giving the judgment of the court, said, at pages 550 to 551, that: "All that can be said in this case is that since a guerrilla attack may take place anywhere at any time and by any means, that the guerrillas had two boats and that they had made one seaborne attack 65 miles away, it was foreseeable that there could be a seaborne attack either en route from Assab to Massawa or in the anchorage at Massawa. If this were enough it would seem to follow that, if there were a seaborne guerrilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerrilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept."

The Saga Cob [1991] 2 Lloyd's Rep. 398 and [1992] 2 Lloyd's Rep. 545 (C.A.).

At the end of his judgment in *The Saga Cob*, Parker, L.J., added that a port "will not, in circumstances such as the present, be regarded as unsafe unless the 'political' risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there". In relation to questions of political unsafety, that may perhaps be relevant to whether a risk has become a characteristic of a port. It should not be taken as adding a new element into the definition of safety set out in paragraph 10.3, above: see *per* Gatehouse, J., in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, at pages 519 to 520, the facts of which are summarised at paragraph 10.56, below.

Safety in use

10.28 The port must be physically safe in its location, size and layout for the particular ship to use at the relevant time, having regard to both its natural and artificial aspects. The fact that it is safe to enter is not enough if the port may become unsafe for the ship to remain at.

The *Saxon Queen* was employed under a time charter "between any safe ports between Hamburg and Brest and the United Kingdom". The ship was ordered to Craster in the United Kingdom which was safe to enter in the weather conditions then prevailing. The port was one, however, which was liable to become dangerous if a change of wind altered the conditions and it was held that it was not a safe port.

Johnston v. *Saxon Queen Steamship* (1913) 108 L.T. 564.

10.29 The port does not have to be safe for uninterrupted use, as long as ships can leave in safety when the port becomes dangerous. So in *Smith* v. *Dart* (1884) 14 Q.B.D. 105 (C.A.), it was held that Burriana in Spain was a safe port, although it was necessary for ships to keep up steam so as to be ready to put to sea in certain weather conditions (see also *The Daffodil B* [1983] 1 Lloyd's Rep. 498 and *The Ocean Victory* [2014] 1 Lloyd's Rep. 59, below, in which Teare, J., said, at [103],

"the fact that a vessel may have to interrupt discharge and leave the port of Kashima on account of a typhoon, bad weather from a non-tropical depression or long waves does not make the port unsafe"). But the port will be safe only if the necessity to depart is predictable and the ship is able to take the required action in safety and in good time.

The *Eastern City* was chartered for a winter voyage from "one or two safe ports in Morocco" and was ordered to Mogador. Ships of her size could not, in certain winter weather conditions, safely remain there as the holding was unreliable, and departure to sea was itself hazardous once such conditions had arisen. Furthermore, the onset of these conditions was sudden and unpredictable. In holding that the port was unsafe, Pearson, J., said, at page 172: "Be it supposed that a port can be safe for a ship even though the ship may have to leave it when certain weather conditions are imminent, nevertheless such a port is not safe for the ship unless there is reasonable assurance that the imminence of such weather conditions will be recognised in time and that the ship will be able to leave the port safely."

The Eastern City [1957] 2 Lloyd's Rep. 153 (upheld on appeal at [1958] 2 Lloyd's Rep. 127) (C.A.).

(See also *The Khian Sea* [1979] 1 Lloyd's Rep. 545, 10.32, below.)

The demise charter of the *Ocean Victory*, a Capesize bulk carrier, required that she be employed "only between good and safe ports" and her head time charter, on an amended New York Produce form, was for 5 to 7 months between "safe port(s)". On 12/13 September 2006 she was ordered to load a cargo of iron ore in South Africa for carriage to Kashima, a large modern port in Japan. She berthed at Kashima on 19 October and began to discharge. A few days later the weather rapidly deteriorated, with high winds and 'long waves' which caused her to range and roll against the berth, breaking one of her breast lines. Tugs held the ship against the berth until a pilot boarded. She then attempted to reach the open sea, but, faced with gale-force winds and heavy seas in the access channel, she lost steerage way and fell upon the end of the breakwater.

Teare, J., held that Kashima was prospectively unsafe for the *Ocean Victory* at the time she was ordered there, in breach of both the demise and head time charters. There was a risk that 'long waves' or bad weather might cause her to try to leave at a time when wind and sea conditions in the access channel demanded not only ordinary seamanship and navigation but also good luck, and there was no system in place to ensure that leaving could be accomplished safely. The concurrence of 'long waves' at the berth and gale-force winds in the access channel, foreseeable if maybe rare, flowed from the physical characteristics of the port and could not be regarded as an "abnormal occurrence". The master had not been negligent, as charterers alleged, in deciding to leave the port nor in his navigation when trying to do so; but even if he had been, the unsafety of the port would still have been causative. So (a) the head time charterers were liable to the demise charterers and (b) the demise charterers were liable to the registered owners (despite a clause in the demise charter which required them to insure the ship at their expense under hull policies in the joint names of themselves and the registered owners, as to which see paragraph 10.83, below).

The Ocean Victory [2014] 1 Lloyd's Rep. 59.

10.30 In his judgment in *The Eastern City* Pearson, J., made the remark, at [1957] 2 Lloyd's Rep. 172 (with which the Court of Appeal agreed at [1958] 2 Lloyd's Rep. 127 at page 131, *per* Sellers, L.J.), that "it might be necessary, on the true construction of a particular charter-party, that the port should be safe for uninterrupted loading". It is suggested, at least in relation to time charters, that this is very unlikely.

Local warnings

10.31 If it is necessary at the onset of adverse weather for the ship to leave the port, there must be arrangements to provide the master with adequate warning.

The *Dagmar* was chartered for the period of a trip from Canada to Italy on the Baltime form. She was ordered to load timber at Cape Chat, a small port on the Saint Lawrence River. The pier at which she was berthed afforded the ship little protection from wind and sea and in certain weather conditions it was necessary for her to leave to seek safety in open water. The charterers neither made arrangements for the warnings of adverse weather which were available locally to be passed to the master, nor made it clear to the master that it was up to him to keep a wireless watch.

Mocatta, J., held that the port was unsafe and that the charterers were liable for the damage caused to the ship when she broke her moorings to the pier and ran aground following the sudden onset of adverse weather.

The Dagmar [1968] 2 Lloyd's Rep. 563.

10.32 Adequate warning to depart because of the onset of bad weather will not suffice if the ship may nevertheless be trapped by lack of the sea room necessary to do so.

The *Khian Sea* was chartered on the New York Produce form for a round voyage via safe ports including Valparaiso. She was ordered by the charterers to a berth at Valparaiso which was outside the breakwater. Upon the onset of bad weather the master was advised to put out to sea but, although a pilot and tug arrived promptly, it was impossible for him to leave the berth for several hours until two other ships which had anchored nearby had moved. Meanwhile the *Khian Sea* suffered ranging damage. Donaldson, J., and the Court of Appeal held that the charterers were liable for the damage to the ship. The berth was unsafe in that there was no system to ensure that ships needing to leave it hurriedly upon the onset of bad weather would have adequate sea room in which to do so.

Lord Denning, M.R., said at page 547: ". . . the following requirements must be satisfied when a vessel has to leave its berth. First, there must be an adequate weather forecasting system. Secondly, there must be adequate availability of pilots and tugs. Thirdly, there must be adequate searoom to manoeuvre. And, fourthly, there must be an adequate system for ensuring that the searoom and room for manoeuvre is always available."

The Khian Sea [1979] 1 Lloyd's Rep. 545.

Berthing and mooring facilities

10.33 A port may be unsafe for reasons other than its geographical and meteorological characteristics. Mooring facilities may be inadequate or the berth to which the ship is directed within the port may be dangerous because of some obstruction. Any such factor might make the port unsafe for the particular ship at the time she is using it.

The *Houston City* was ordered under a voyage charter to proceed to one or two safe ports in Western Australia and there load at a safe wharf as ordered. She was ordered to a berth at Geraldton which was exposed to northerly winds but which ordinarily would have been safe for a ship of the size of the *Houston City*. To reduce danger from northerly winds there were two hauling off buoys and a fender on the wharf. However, one of the buoys had been removed for repair, although the master was told that its return was imminent. A 50 ft. section of the fender on the wharf was also missing. The ship was damaged in a northerly gale as a result of the absence of the hauling off buoy and the missing section of fender, and it was held by the Privy Council that Geraldton was unsafe for the ship because of these deficiencies.

Reardon Smith Line v. *Australian Wheat Board* (*The Houston City*) [1956] 1 Lloyd's Rep. 1 (P.C.).

(See also *The Carnival* [1992] 1 Lloyd's Rep. 449, [1994] 2 Lloyd's Rep. 14 (C.A.) where the ship was damaged by a defective fender.)

Navigational aids

10.34 The safety of a port often depends on the existence of efficient navigational aids, including pilots, buoys and lights. If the relevant aid is adequate to neutralise a hazard which would otherwise constitute a danger to navigation, the existence of that aid cannot be relied upon to show that the port is unsafe: see the comments of Parker, L.J., in *The Saga Cob* [1992] 2 Lloyd's Rep. 545 (C.A.), at page 550, in relation to the establishment of an escorted convoy system for ships approaching a port to counter any risk from guerilla boats.

10.35 It is the system that must be adequate; an error by a competent individual in an adequate system will not make the charterers liable: see the judgment of Lord Denning, M.R., in *The Evia* (*No. 2*) [1982] 1 Lloyd's Rep. 334 and the discussion under "Abnormal occurrences", below.

Safety in departure

10.36 The port will not be safe if the ship is endangered in departing from it.

The *Innisboffin* in laden condition reached the port of Manchester by the Ship Canal without difficulty. But after discharging she could not clear the canal bridges on her outward passage owing to her decreased draught. It was held that Manchester was, for her, an unsafe port.

Limerick v. *Stott* (1920) 5 Ll.L.Rep. 190.

After encountering ice on her passage up the Elbe to Hamburg (see paragraph 10.22, above) the *Sussex Oak* was further damaged by the exceptional ice on her way out down river. The charterers were held liable for this damage also.

The Sussex Oak (1949) 83 Ll.L.Rep. 297.

(See also *The Eastern City* [1958] 2 Lloyd's Rep. 127; *The Khian Sea* [1979] 1 Lloyd's Rep. 545; and *The Archimidis* [2007] 2 Lloyd's Rep. 101, [2008] 1 Lloyd's Rep. 597 (C.A.).)

This may involve, as in *The Marinicki* [2003] 2 Lloyd's Rep. 655 and paragraph 10.25, above, that there be an adequate system at the port for monitoring the safety of channels leading from the port and for warning visiting ships of such underwater dangers as might there lie.

10.37 It is not clear from the authorities how far the requirement of safety extends after the ship has departed from the port. In *The Hermine* [1979] 1 Lloyd's Rep. 212 (see paragraph 10.16, above) all three Court of Appeal judges expressed doubt whether an up-river port could be regarded as unsafe in a case where the ship had reached and departed from the port in safety and without delay, but had encountered an obstruction about 100 miles downriver in the course of her passage to the sea.

10.38 But logically the distance between an up-river port and the place in the river where the condition of unsafety exists should not be relevant, given that there is no alternative route which will enable the particular ship to reach the port and depart from it in safety.

The voyage charter for the *Mary Lou* provided that she was to sail for loading to "one safe port U.S. Gulf (excluding Brownsville) New Orleans/Ama/Reserve/Myrtle Grove/Destrehan counting as one port". The charterers nominated the New Orleans area. A ship of this size has no route to the sea from New Orleans other than the Mississippi and eventually the Southwest Pass of that river, which lies about 100 miles from New Orleans and is subject to silting in a manner which cannot accurately be forecast. While outward bound through the Pass the *Mary Lou* grounded and was damaged, despite the fact that her draught was slightly less than the maximum recommended at that time by the river pilots. Arbitrators found that at the relevant time there was a significant risk that ships such as the *Mary Lou* might ground in the Pass and that her grounding had not been caused by negligence on the part of the pilot or the master in navigating the ship; as to the choice of draught, they found that the master had acted reasonably in relying on the recommendation of the river pilots and made no finding as to whether the pilot should have checked further to ensure that this recommendation was still up to date (by, for example, examining the latest hydrographic survey of the Pass by the Corps of Engineers).

Mustill, J., held that the charterers were in breach. He said, at page 283: "In my judgment the dangers of the navigable channel were such as to amount to a characteristic of the port which would make it unsafe within the meaning of the warranty, unless the system [of recommended maximum draughts provided by the river pilots] was actually operating effectively at the relevant time. On this occasion it was not. In my opinion, the arbitrators were right to decide that this amounted to a breach of contract, from which flowed (on their findings of fact) the loss and damage suffered by the shipowners." In rejecting the charterers' argument that the unsafety of the Pass was too distant to make New Orleans an unsafe port, he said, at page 280: "Certainly it is not easy to accept at first sight the idea that hazards existing nearly one hundred miles away can be treated as features of the port. But logically the distance should make no difference, although the further away the obstacle, the less likely it will be that there is no alternative route which will enable the ship to reach the port in safety. In the present case, however, there was no such alternative; the Southwest Pass provided the only means of access. Notwithstanding the doubts tentatively expressed by the Court of Appeal in *The Hermine*, I would regard any unsafe feature of the Pass as a breach of the warranty."

The Mary Lou [1981] 2 Lloyd's Rep. 272.

(It should be noted that the House of Lords in *The Evia* (*No. 2*) disagreed with that part of Mustill, J.'s judgment in which he said that the charterers' obligation of safety was absolute and continuing: see paragraph 10.50.)

Abnormal occurrences

10.39 Charterers will not be responsible for damage to the ship which is unrelated to the prevailing characteristics of the particular port: see Teare, J., in *The Ocean Victory* [2014] 1 Lloyd's Rep. 59 at [126]. Thus a port is not unsafe because a ship within it is damaged by a wholly exceptional storm or by another ship being negligently navigated. Such causes of damage do not arise from the qualities or attributes of the port itself; in the words of Lord Roskill in *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307, at page 317, the port is not "inherently unsafe". In the same case Lord Denning, M.R., in the Court of Appeal [1982] 1 Lloyd's Rep. 334, said: "if the set-up of the port is good but nevertheless the vessel suffers damage owing to some isolated, abnormal or extraneous occurrence – unconnected with the set-up – then the charterer is not in breach of his warranty. Such as when a competent berthing-master makes for once a mistake, or when the vessel is run into by another vessel. . ." In *The Saga Cob* [1992] 2 Lloyd's Rep. 545, at page 550, Parker, L.J., said: "Furthermore, if a hazard is, for example, properly lighted but for some extraneous reason, e.g., because the power supply was suddenly cut by guerilla action the lights fail, it cannot in our judgment be said that the port was prospectively unsafe or that the unlighted hazard was a normal characteristic of the port."

10.40 In *The Mary Lou* [1981] 2 Lloyd's Rep. 272, Mustill, J., pointed out that a particular cause of unsafety is not to be regarded as abnormal in this sense merely because it is out of the ordinary when looked at over the whole history of the port. He said, at page 278: "Changed circumstances may make a port unsafe if the new circumstances can be regarded as an attribute of the port." Referring to *The Houston City* [1956] 1 Lloyd's Rep. 1, paragraph 10.33 above, he said: "The port was unsafe, not because it was prone to suffer this kind of defect. . . but because the defects were of sufficiently long standing to be, for the time being, a characteristic of the port."

10.41 Thus to say that abnormal occurrences will not make a port unsafe may be seen as another way of saying that a port will be unsafe only if the danger flows from its own qualities or attributes: see Teare, J., in *The Ocean Victory* [2014] 1 Lloyd's Rep. 59 at [126].

10.42 In *The Evia* (*No. 2*), the facts of which are set out at paragraph 10.50, below, the question arose whether the outbreak of a local war while the ship was discharging at Basrah under a Baltime charter was a characteristic of the port or, by contrast, an abnormal occurrence at an otherwise safe port. Reversing Robert Goff, J., the Court of Appeal (Lord Denning, M.R., and Sir Sebag Shaw, with Ackner, L.J., dissenting) held that the outbreak of war was not connected with the characteristics or attributes of the port but was an isolated and abnormal occurrence, so that the charterers were not thereby in breach of their safe port obligation. Lord Denning, M.R., regarded the charterers' undertaking as a promise that the port would be safe when the ship was there (a view reversed by the House of Lords, see paragraph 10.50, below), but that did not involve responsibility for damage due to "some isolated, abnormal or extraneous occurrence – unconnected with the set-up [of the port]". Lord Denning, M.R., applied that to the facts of the case, saying: "When the full-scale war erupted on 22 September 1980 that was an utterly abnormal and extraneous occurrence. It rendered the port unsafe, but this unsafeness was not a breach of the warranty of a 'safe port'. If the ship had been hit by shell-fire, the owners would have had to bear the damage themselves and recover from their insurers. They could not have recovered it from the charterers. When she was prevented from leaving—and ordered not to leave – that too was an utterly abnormal and extraneous occurrence." The House of Lords took

the same approach to this aspect of the case. Giving the decision of the House, Lord Roskill said: ". . . since Basrah was prospectively safe at the time of nomination [see paragraph 10.50, below], and since the unsafety arose after her arrival and was due to an unexpected and abnormal event, there was at the former time no breach of Clause 2 by the [charterers] . . . ". It is suggested that all parts of Lord Roskill's formulation are important. Where unsafety arises before arrival, the charterers are not entitled to insist that the ship proceed into the unsafe port, whatever has caused the port to become unsafe. Where unsafety arises after arrival but not due to an abnormal event, the owners will ordinarily be entitled to an indemnity from the charterers against any loss or damage caused by that unsafety, as a consequence of compliance with their orders (see paragraph 10.94, below).

10.43 The possibility of the ship's being damaged by an abnormal occurrence must naturally be disregarded when considering whether the owners must accept orders from the charterers to go to a particular port: see the judgment of Mustill, J., in *The Mary Lou*, above. In the words of Ackner, L.J., in *The Evia* (*No. 2*), above: "In such circumstances, the formation of a test of whether a port is safe must assume normality and must therefore exclude danger from some abnormal occurrence." Normality includes proper performance by those involved in running an adequate safety system: see the judgment of Parker, L.J., in *The Saga Cob*, above. The charterers may assume that an adequate system will be properly operated.

10.44 But if at the time the ship is ordered to the port it is unsafe due to risks caused by a certain situation, the subsequent increase in those risks due simply to a worsening of that situation should not amount to an abnormal occurrence. Looked at in terms of causation, the consequent damage to the ship arises from the same risks that made the port unsafe at the time of the order to go there, albeit that their extent and gravity have subsequently increased. Had the damage arisen from some different risk then the concept of abnormal occurrence might have been relevant: see *The Lucille* [1983] 1 Lloyd's Rep. 387 and [1984] 1 Lloyd's Rep. 244 (C.A.).

10.45 If after orders have been given under a time charter to a prospectively safe port, that port subsequently becomes unsafe (as a result of an abnormal occurrence) at a time when the ship can still avoid the danger by stopping short of or leaving the port, the charterers come under a new obligation to order her to do so: see *The Evia* (*No. 2*), at paragraph 10.50.

Dangers avoidable by good navigation and seamanship

10.46 Dangers which are avoidable by ordinary good navigation and seamanship do not render a port unsafe. The standard required is that "expected of the ordinary prudent and skilful master", *per* Teare, J., in *The Ocean Victory* [2014] 1 Lloyd's Rep. 59 at [112]. In *The Eastern City* [1958] 2 Lloyd's Rep. 127, Sellers, L.J., said, at page 131: "Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimised by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship." But if more than ordinary skill is required to avoid the dangers the port will not be safe: see, for example, *The Ocean Victory*, above, in which Teare, J., held that in the circumstances of that case, good luck was also required.

The tanker *Polyglory*, while employed under time charter, was ordered to Port La Nouvelle. While taking on ballast the master and the compulsory pilot decided to leave the berth because of increasing wind forces. In leaving, difficulties were experienced because the ship was still light and one of her anchors dragged, damaging an underwater pipeline. The owners settled a claim in respect of the damage to the pipeline and sought to recover the amount from the charterers on the ground that the port was unsafe. In awarding in favour of the owners, the arbitrator held that: (1) the port was unsafe; (2) the pipeline was damaged as a result of the

pilot's negligence; but (3) the negligence did not break the chain of causation between the order to proceed to the port and the damage.

In upholding the award, Parker, J., said that the principle to be applied in deciding whether the port was unsafe was that: ". . . if the only dangers to which a properly manned and equipped vessel of the size and type in question will be exposed are dangers which can be avoided by the exercise of ordinary reasonable care and skill that port is not, as a matter of law, unsafe and the order to proceed to it is not therefore a breach. . ."

He held that the arbitrator was justified (1) in finding the port unsafe, because the dangers could only be avoided by very high standards of navigation and seamanship and (2) in finding that the pilot's negligence did not break the chain of causation, because it was not the effective cause, even though, chronologically, it was the immediate cause.

Kristiandsands Tankrederi v. *Standard Tankers* (*Bahamas*) (*The Polyglory*) [1977] 2 Lloyd's Rep. 353.

10.47 It does not necessarily follow from proof that the ship suffered damage despite the exercise by her officers of reasonable skill and care that the port was unsafe. As Mustill, J., pointed out in *The Mary Lou* [1981] 2 Lloyd's Rep. 272: ". . . care and safety are not necessarily the opposite sides of the same coin. A third possibility must be taken into account, namely that the casualty was the result of simple bad luck". See also *The Apiliotis* [1985] 1 Lloyd's Rep. 255.

10.48 Nor does it follow from the fact that the negligent navigation of another ship was the immediate cause of the accident that the charterers will avoid liability if the port or berth was also independently unsafe. In *The Carnival* [1992] 1 Lloyd's Rep. 449 a ship was mooring when she was pressed by the negligent navigation of a passing ship into a defective fender on the berth which pierced her hull. In the Admiralty Court, Sheen, J., whose judgment was affirmed by the Court of Appeal at [1994] 2 Lloyd's Rep. 14, held liable for the full damage both the passing ship and the voyage charterers, the latter for breach of their safe berth obligation as the fender was dangerous even without negligent navigation; contribution was then ordered between the two under the Civil Liability (Contribution) Act 1978.

Fact and law

10.49 Safety is a question of fact (see, for example, *The Apiliotis* [1985] 1 Lloyd's Rep. 255), but the criteria which have to be applied in determining whether a port is a "safe port" are matters of law: see *The Polyglory* [1977] 2 Lloyd's Rep. 353.

Charterers' primary obligation arises when they order the ship to the port

10.50 The primary obligation of the charterers with regard to the safety of the port to which they order the ship arises at the time they give that order and it is at that time that their compliance with the obligation is to be judged. At that time the port need only be *prospectively* safe for the ship, at the appropriate time in the future, to reach, use and leave. Thus this primary obligation will not be broken by a state of unsafety prevailing at the time of the order which will have been cured before the ship's arrival. Nor will the primary obligation be broken if the port is prospectively safe at the time of the order but a state of unsafety subsequently arises from some unexpected and abnormal event occurring after the order has been given; in this sense the obligation is not a continuing obligation.

The *Evia*, time chartered on the Baltime form, was ordered in March 1980 to load cargo in Cuba for discharge at Basrah. She reached the Shatt-al-Arab on 1 July, berthed on 20 August and completed discharge on 22 September, on which day war broke out between Iran and Iraq. The ship was trapped for a time sufficient to frustrate the charter (see chapter 26), being unable to sail because of the danger to navigation in the Shatt-al-Arab. The umpire found that: "Basrah was a safe port for the vessel both when she was ordered to proceed there and when she got there. It did not become unsafe until the 22nd September, and by then it was impossible for the vessel to leave."

The owners claimed that in these circumstances the charterers were in breach of their safe port obligation in Clause 2: "The vessel to be employed. . . between good and safe ports. . .". This was accepted by Robert Goff, J., but rejected by a majority of the Court of Appeal and unanimously by the House of Lords. The House of Lords held that the charterers were not in breach of Clause 2 because at the time they gave their order to go there Basrah was prospectively safe and the state of unsafety arose after the ship's arrival and was due to an unexpected and abnormal event, namely the outbreak of the local war.

Lord Roskill, with whose speech the other Law Lords all agreed, said: "The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question, and in my view, means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial. So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view should properly fall upon the ship's insurers under the policies of insurance the effecting of which is the owner's responsibility under Clause 3 unless, of course, the owner chooses to be his own insurer in these respects. . . . My Lords, on the view of the law which I take, since Basrah was prospectively safe at the time of nomination, and since the unsafety arose after her arrival and was due to an unexpected and abnormal event, there was at the former time no breach of Clause 2 by the respondents."

Lord Diplock said: "It is with the prospective safety of the port at the time when the vessel will be there for the loading or unloading operation that the contractual promise is concerned and the contractual promise itself is given at the time when the charterer gives the order to the master or other agent of the shipowner to proceed to the loading or unloading port."

An alternative ground for the decision of the House of Lords was that, even if there would otherwise have been a breach by the charterers of Clause 2, the war clause of the then current form of the Baltime charter, Clause 21, fixed upon the owners all risks of unsafety arising from the war risks referred to in Clause 21(A). In respect of those risks Clause 21 displaced Clause 2; it thereby freed the charterers in the present case from any liability that might otherwise have been placed upon them by Clause 2, in respect of the results of the local war.

Lord Roskill said: "My Lords, whether Clause 21 is a complete code and thus exhaustive of the owners' rights depends upon the construction of the time charter-party as a whole. But if the owners are right that Clause 21 leaves the time charterers' obligations under Clause 2 in full force and effect, one remarkable result follows. The time charterers are to repay to the owners the premiums for the extra insurance, including extra war risk insurance premiums. But if the dangers, against the risks on which they have paid those premiums materialise and cause loss or damage to the ship, then war risk insurers, upon payment of the relevant claim, become subrogated to the owners' rights against the time charterers for the assumed breach of Clause 2. My Lords, this result would no doubt be highly attractive to war risk insurers but the less fortunate time charterers would have paid the premiums not only for no benefit for themselves but without shedding any of the liabilities which Clause 2 would, apart from Clause 21, impose upon them." (But not every clause obliging charterers to pay war risk premiums will have this effect: see *The Concordia Fjord* [1984] 1 Lloyd's Rep. 385, *The Chemical Venture* [1993] 1 Lloyd's Rep. 508 and paragraph 37.173, below; also, more generally, paragraph 10.83, below.)

The Evia (*No. 2*) [1981] 2 Lloyd's Rep. 613, [1982] 1 Lloyd's Rep. 334 (C.A.) and [1982] 2 Lloyd's Rep. 307 (H.L.).

(See also *The Marinicki* [2003] 2 Lloyd's Rep. 655, paragraph 10.25, above, in which the owners' first allegation of unsafety – the presence of an obstruction in the channel leading from the port – failed for want of proof that the obstruction had been present when the relevant order was given.)

Port becomes unsafe after nomination; charterers' secondary obligation

10.51 If the charterers have complied with their primary obligation by ordering the ship to a prospectively safe port but the port subsequently becomes unsafe while the ship is en route to it, the charterers come under a new obligation to cancel the original order and, if they wish to continue to trade the ship, to issue fresh orders to another port which is then prospectively safe. Whether the charterers do so or not, it is suggested that if the owners become aware of the changed circumstances they are entitled to cease to obey the earlier order, although it was legitimate when given, unless some particular term of the charter amounts to a contract to the contrary. The

charterers may not have broken the charter when issuing their order, but employment at an unsafe port is nonetheless not something to which the owners consented under the charter. So the order, having become one with which (further) compliance will expose the ship to a risk her owners have not agreed to bear, may now be disobeyed (see Lord Hobhouse in *The Hill Harmony*, quoted in paragraph 19.1, below). Similarly, if a subsequent state of unsafety arises when the ship is at the port, but while she may still avoid the danger by leaving, the charterers come under a new obligation to order the ship to leave and, if they wish to continue to trade the ship, to issue fresh orders to another port which is then prospectively safe: see the speech of Lord Roskill in *The Evia* (*No. 2*), above. On the particular facts of that case no such new obligation arose, because by the time the war broke out and endangered the ship it was too late for the ship to avoid the danger by leaving. But on one view the new obligation did arise and was broken in *The Lucille* [1983] 1 Lloyd's Rep. 387 and [1984] 1 Lloyd's Rep. 244 (C.A.); the port, prospectively safe when nominated, became unsafe while there was still time for the charterers to cancel their orders. (It may be, however, that *The Lucille* is not properly an application of the secondary obligation, as there was both an initial nomination of Basrah, when it was prospectively safe, and, after delay due to congestion, a specific order to proceed to Basrah, through the Shatt-al-Arab, at a time when it had become prospectively unsafe.)

'Absolute' obligation

10.52 The charterers' primary obligation is 'absolute' rather than being one to exercise due diligence (absent express limiting language, for example the due diligence wording in the Shelltime 4 form: see paragraphs 10.54 *et seq*.). The question is whether the port is (prospectively) safe, not whether, if it is unsafe, the charterers have been careless or worse. Rejecting an argument based on the use of the phrase "reasonably safe" by Lord Denning, M.R. in *The Evia* (*No 2*) [1982] 1 Lloyd's Rep. 334 (C.A.) at page 338, Teare, J., said in *The Ocean Victory* [2014] 1 Lloyd's Rep. 59, at [100] – [101], "Safety is not absolute but the measure of safety is not what is "reasonable" but whether any dangers in a port can be avoided by good navigation and seamanship. . . The charterers' warranty is of safety, not of reasonable safety. The enquiry in an unsafe port case is not into the conduct of the port authority, for example, whether it has acted reasonably or otherwise. Rather, the enquiry in an unsafe port case is into the prospective exposure of the vessel, when arriving, using and leaving the port, to a danger which cannot be avoided by good navigation and seamanship." (An outline of this case appears at paragraph 10.29, above.)

So, in particular, the charterers will be in breach even if ignorant, despite taking care, of the unsafety.

The *Terneuzen*, which was time chartered on the Baltime form, grounded at her berth in Leningrad. This was not expected by the charterers and their representatives or by those on board, particularly as the ship had safely loaded at the same place on an earlier voyage under the same charter. Despite the charterers' lack of knowledge of the unsafety of the berth, the Court of Appeal held the charterers liable for the damage caused.
Lensen Shipping v. *Anglo-Soviet Shipping* (1935) 52 Ll.L.Rep. 141 (C.A.).

10.53 It is not considered that the restatement of the law by the House of Lords in *The Evia* (*No. 2*), above, has changed this principle; any order must be to a port which is in fact prospectively safe and not merely to a port which the charterers have no reason to believe is prospectively unsafe. In *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, Colman, J., *obiter*, stated at [324] a different test, namely whether "an objective observer equipped with all the information relevant to safety could be expected to perceive the risk". It is suggested that that does not represent the law and should not be followed. The further question arises, however, whether the secondary obligation of the charterers,

to give fresh orders in the event of the port becoming prospectively unsafe after nomination, arises independently of charterers' appreciation that the port has become unsafe. Lord Roskill, when explaining the secondary obligation, said that it would exist when "new circumstances arise which render the port unsafe", unless when that occurred it was not possible for the ship to escape the danger. That does not appear to turn on whether the charterers knew or ought to have known of the changed circumstances. In *The Lucille* at [1983] 1 Lloyd's Rep. 391, Bingham, J., regarded *The Evia* (*No. 2*) as laying down that the secondary obligation arises "If a port is prospectively safe when nominated, but becomes prospectively unsafe by reason of an occurrence abnormal and unexpected at the time of nomination", again without reference to the charterers' knowledge or means of knowledge of the changed circumstances (see likewise Kerr, L.J., in that case at [1984] 1 Lloyd's Rep. 248 and, perhaps more cryptically, *The Gregos*, at first instance, [1992] 2 Lloyd's Rep. 40, at page 47 *per* Evans, J.). *The Evia* (*No. 2*) and *The Lucille* may not be the last word on that point – it did not arise in either case, so Lord Roskill, Bingham, J., and Kerr, L.J., may not have had it in mind when expressing themselves as they did, and it seems somewhat artificial to speak of an obligation to give fresh orders on the part of charterers who neither know nor have reason to appreciate the need for them. On the other hand, it is in keeping with the absolute nature of the test for safety that whether the secondary obligation arises should not depend on the charterers' knowledge (actual or constructive). All of that said, it may not matter in practice whether the secondary obligation is absolute, as generally the owners should be able to rely on a claim for indemnity under Clause 8 (see paragraph 10.94 below) if the new unsafety results in loss or damage.

Due diligence clauses

10.54 Some charter forms expressly reduce the charterers' safe port obligation to one of due diligence only. For example, Clause 4 of the Shelltime 4 form provides, in part, as follows:

> Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places. . . Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.

10.55 Such a clause may be overridden by unqualified safe port language in the recap, as in *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, summarised in paragraph 9.1, above. When a due diligence clause does apply, however, the charterers will be in breach only if they have failed to take reasonable care to establish that the port or berth is safe. In the case of a port which turns out to be politically unsafe, the charterers should not be in breach of such a clause if they have made diligent enquiries and come to a reasonable conclusion that the apparent degree of danger does not amount to unsafety: see the *obiter* comments of Parker, L.J., in *The Saga Cob* [1992] 2 Lloyd's Rep. 545, at page 551, and paragraph 37.43 below.

10.56 In the case which follows, the charterers were held in breach of their obligation of due diligence.

The Liberian tanker *Chemical Venture*, chartered on the Shelltime 3 form (Clause 3 of which included due diligence wording similar to that quoted in paragraph 10.54, above), was ordered to load at Mina Al Ahmadi during the Iran/Iraq war. Shortly before, Iran had begun air attacks on any tankers using Saudi Arabian and Kuwaiti terminals. At first the master and crew refused to proceed, but, helped by the owners with whom they exchanged several telex messages, the charterers eventually persuaded them to do so against payment of war bonuses.

The ship was severely damaged by a missile from an Iranian warplane while in the channel leading to Mina Al Ahmadi in which three other tankers had been similarly attacked in the previous 11 days (and in which 11 tankers of various flags were subsequently attacked during the next five months).

In the Commercial Court, Gatehouse, J., held that:

(a) Clause 3 applied in the case of political as well as physical dangers;

(b) Mina Al Ahmadi was unsafe, Iranian air attacks being a normal characteristic of the approach voyage for a tanker rather than abnormal or unexpected events;
(c) the charterers, who knew the relevant facts, had failed to exercise due diligence and were in breach of Clause 3; but
(d) what the owners had said (and not said) in their telex exchanges with the charterers while the crew bonuses were being arranged, amounted to an unequivocal representation that they would not treat the orders to Mina Al Ahmadi as a breach of Clause 3, and this prevented them from subsequently claiming damages from the charterers (as to which see paragraph 10.66, below).

The Chemical Venture [1993] 1 Lloyd's Rep. 508.
(For fuller treatment of this case and of *The Saga Cob*, above, see paragraphs 37.42 to 37.44.)

10.57 If under a clause of this type charterers delegate their right to nominate a port or berth to another, due diligence must be exercised by that other in making the nomination: see *Dow Europe* v. *Novoklav* [1998] 1 Lloyd's Rep. 306, the facts of which are set out at paragraph 37.46, in which charterers under the Shelltime 4 form were found by arbitrators to have made such a delegation to a port authority.

Consequences of an order to a prospectively unsafe port

10.58 If the charterers order the ship to a prospectively unsafe port they are in breach: see *The Evia* (*No. 2*), above, *The Stork* [1955] 1 Lloyd's Rep. 349 (C.A.) and *The Batis* [1990] 1 Lloyd's Rep. 345 and paragraph 5.20, above. The owners will be entitled to damages if the master reasonably obeys the charterers' order and the ship is lost or damaged as a result of the unsafety of the port: see *The Houston City* [1956] 1 Lloyd's Rep. 1 (P.C.).

10.59 The charterers' orders to a particular port do not necessarily have to be obeyed instantly. Where there is room for doubt as to whether the nominated port is safe, the owners and their master may take time for consideration. As Millett, L.J., said in *The Houda* [1994] 2 Lloyd's Rep. 541, at page 555: "In my judgment the authorities establish two propositions of general application: (1) the master's obligation on receipt of an order is not one of instant obedience but of reasonable conduct; and (2) not every delay constitutes a refusal to obey an order; only an unreasonable delay does so."

10.60 Generally speaking, the owners and the master are entitled to assume that the charterers in making their nomination of a port are doing so in accordance with their contractual obligation; there is not usually any duty on the owners or the master to check the safety of the nominated port before proceeding to it: see the judgment of Morris, L.J., in *The Stork* [1955] 1 Lloyd's Rep. 349, at page 372. In *The Kanchenjunga* [1987] 2 Lloyd's Rep. 509, see below, Hobhouse, J., said, at page 515: "Generally speaking a person is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. Even if the breach of contract is clear it is vital to the proper conduct of business that the relevant party should be able if he considers the breach a minor one to proceed without sacrificing his right to be indemnified. But this does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. It is also the rule that an aggrieved party must act reasonably and try to minimize his damage."

10.61 But the owners or the master may refuse an order to an unsafe port, both because it is 'uncontractual' – in the words of Lord Goff in *The Kanchenjunga*, below, the order is "a tender of performance" which does not "conform to the terms of the contract" – and because to proceed to an unsafe port would take the ship outside the limits within which the owners have agreed by the time charter she should be employed: see *Lensen Shipping* v. *Anglo-Soviet Shipping* (1935) 52 Ll.L.Rep. 141. That is the case, i.e. the master may refuse to comply with such an order even

though he is, by the terms of the charter, under the charterers' orders as regards employment. Devlin, J., said in *Grace* v. *General Steam Navigation* (*The Sussex Oak*) (1949) 83 Ll.L.Rep. 297, at page 307: "I cannot think that the clause in a time charter-party which puts the master under the orders of the charterers as regards employment is to be construed as compelling him to obey orders which the charterers have no power to give."

10.62 Indeed, the owners or the master may be obliged, if they know the port is unsafe, to refuse to obey the order. Otherwise they may be held to have caused the loss. Moreover, as with any other breach of contract, a breach of this obligation by the charterers may place the owners under a duty to take reasonable steps to mitigate the loss they may suffer or are suffering: see the extract, above, from the judgment of Hobhouse, J., in *The Kanchenjunga*. But it may not necessarily follow that the owners, if they have waived their right to reject the charterers' orders to an unsafe port and if the degree of unsafety is not changed, can subsequently use the concept of mitigation of damage to escape from their obligation to use that port: see the comments of Lord Goff in the same case in the House of Lords, at page 401. If the owners or the master discover the port to be unsafe only at some stage after having at first obeyed the charterers' order, and they wish on that ground not to use it, they should refuse to enter the port or, if already within it, leave the port.

10.63 If the owners or their master do take reasonable action to avoid or mitigate the effects of any unsafety of the port, they may claim from the charterers the cost of so doing: for example, the cost of tugs in *Brostrom* v. *Dreyfus* (1932) 44 Ll.L.Rep. 136, and the cost of lightening in *Hall* v. *Paul* (1914) 19 Com. Cas. 384 and paragraph 10.24, above.

10.64 Although the owners may treat an order to a prospectively unsafe port as invalid, they may be held to have waived their right to do so if, knowing of the unsafety and (which may or may not also be necessary) of the right that this gives them, they indicate unequivocally that they will nevertheless treat the order as valid and obey it.

The *Kanchenjunga* was chartered on the Exxonvoy form for consecutive voyages from "1/2 (one/two) safe ports Arabian Gulf excluding Fao and Abadan" in charterers' option. Printed Clause 20(vi) read: "(b) if owing to any war, hostilities, warlike operations. . . entry to any such port of loading. . . or the loading. . . of cargo at any such port be considered by the master or owners in his or their discretion dangerous. . . the charterers shall have the right to order the cargo. . .to be loaded at any other safe port. . . ". On 21 November 1980, shortly after full-scale war began between Iran and Iraq, the charterers ordered the ship to Kharg Island. Despite their knowledge that Kharg was unsafe because of the war, the owners complied with this order. The ship anchored off Kharg and on 23 November served notice of readiness to load, thereafter pressing for priority berthing and referring to the running of laytime. Her berth became free on 30 November, but before she could berth there was on 1 December an air raid on Kharg and the master sailed her away. On 2 December the owners called on the charterers to nominate another loading port, but the charterers continued to demand that the ship return to load at Kharg. London arbitrators found that Kharg was not prospectively safe when the charterers issued their order on 21 November (and that the nature of the unsafety there was not changed by the air raid on 1 December).

In the Commercial Court Hobhouse, J., held that the owners had waived their right to object to the orders but that they were protected from liability in damages for refusal to load at Kharg by Clause 20(vi). The judge's decision was upheld on both points by the Court of Appeal and the House of Lords. The owners had known that they were entitled to refuse the orders to load at Kharg as it was unsafe, but had unequivocally accepted them by serving a notice of readiness, calling for priority berthing and referring to the running of laytime. Thus they had abandoned their right to reject the nomination of Kharg. However, Clause 20(vi) shielded them from being liable in damages for their eventual refusal to load there.

Lord Goff said, at page 399: "But if, with knowledge of the facts giving rise to his right to reject, he nevertheless unequivocally elects not to do so, his election will be final and binding upon him and he will have waived his right to reject the tender as uncontractual."

The Kanchenjunga [1987] 2 Lloyd's Rep. 509, [1989] 1 Lloyd's Rep. 354 (C.A.), and [1990] 1 Lloyd's Rep. 391 (H.L.).

10.65 It was emphasised in *The Kanchenjunga* that what the owners had waived was their right to refuse the order to go to the nominated port and not their additional right to recover damages from the charterers if they obeyed the order and their ship was damaged by the unsafety of the port. Lord Goff said, at page 397, that by their nomination the charterers had impliedly promised that the port was safe: "Accordingly if the owners, notwithstanding their right to reject the nomination, complied with it and their ship suffered loss or damage in consequence, they would be entitled to recover damages from the charterers for breach of contract. . . " Lord Brandon added that "the only right which the owners waived was the right to reject the nomination. . . as uncontractual. . . " See also *The Batis* [1990] 1 Lloyd's Rep. 345, and paragraphs 5.20 and 5.21, above.

10.66 That is not to say it is impossible for an owner to deprive himself of his right to damages. In *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, above, Gatehouse, J., held that, on the facts of that case, the owners had made an unequivocal representation that they would not treat the charterers' order to the relevant port as a breach of their safe port obligation and had consequently prevented themselves from subsequently claiming damages for the breach of that obligation. Gatehouse, J., said the matter was one of waiver or estoppel, although the best analysis of the position was variation. It is suggested that only variation or estoppel could justify the decision (there was detrimental reliance on the facts, so an argument of estoppel could succeed). A right to claim damages cannot be relinquished by a mere waiver. Moreover, it seems a doubtful decision on the facts. The owners' focus was on securing the charterers' agreement in advance to pay war bonuses to the crew, which seems rather an affirmation than a denial of the charterers' responsibility to compensate the owners in respect of the consequences of acceding to their order, and seems more an assertion that the port was unsafe than a concession of the opposite. There seems little basis for the judge's implicit conclusion that the owners represented that the crew bonuses would be the only adverse consequence in respect of which claim would be made, no matter what happened if the ship proceeded into the danger.

10.67 An order to proceed to an unsafe port, if persisted in, might in certain circumstances entitle the owners to terminate the charter: see, for example, the judgment of Hobhouse, J., in *The Kanchenjunga*, above; see also *The Gregos* [1995] 1 Lloyd's Rep. 1 (H.L.) on the consequences of charterers persisting in invalid orders. Such an order, if persisted in, might also, it seems, amount to a fundamental breach within the meaning of the words "any breach of this Charter Party" in Line 61 of the New York Produce form and give the owners the right to withdraw under Clause 5: see *The Tropwind* (*No. 1*) [1977] 1 Lloyd's Rep. 397 and paragraph 16.122, below. It might also, if obeyed by mistake or under protest, entitle the owners to additional remuneration (see paragraphs 5.19 to 5.23, above).

Effect of negligence by master or crew

10.68 It is frequently argued by charterers that, if the port is unsafe, the damage suffered by the owners has been caused by or contributed to by the negligence of the master and crew. It may be said that the master should have seen the danger for himself and refused to enter the port. Such arguments often face the practical difficulty, when it comes to arbitration or litigation, that it is awkward simultaneously to contend that the port was safe and yet also that it was so obviously unsafe that the master should have disobeyed charterers' order to go there. It may also be said (less awkwardly) that the damage was caused not by the unsafety of the port but by the negligent handling of the ship by her master or crew at the relevant time, or partly by one and partly by the other.

Causation

10.69 If the negligent act of the master or crew rather than the charterers' breach of the term as to safety is the effective cause of the damage, there is no liability on the charterers. It is said that

the chain of causation from the breach by the charterers has been broken by the intervening act or default of the master or crew: see, for example, *The Dagmar* [1968] 2 Lloyd's Rep. 563, *per* Mocatta, J., at page 571, *The Polyglory* [1977] 2 Lloyd's Rep. 353 and the judgment of Mustill, J., in *The Mary Lou* [1981] 2 Lloyd's Rep. 272. But the dilemma in which a master is frequently placed, and the fact that it is the initial breach of contract by the charterers that has placed him in it, has to be taken into account in determining the effective cause. If the master acts reasonably, even though mistakenly, in the situation confronting him it is unlikely that his actions will be held to have been the effective cause of the damage: see, for example, the judgment of Sellers, L.J., in *The Stork* [1955] 1 Lloyd's Rep. 349, at page 363. In the case of *The Houston City*, the port of Geraldton was held to be unsafe because of the absence of a hauling off buoy and a section of fender on the wharf at which the ship was berthed. Dixon, C.J., in a dissenting judgment in the High Court of Australia (subsequently supported by the Privy Council), dealt with the argument that the chain of causation had been broken by the master's actions in the following terms (see [1954] 2 Lloyd's Rep. 148, at page 158): "It was then contended that the damage to the ship was not the natural or probable consequence of her being ordered to the berth. The chain of causation was broken, it was suggested, because the decision of the master to rely upon the fine weather and not to put out a stream anchor intervened. The master knew the berth to be unsafe, so it was said, or liable to become unsafe on a change of weather. His action in going to the berth with that knowledge, it was said, was the true cause of the damage. I do not think that this view can be supported. The purpose of requiring the charterer to choose a safe port or berth is to avoid danger to the ship. By ordering the ship to an unsafe berth the charterer placed the master in a dilemma, and the master's acquiescence in the order cannot relieve the charterer of his responsibility. If it is material the charterer may be taken to have known as much about the matter as the master. The charterer was represented by an agent who took charge of the loading and had the same opportunities for knowledge as the master. The master was guided by the harbour-master pilot who did not advise any other measures. In these circumstances, it is difficult to see why the course which was taken was not a direct and natural consequence of the breach of the provision of the charter in giving an order to go to the berth at Geraldton." In *The Ocean Victory* [2014] 1 Lloyd's Rep. 59, Teare, J., said, at [173] – [175], that even if the master's navigation had been negligent as alleged, this would not have broken the chain of causation; the effective cause remained the unsafety of the port.

10.70 Where the master has fears about the safety of the port but eventually decides to enter it or remain in it, damage which is then caused to the ship may yet be regarded as the natural and probable result of the charterers' order – and thus caused by it. This is particularly likely to be so when the master's fears have been allayed by local advice (see, for example, *The Ocean Victory*, above, at [144]), especially from the charterers or their agents.

The *Stork* was chartered for a voyage to carry logs from Newfoundland and the charter provided that the ship was to load at "not more than two approved loading places as ordered". The loading place nominated by the charterers was a small rocky inlet called Tommy's Arm. It was too small to allow the ship to lay out sufficient anchor chain to prevent dragging and eventually she was damaged in one of the gales that occurred regularly at that place at that time of year. On first arriving there, the master of the *Stork* had expressed considerable concern for the ship's safety but had been reassured by an experienced local pilot whom the charterers had sent to meet him. It was held by the Court of Appeal, affirming Devlin, J., that the place was unsafe for the ship and that despite the master's awareness of danger, the damage was caused by the charterers' order to proceed there. Sellers, L.J., said of the master: "He is sometimes on the horns of a dilemma. The material question is, I believe, whether he acted reasonably. The learned Judge was of the opinion that the master, in accepting the assurances given to him, acted reasonably, and I share his view."

The Stork [1954] 2 Lloyd's Rep. 397 and [1955] 1 Lloyd's Rep. 349 (C.A.).

10.71 Even though paid for by the charterers a pilot is usually to be regarded as the servant of the owners (see paragraph 12.19) and negligence on the part of the pilot may therefore be such as to

constitute a break in the chain of causation between the charterers' order and the damage suffered. In some cases, however, the pilotage arrangements at a port may be regarded as a characteristic of the port and in such circumstances the incompetence or negligence of a pilot may be held to be one of the elements constituting the unsafety of that port: see *The Stork*, above, and *The Mary Lou* [1981] 2 Lloyd's Rep. 272. See also *The Evia* (*No. 2*) [1982] 1 Lloyd's Rep. 334 (C.A.), *per* Lord Denning, M.R., at page 338.

10.72 It may be that the charterers' breach is held to be the effective cause of some clearly defined part of the loss or damage and the negligence of the master or crew the effective cause of another distinct and separable part. Examining that possibility may entail difficult or complex evidence, and fine judgments, but if ultimately that is the finding, there is no difficulty about the result: the charterers must pay damages for the consequences of their breach, but not for the separate consequences of the crew negligence.

Apportionment of damage under Law Reform (Contributory Negligence) Act 1945

10.73 It is suggested that in some unsafe port cases there may possibly be circumstances in which there could be an apportionment of damage under the Law Reform (Contributory Negligence) Act 1945: see paragraphs 20.37 *et seq*. The 1945 Act might, for example, be applicable to a claim under a time charter where one party had, in the circumstances of the case, assumed special responsibility for the provision of information or advice as to the safety of a particular port and was negligent in that regard. If in such a case it was foreseeable that the other party would rely upon the information or advice provided and in fact it was relied upon, there might be a liability in tort, irrespective of the existence of the charter contract (but it would need to be examined carefully whether the party accused of negligence was doing more than (attempting to) perform a contractual obligation under the charter). The 1945 Act could then apply if the contract did not exclude liability in tort and both parties were at fault.

10.74 It is, however, right to be cautious about the application of the 1945 Act in any case relating to the safety of ports in the absence of any case law on the issue. Certainly, it is suggested there is no room for the 1945 Act to apply to an ordinary claim for breach of an absolute warranty of safety such as that in the New York Produce form, a plain "category (1)" case under *Vesta* v. *Butcher* (paragraph 20.38, below).

Implied term as to safety

10.75 Where there is no express term as to safety it seems that the court may in certain circumstances imply a term as to safety.

The tanker *Evaggelos Th* was time chartered in November 1968 for trading in the Red Sea and elsewhere, which was at all material times a war zone. The charterers agreed to contribute to the cost of the ship's war risks insurance. The charter contained no express term as to the safety of ports to which the ship might be ordered but provided that cargoes should be loaded or discharged at any place where the ship could "always lie safely afloat". The ship was ordered by the charterers to proceed to Suez at a time when there was a cease fire. But following the ship's arrival hostilities broke out again and the ship became a constructive total loss as a result of shell fire. It was held that:

(1) the words "always lie safely afloat" were concerned exclusively with the marine characteristics of the place of discharge (see paragraph 10.93, below);
(2) a term should be implied that the nominated port of discharge was safe at the time of nomination and might be expected to remain so from the moment of the ship's arrival until her departure;
(3) since Suez was not unsafe at the time of nomination, nor at that time expected to become so, the charterers were not in breach of the implied term as to safety.

The Evaggelos Th [1971] 2 Lloyd's Rep. 200.

(For the owners' alternative claim under the employment and indemnity clause, see paragraphs 10.94 *et seq*.)

10.76 In *The Evia* (*No. 2*), above, Lord Roskill said that he agreed with the decision in *The Evaggelos Th* but questioned the reasoning.

10.77 The court will not imply a term as to safety unless it takes the view that this is necessary to give business efficacy to the charter.

The *A.P.J. Priti* was voyage chartered during the Iran/Iraq war for a voyage from Damman to "1/2 Safe berths" at one of three named Iranian ports, from which the charterers selected Bandar Khomeini. There was no express term as to the safety of the ports themselves. An elaborate war risks clause gave the master the right to discontinue the voyage if the ship became endangered by war. During the approach to Bandar Khomeini the ship was damaged by a hostile missile.

The Court of Appeal approved the owners' concession that it was inappropriate to seek to imply a promise as to the safety of the discharge port. Bingham, L.J., said: "There is no ground for implying a warranty that the port declared was prospectively safe because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter."

The court went on to reject the owners' argument that they could rely instead on the term as to the safety of the berth or berths. In the absence of a safe port term, the safe berth obligation could not be extended to the approach to the port but was restricted to movements within the port. Moreover, it related only to safety from risks that did not affect the port as a whole or all the berths within it. Bingham, L.J., said: "There will be no breach by the charterers even if a berth nominated is prospectively unsafe, if every berth or the port as a whole is prospectively unsafe in the same way and to the same extent."

The A.P.J. Priti [1987] 2 Lloyd's Rep. 37 (C.A.).

10.78 That last proposition of Bingham, L.J., depended upon a distinction between a port and its berths and should be confined to that context. The charterers had promised only a safe berth. The owners had accepted the risk that the port would be unsafe. It would be inconsistent with that acceptance of risk to hold that some feature common to every berth at the port put the charterers in breach. In *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, at [320]–[323], Colman, J., *obiter*, confined *The A.P.J. Priti* to that situation and rejected an argument that, by analogy, owners could not sue for political unsafety in breach of an express unsafe port undertaking if the unsafety was common to all the ports of a country.

Named ports

10.79 Where a port is named expressly in the charter, either on its own, or as one of a list of named ports from which the charterers may select, or as one of two ports marking the ends of a permitted range (as in "Bordeaux/Hamburg range"), and there is an express term as to safety, it will be a matter of construction of the particular term in the context of that charter whether it applies to the named port or only to ports which the charterers nominate in the course of the ship's employment under the charter. It is suggested, however, that generally the safe port undertaking will apply to the named port, because the fact that the owners have agreed to it by having it named in the charter is not inconsistent with the charterers having undertaken that it will be safe for their ship: see *The Livanita* [2008] 1 Lloyd's Rep. 86, summarised below, and *The Archimidis* [2007] 2 Lloyd's Rep. 101, approved on appeal [2008] 1 Lloyd's Rep. 597. In *The Archimidis*, Gloster, J., held that the phrase "1 safe port Ventspils" in a voyage charter constituted an undertaking by the charterers that this named loading port would be safe for the chartered ship. That decision was followed by Langley, J., in the time charter case of *The Livanita*, below. His decision, and essential reasoning, was in turn approved by the Court of Appeal in *The Archimidis*, which upheld Gloster, J.'s decision in that case.

The *Livanita* was chartered on the New York Produce form for "one time charter trip via St Petersburg, Baltic/Conti to the far east with duration 60/70 days without guarantee". The ship's hull was damaged by ice while in convoy outbound from St Petersburg having loaded there under the charter. Line 29 (trading exclusions) cross-referred to a Clause 67, which provided "trading to be worldwide between safe ports, safe berths and safe anchorages and places, always afloat, . . .". Arbitrators found that St Petersburg had been unsafe for the ship and gave the owners damages for breach by the charterers of their safe port undertaking. On appeal the charterers argued that there was no undertaking as to the safety of St Petersburg.

Langley, J., dismissed the appeal. There was no inherent inconsistency between a safe port undertaking and the naming of a loading or discharging port. The latter limited the charterers' choices as to the employment of the ship but not the unqualified promise that she would be traded only between safe ports. The charterers also sought to argue that there was no undertaking as to safety if the owners knew or should reasonably have known of the unsafety of St Petersburg at the date of the charter. Since they had not advanced the necessary factual case before the arbitrators, let alone obtained the necessary findings of fact, they were not allowed to advance that argument on appeal. It is suggested the argument was, in any event, unsound – knowledge (actual or constructive) of unsafety is not inconsistent with the charterers having undertaken responsibility and thus liability should damage arise. See paragraph 10.4, above on the distinction between risk and actual harm.

The Livanita [2008] 1 Lloyd's Rep. 86.

(See also *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, summarised in paragraph 9.1, above, *per* Colman, J., *obiter*, at [311] – [315].)

10.80 Where a port is expressly named in the charter in one of the ways described above but the charter contains no express warranty of safety, it is unlikely that a term will be implied making the charterers responsible for the safety of the port: see *The A.P.J. Priti*, above, and *The Reborn*, below. The port has been identified, and, if the owners have not negotiated an express warranty of its safety from the charterers, they can be taken to have satisfied themselves as to its safety for their ship. In *Reardon Smith Line* v. *Australian Wheat Board* (*The Houston City*) (High Court of Australia) [1954] 2 Lloyd's Rep. 148, a voyage charter case, Dixon, C.J., said, at page 153: "When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desires it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place, then, subject to excepted perils, his liability to have his ship there is definite." This reasoning was upheld when the case reached the Privy Council ([1956] 1 Lloyd's Rep. 1), adopted by Devlin, J., in *The Stork* [1954] 2 Lloyd's Rep. 397, at page 415, and in the same case approved by the Court of Appeal [1955] 1 Lloyd's Rep. 349, *per* Singleton, L.J., at page 365.

The *Reborn* was voyage chartered on an amended Gencon form for the carriage of a cargo of cement from Chekka, Lebanon, to Algeria. The owners alleged that she was damaged by a hidden underwater projection at the loading berth. The "Loading port or place" was identified as "1 BERTH CHEKKA – 27 FT SW", the word "safely" was struck through by the parties, as regards the loading port, in Clause 1 of the form, and, by an additional Clause 20, the owners warranted that they had "satisfied themselves to their full satisfaction with and about the ports specifications and restrictions [including anchorages, berths and approaches] prior to entering into this Charter Party". Aikens, J., and the Court of Appeal, had no difficulty upholding an award of arbitrators on a preliminary issue that the owners had accepted the port of Chekka, and accordingly the berths at that port, and there was no implied warranty of safety that could found a claim.

Lord Clarke, M.R., at [28] on page 646 of the Court of Appeal report, endorsed as a correct general approach the suggestion in *Voyage Charters*, now at paragraph 5.33, that whether a warranty of safety is to be implied will be influenced greatly by the degree of liberty which the charterers enjoy to choose the port or place allegedly warranted safe. "In principle, the more extensive that liberty, the greater the necessity to imply a warranty: conversely, the more specific the information given in the charter to the owner about the intended port or place, the more reasonable it is to conclude that he has satisfied himself as to its safety, or that he is prepared to take the risk that it is unsafe."

The Reborn [2008] 2 Lloyd's Rep. 628 and [2009] 2 Lloyd's Rep. 639 (C.A.)

10.81 The ports of delivery and redelivery are often agreed by the parties and inserted in the spaces left at Lines 18 and 55 of the New York Produce form. Whether or not the charterers are

responsible for such named ports they may still be liable if the berth they select within the port of delivery is unsafe (Lines 20 and 21 of the New York Produce form, Lines 23 and 24 of the Baltime form). The same is true of the redelivery berth if the berth has been used for cargo purposes (New York Produce form Clause 6, Baltime form Clause 2) and maybe in any event, see below. It is also possible that in such cases the obligation as to safety of the berth may be extended to cover the immediate approach to and departure from the berth, a point discussed but left undecided in *Stag Line* v. *Ellerman & Papayanni Lines* (1949) 82 Ll.L.Rep. 826 – a case which concerned the alleged unsafety of a berth selected by charterers at a named port of redelivery. But it is clear from the judgments of the Court of Appeal in *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 that the safe berth obligation, while capable of covering movements within the port particular to the chosen berth, does not extend to the approach to or departure from the port: see paragraph 10.77, above.

Agreement that trading limits may be broken

10.82 It is not unusual for the parties to agree in the charter that the charterers may order the ship outside the specified trading limits, the charterers paying any extra premium consequently required by the ship's underwriters. It does not follow from their assumption of such extra premium that the charterers are relieved from their obligation as to the safety of the ports to which they order the ship outside those limits.

The New York Produce form charter for the *Helen Miller* contained an additional clause defining the trading limits as being "between safe ports within Institute Warranty Limits including St. Lawrence up to and including Montreal, but excluding Cuba. . . Guinea, and all unsafe ports, but Charterers have the liberty of breaking limits, they paying extra insurance, if any, . . .". The charterers ordered the ship to ports outside the Institute Warranty Limits and she suffered ice damage on voyages to these ports, which were found to have been unsafe at the relevant time. Mustill, J., held that the charterers were liable for this damage: the owners had given general consent to trading outside the Limits but this did not detract from the charterers' duty to select ports which were safe, and this was not affected by the charterers' payment of extra insurance premium: "by paying the premium the charterer does obtain a benefit – the benefit of being able to send the ship on a voyage which the owner would not otherwise allow her to perform. But this is not at all the same as saying that the charterer thereby obtains the right to send her on such a voyage risk-free."

The Helen Miller [1980] 2 Lloyd's Rep. 95.

10.83 In *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307, the House of Lords held that in respect of the war risks referred to in Clause 21(A) of the then current version of the Baltime form, the charterers were relieved of their safe port obligation under Clause 2. But in arriving at this decision Lord Roskill drew attention to several special features of Clause 21. As Bingham, J., emphasised in *The Concordia Fjord* [1984] 1 Lloyd's Rep. 385, at pages 387 and 388, everything depends on the construction of the detailed terms of the particular charter. In the case before him Bingham, J., upheld the decision of an arbitrator that the charterers under an amended New York Produce form were liable for the damage suffered by the ship at a port which was unsafe because of war, despite a clause putting upon them the costs of additional war risk insurance premiums, to which the relevant port was then subject. The charter terms in *The Helen Miller*, above, were equally distinct from those in *The Evia* (*No. 2*) and the facts more so; consequently there seems no reason to suppose that the validity of the decision has been undermined by the latter case, unless it be by a general comment of Lord Roskill that, as by Clause 21(B)(1) of the Baltime charter the charterers were to refund the owners' war risks insurance premiums, it would be unjust that they should remain exposed to a subrogated claim by the war risk underwriters under the safe port provision, Clause 2. As to this comment of Lord Roskill, Bingham, J., in *The Concordia Fjord*, above, recorded with approval the arbitrator's rejection of any general principle exempting charterers from a liability merely because they have assumed a contractual obligation to put the

owners into funds to insure themselves against the relevant damage. It seems that there is no such principle. In *The Ocean Victory* [2014] 1 Lloyd's Rep. 59, Teare, J., held that the demise charterers were liable in damages to the registered owners for breach of their safe port obligation despite Clause 12 in their amended Barecon 89 charter, which required them to insure the ship at their expense under hull policies in the joint names of themselves and the registered owners. At [193] he said, "The mere fact that the charterer pays for the hull insurances is not enough to exempt him from liability for breach of his obligations under the charterparty. There has to be an intention to create an exhaustive code which determines the parties' rights and liabilities by reference to a claim on the insurance policy."

Limitation of liability

10.84 Where time charterers have incurred a liability to owners for damaging their ship by a breach of a safe port obligation, they are not entitled to limit that liability under the Convention on Limitation of Liability for Maritime Claims 1976. Although they come within the category of persons entitled to limit their liability under the Convention, that right does not extend to claims for or consequential upon damage to the chartered ship herself: *CMA CGM* v. *Classica Shipping* [2004] 1 Lloyd's Rep. 460 (C.A.) and *The Darfur* [2004] 2 Lloyd's Rep. 469.

Safety of berth

10.85 Where charterers are subject to a safe port obligation they will also be responsible for the safety of docks, wharves, berths and other places within the port to which the ship is directed. This will probably be so whether or not there is an obligation, as in Clause 6 of the New York Produce form (Lines 68 to 70), to load and discharge at any place where the ship can "safely lie always afloat".

The *Terneuzen*, which was time chartered under the Baltime form, was damaged owing to the unsafety of the berth to which she had been ordered at Leningrad. The question arose as to the extent of the obligation imposed on the charterers by the words in Clause 1 of the charter: "Steamer to be employed in lawful trades. . . between good and safe ports or places within the following limits. . . where she can lie safely always afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety." It was held by a majority of the Court of Appeal that either these words meant, on their true construction, that the ship had to be directed to a safe berth within the port or, alternatively, that the words made it necessary to imply a term into the charter to that effect. Slesser, L.J., said: "In my view, the stipulation in Clause 1 in this case, implying the right of the owners to direct the ship to good and safe ports as there defined as a matter of business, requires an implication that the port or place should include good and safe berths therein."

Lensen Shipping v. *Anglo-Soviet Shipping* (1935) 52 Ll.L.Rep. 141 (C.A.).

(See also *Stag Line* v. *Ellerman & Papayanni Lines* (1949) 82 Ll.L.Rep. 826, above.)

10.86 The duty of the charterers with regard to a "safe berth" is generally the same as with regard to a "safe port": see *The Stork* [1955] 1 Lloyd's Rep. 349. See also *The Carnival* [1992] 1 Lloyd's Rep. 449 and [1994] 2 Lloyd's Rep. 14 (C.A.), where voyage charterers were held in breach of their safe berth obligation when a defective fender pierced the hull of the chartered ship.

10.87 Where there is no term express or implied as to the safety of the port, an express term as to the safety of the berth or berths will not avail the owners if every berth in the port is prospectively unsafe in the same way and to the same extent: see *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 (C.A.) and paragraph 10.77, above. It was also held by the Court of Appeal in that case that the safe berth term in such a charter could not be used to cover the safety of the approach to the port as opposed to movements within the port to and from a nominated berth.

10.88 As with a port, the prospective safety of a berth is to be judged as at the time of the order

to go there. This order will not normally have to be given until the voyage to the port has been concluded: see the judgments of the Court of Appeal in *The A.P.J. Priti*, above.

Directions given by third parties

10.89 Charterers may become liable in respect of orders to an unsafe berth or other place given on their behalf by agents in all the circumstances the orders are to be regarded as those of the charterers. Those orders may amount to breach of an express or implied safe berth obligation in the charter; or if the agent was negligent, the charterers may be liable simply for that negligence. But by no means everyone who gives orders to the ship to proceed to a particular berth or place within a port will bring such liabilities upon the charterers.

The *Mediolanum* was chartered on the New York Produce form. In the course of the charter, the charterers, through their agents, stemmed bunkers for the ship at Las Minas, itself a safe port for this ship. It was found as a fact by arbitrators that in stemming bunkers the charterers impliedly authorised the bunker suppliers to select the exact place where the ship was to bunker. The bunkering place actually selected by the suppliers was unsafe by reason of an uncharted reef and the ship was damaged in consequence.

The Court of Appeal expressed grave doubt as to whether the bunker suppliers were indeed acting as the charterers' agents in making the selection of bunkering place. In giving the judgment of the court, Kerr, L.J., suggested that the suppliers might instead be regarded as performing similar functions to those of a harbour master or port authority, whose actions would not be those of the charterers, following the judgment of Robert Goff, J., in *The Isabelle* [1982] 2 Lloyd's Rep. 81.

Assuming, "with the greatest misgivings", that the suppliers were the agents of the charterers for this purpose, the court found no liability on the charterers for there had been no breach of their safe port promise. Moreover, there was no negligence on the part of the suppliers for which the charterers might have 'vicarious' liability, even assuming that they were truly acting as agents in directing the ship.

The Mediolanum [1984] 1 Lloyd's Rep. 136 (C.A.).

10.90 Despite the caution expressed by the Court of Appeal in *The Mediolanum*, above, and the court's adoption of the judgment of Robert Goff, J., in *The Isabelle*, Staughton, J., held in *The Erechthion* [1987] 2 Lloyd's Rep. 180 that an order of the Port Harcourt harbour authority to lighten at Dawes Island anchorage, where the ship was damaged, should be considered as the charterers' order for the purpose of the charterers' implied obligation to indemnify the owners for compliance with such orders under the New York Produce form charter (as to which obligation generally, see paragraphs 19.15 *et seq*.; see also paragraph 37.46 for *Dow Europe* v. *Novoklav*, a decision to similar effect under the Shelltime 4 form). It may be noted, however, that the judge expressed a preference for treating the matter not as a question of agency but rather on the basis that the charterers' orders were to such discharging place at Port Harcourt as the port authorities might nominate. (As to the charterers' right to choose the ports at which the ship is to bunker, see paragraph 13.10.)

NYPE 93

10.91 Clause 12 of the 1993 revision of the New York Produce form emphasises the obligation as to safety of berths by requiring that "The Vessel shall be loaded and discharged in any safe dock or at any safe berth or safe place that Charterers or their agents may direct, provided the Vessel can safely enter, lie and depart always afloat at any time of tide": see Lines 180 to 182.

Baltime

10.92 The loading of the ship at an unsafe berth may involve the charterers in liability under the last sentence of Baltime Clause 12, which makes charterers responsible for loss or damage to the

ship or her owners by, *inter alia*, "goods being loaded contrary to the terms of the Charter" (Line 179).

The *Terneuzen*, which was chartered under the Baltime form, was damaged owing to the unsafety of the berth at which she had been ordered to load at Leningrad. It was held by Greer, L.J., in the Court of Appeal, that if the ship was off hire for the time lost the owners would be entitled to recover the same amount under this clause as damage caused to the owners by goods being loaded contrary to the terms of the charter.

Lensen Shipping v. *Anglo-Soviet Shipping* (1935) 52 Ll.L.Rep. 141 (C.A.).

Safely lie always afloat

10.93 In *The Evaggelos Th* [1971] 2 Lloyd's Rep. 200, Donaldson, J., construed the phrase "where the vessel can always lie safely afloat" as being limited to the purely marine characteristics of a berth. But it was recognised expressly by Donaldson, J., that this phrase differed from phrases of the type used in the Baltime and New York Produce forms. These should not therefore be restricted in this way but should be read as a stipulation for safety in all the aspects discussed in these pages.

Alternative claim under employment clause

10.94 By Clause 8 of the New York Produce form the master is to be under the orders and direction of the charterers as regards employment. The court will normally imply a term that the charterers will indemnify the owners against the consequences of the master obeying their orders (as to which see paragraphs 19.15 *et seq*., below). If the ship is damaged or other losses are suffered by the owners in the course of complying with the charterers' orders to sail to or use a particular port, the owners may argue that they are entitled to be indemnified.

10.95 Where the charterers are in breach of the safe port obligation there would usually be no purpose in claiming under Clause 8. If a claim for breach of the safe port obligation fails, a claim under Clause 8 may well fail for the same reason (for example, where the safe port claim has failed on causation): see *The Lucille* [1983] 1 Lloyd's Rep. 387, *per* Bingham, J., at pages 395 to 397 and *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, *per* Colman, J., at [294] – [309]. An alternative claim under the Baltime employment and indemnity clause failed in *Stag Line* v. *Ellerman & Papayanni Lines* (1949) 82 Ll.L.Rep. 826. Morris, J., said, at page 836: "In my judgment, if it is not shown that there is a breach of Clause 1 ['where she can lie safely always afloat'], the plaintiffs cannot claim that under Clause 8 [the employment and indemnity clause] they can recover against the defendants. The casualty, the happening after the ship had left a berth at which she could safely lie afloat, was not something, in my judgment, which can be regarded as a consequence or liability arising from the order to go to Berth 51."

10.96 But where the charterers' obligation as to the safety of ports is restricted – either because the charter expressly says so or because the courts have implied a limited obligation only – there may be a good claim under Clause 8 although there is none under the safe port obligation. So had the charter in *The Chemical Venture*, paragraphs 10.56 and 10.66 above, been on the New York Produce form rather than the Shelltime form, it is suggested that a Clause 8 indemnity claim might well have succeeded. Or, again, if the claim for breach of the safe port obligation fails because the unsafety arose only from a change of circumstances after the order to proceed there, there may be a good claim for indemnity. Any damage resulting will likely be held to have been caused by compliance with the order, absent any negligence of master, crew or pilot breaking the chain of causation, unless (as in *The Evia* (*No. 2*) and *The Greek Fighter*, above) it resulted from an abnormal, extraneous event from the consequences of which the ship had no opportunity to escape.

10.97 In *The Evaggelos Th* [1971] 2 Lloyd's Rep. 200, paragraph 10.75, above, Donaldson, J., held that the charterers had not broken the implied obligation as to safety, but went on to hold that they would nevertheless be liable under the employment and indemnity clause of the charter if the arbitrators found that compliance with the orders of the charterers was the cause of the damage to the ship. He said: "I am quite satisfied that the owner can recover under this clause if, but only if, he can prove that the proximate cause of the loss of the vessel was his, or his master's, compliance with the charterers' orders as to the employment of the vessel." (Compare the success of the indemnity claim by the owners of the *Georges Chr. Lemos*, although dangerous cargo had not been established, in *The Athanasia Comninos*, paragraph 9.13, above.) In *The Evaggelos Th*, the employment and indemnity clause was worded similarly to the corresponding clause in the Baltime form, both containing an express indemnity against the results of complying with the orders of the charterers.

10.98 In *The Erechthion* [1987] 2 Lloyd's Rep. 180, arbitrators had held that charterers were liable to indemnify owners under Clause 8 of the New York Produce form for damage suffered by the ship from a submerged object while complying with charterers' order to a lightening anchorage, despite the lack of any breach of any safe port or berth obligation. Staughton, J., upheld this decision, subject only to confirmation from the arbitrators that the damage was proximately caused by the charterers' order. (See also *The Marinicki*, at paragraph 10.25 above.)

Interaction with war clauses

10.99 It is not unusual for there to be interaction between safe port provisions and war clauses within the same charter. Some consequent issues are dealt with at paragraphs 5.32 *et seq*., above, and paragraphs 37.173 *et seq*., below.

U.S. Law

Nomination of unsafe port or berth

10A.1 The safe port and berth warranty is an integral part of a time charter. Because the charterer may be given a wide latitude in nominating loading and discharging ports, the warranty is of material importance to the owner in providing an undertaking that the ports and berths nominated by the charterer will be safe for the chartered ship in performing under the charter.

10A.2 If the ship is damaged or delayed by reason of the nomination of an unsafe port or berth, the owner is entitled to recover its loss from the charterer. Moreover, the owner would be justified in refusing to accept the charterer's orders to proceed to an unsafe port or berth.

Safely lie, always afloat

10A.3 The words "safely lie, always afloat" constitute an express warranty of safe port and safe berth. See, e.g., *Cities Service Transp. Co*. v. *Gulf Refining Co*., 79 F.2d 521, 1935 AMC 1513 (2d Cir. 1935), holding that "the charter party was itself an express assurance on which the Master was entitled to rely, that at the berth 'indicated' the ship would be able to lie 'always afloat'." See also *Park S.S. Co*. v. *Cities Service Oil Co*., 188 F.2d 804, 1951 AMC 851 (2d Cir. 1951), *cert. denied*, 342 U.S. 802 (1951).

Between safe port and/or ports

10A.4 The American and English authorities generally are in agreement that these words constitute an express warranty of safe port by charterer, the components of which are set forth in *Leeds Shipping* v. *Société Française Bunge* (*The Eastern City*) [1958] 2 Lloyd's Rep. 127 (see paragraphs 10.3 to 10.4, above). Under the rule followed by the majority of American courts, the warranty means that the port or berth nominated by the charterer must be completely safe for the particular ship so that she can proceed there and leave in the normal course of operation without being exposed to the risk of physical damage. *Venore Transportation Co*. v. *Oswego Shipping Corp*., 498 F.2d 469, 1974 AMC 827 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974).

10A.5 In *The Oceanic First*, SMA 1054 (Arb. at N.Y. 1976), the panel summarized the safe port warranty in the following manner:

> There is no dispute that both Charters contain a warranty that the vessel will only be employed between "Safe Ports" and that she will only be loaded and/or discharged at "Safe Berths." We believe it is generally accepted that this warranty is an undertaking that this vessel could proceed to discharge her cargo and depart from the port and that in the absence of some abnormal and unforeseen occurrence and given good navigation and seamanship this could be done without undue risk of physical damage to the vessel. The warranty is expressly given for each period the vessel was ordered to discharge at Niigata and must be weighed in light of the known conditions which one could reasonably expect would prevail during each call of the vessel at the Port.

10A.6 The charterer's duty to provide a safe port and berth is non-delegable. *Venore Transportation Co*. v. *Oswego Shipping Corp*., above, 498 F.2d at 472. This principle flows quite naturally from the commercial purpose of the safe port clause. As Judge Swan wrote in *Park S.S. Co*. v. *Cities Service Oil Co*., above:

> The charterer wishes to control the manner and place of discharging its cargo. . . Hence, the charterer bargains for the privilege of selecting the precise place of discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice.
>
> [188 F.2d at 806.]

10A.7 Although the language in Line 27 expressly refers only to safe ports, the warranty has universally been held to encompass safe berths as well as safe ports. See *The Mozart Festival*, SMA 2393 (Arb. at N.Y. 1987).

10A.8 The settled waters of the safe port warranty were disturbed by the decision of the Court of Appeals for the Fifth Circuit (which encompasses Louisiana, Mississippi and Texas) in *Orduna S.A*. v. *Zen-Noh Grain Corp*., 913 F.2d 1149, 1991 AMC 346 (5th Cir. 1990).

10A.9 In *Orduna*, the Fifth Circuit rejected the general rule and held that there is no safe port warranty by charterer. According to the court:

> . . . no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port.
>
> In conclusion, we hold that a charterparty's safe berth clause does not make a charterer the warrantor of the safety of a berth. Instead the safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth.
>
> [1991 AMC at 356.]

10A.10 We disagree with the Fifth Circuit, particularly in its emphasis on "legal or social policy." The charterer's undertaking to provide a safe port or berth is a matter of contract and has long been widely accepted in the shipping industry as a custom of the trade which is of material importance to shipowners. It is difficult to comprehend what policies are offended by the safe port warranty since, based as it is on the commercial reality that it is the charterer rather than the owner who is selecting the port or berth, in the usual case it can hardly be said to have arisen from other than arm's length bargaining.

10A.11 The warranty can be and often is modified by contract either by the inclusion of language which reduces it to a due diligence standard or by the owner's acceptance of a named port which may have the effect of waiving the warranty entirely. Moreover, courts and arbitrators have consistently held that the safe port/safe berth warranty does not relieve the master of his duty to exercise due care in navigating the ship.

10A.12 The Fifth Circuit's reliance in *Orduna* on *Atkins* v. *Fibre Disintegrating Co*., 2 Fed. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd*, 85 U.S. (18 Wall.) 272 (1873), is unfortunate. Contrary to the Fifth Circuit's reading of *Atkins*, Judge Benedict found in that case that there was a safe berth warranty, but that it was waived by the master's acceptance of the port without protest when he would have been entitled to refuse to enter the port. As to the safe port warranty, Judge Benedict wrote:

> The words "second safe port" imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than ordinary perils of the seas.
>
> [2 Fed. Cas. at 79. A further discussion of *Atkins cert. denied*, 134 S. ct. 1279 (2014), can be found below under the heading "Waiver and acceptance of named port."]

10A.13 In *In re Frescati Shipping Company, Ltd*., 718 F.3d 184 (3d Cir. 2013)(reh'g denied), the United States Court of Appeals for the Third Circuit sided with the Second Circuit and disagreed with the Fifth Circuit's decision in *Orduna*. In so holding, the Third Circuit relied in part on prior editions of *Voyage Charters*, 3rd edn, paragraph 5.68 (5.71 in the 7th edn), and *Time Charters*, 6th edn, paragraph 10.124. (now 10A.17).

10A.14 See *The Mercandian Queen*, SMA 2713 (1990). The charter was on the NYPE form. The ship discharged a cargo of railway trailers at Ilo, Peru, at a new ro/ro berth which had not previously been used by a ship her size. During discharge, the ship struck a large rock on the bottom which holed the ship's hull. The rock was not noted on any chart and prior to this occurrence was unknown to the local pilots and port authority. The panel held that the charterer was liable for the

damage by virtue of the safe berth warranty. The panel stated that it was convinced that neither charterer, nor owner, nor the local pilot were aware of the uncharted rock and that the charterer had "quite innocently designated an unsafe berth." While the panel imposed liability on the charterer because of its safe port warranty, it is readily apparent that under *Orduna* the charterer would not have been liable. The charterer was not negligent in designating the berth and, indeed, the panel specifically found that the charterer had acted "innocently" in designating what turned out to be an unsafe berth.

The particular ship

10A.15 The American cases have adopted the rule that the port must be safe for the particular ship named in the charter. See *The Zaneta*, 1970 AMC 807 (Arb. at N.Y. 1968). In *The Pyrgos*, SMA 896 (Arb. at N.Y. 1974), for example, the ship went aground at the Mantua Creek Anchorage in the Delaware River. The panel held for the owner, stating "although Mantua Creek Anchorage is a safe anchorage for smaller and lighter draft vessels, it is not safe for vessels the length and depth of the 'Pyrgos'. . . ."

Safety in approach/safety in departure

10A.16 As a general rule, it is well settled that a port or berth will be safe for purposes of the safe port clause if, during the relevant period of time, the particular chartered ship can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship. There is no "black and white" test for determining whether a given port or berth is safe for any given ship and the issue must always be resolved on a case-by-case basis. Courts or arbitrators are obliged to examine the facts of each case and, assuming a ship which is properly manned, equipped, managed and navigated, decide whether the port or berth is safe for the chartered ship. Dangers which can be avoided by good seamanship and navigation will not render a port "unsafe."

10A.17 The safe port warranty covers not only the immediate area of the port itself; it also means that adjacent areas the ship must traverse to either enter or leave the port are to be safe.

10A.18 In *The Gazelle*, 128 U.S. 474 (1888), the court found that the charterer had breached a safe port warranty because a sand bar at the mouth of the inlet made it impossible for the *Gazelle* to pass, either in ballast or with cargo. The court stated:

> By the express terms of the charterparty, the charterers were bound to order the vessel "to safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get and always lay and discharge afloat." The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. . . The charterers, having refused to order the vessel to such a port as the charterparty called for, and having insisted on ordering her to a different one, were rightly held to be in default and answerable in damages. . . [128 U.S. at 485–486.]

10A.19 In *Crisp* v. *United States & Australasia S.S. Co*., 124 F. 748 (S.D.N.Y. 1903), the court said:

> A covenant for a safe loading or discharging place implies that a port to be named by the charterer shall be one where the vessel can safely get with her whole cargo and can discharge her whole cargo without touching the ground. . .. and, of course, without being subject to obstructions, at any stage of the tide. . . [124 F. at 750]

In *Crisp*, the court found that the words "always safely lie afloat" put the risk of a safe port on the charterer, and that the charterer was liable for damages even though they were caused when the ship was under the control of a compulsory pilot.

10A.20 In *Carbon Slate Co*. v. *Ennis*, 114 F. 260 (3d Cir. 1902), the court found that the owner was entitled to deadfreight, stating:

> [T]he contract was, in legal effect, that the vessel should proceed to Bilbao, or as near as she could safely get, and when loaded get away from, in order to proceed to the port of Philadelphia . . . and the fact is that she was directed to load at a berth where a full cargo, if taken aboard, would have made it impossible for her, at any state of water or at any time, to pass out over the harbor bar. [114 F. at 261.]

10A.21 In *The Silvercove*, SMA 813A (Arb. at N.Y. 1976), the charterer was held liable for damage to the ship's rudder caused by contact with an underwater object in or immediately adjacent to the berth which prevented the ship from safely departing therefrom.

10A.22 See also *Mencke* v. *A Cargo of Java Sugar*, 187 U.S. 248 (1902), holding a berth above the Brooklyn Bridge unsafe for a ship with masts too tall to allow the ship to pass under the bridge; *The Caroline Horn*, SMA 649 (Arb. at N.Y. 1971), where the panel stated: "We hold this warranty to mean that the port and its approaches must be safe for this vessel at the particular time Charterers order her there;" *The Magdalene*, SMA 579 (Arb. at N.Y. 1957).

10A.23 The safe port warranty has been held to be quite far-reaching in geographic scope. In *The Tropical Veneer*, SMA 1172 (Arb. at N.Y. 1977), the ship suffered ice damage as she made her way down the St. Lawrence River after departing from Montreal. The panel unanimously held that the charterer was liable for the damage, and, in so doing, rejected the charterer's argument that the safe port warranty was not intended to stretch as far as 225 miles downriver from the port of Montreal. The panel stated:

> The Panel cannot accept Charterers' view that the established law and practice should be disregarded with respect to safe approach waters for entry and exit of a vessel as an integral part of the safe port warranty the Charterers granted the vessel and owners. Whether it be the Amazon or Mississippi or St. Lawrence Rivers, all are direct extensions of the ports they serve at their heads or at any intermediate point insofar as accessibility to the legal or geographical limits of their respective ports are concerned. We believe that indifference to the approach waters, if they were divorced from the port limits per se, would make a hollow mockery of the safe port warranty sort of in the vein of "it's a safe place if you can overcome the obstacles to get there or get out."

10A.24 So also in *The Ross Isle*, SMA 1340 (Arb. at N.Y. 1979), the panel held that the Mississippi River itself was within the coverage of the safe port warranty when the ship was diverted to a port on that river.

10A.25 Similarly, in *The Naiad*, SMA 1177 (Arb. at N.Y. 1977), the panel concluded that owner was entitled to recover deadfreight for cargo shut out as the result of a seasonal draft restriction at the Southwest Pass of the Mississippi River. The panel held that the safe port warranty encompassed the entrance to the river, as well as the berths along the river at which the ship loaded.

10A.26 In *The Eastern Eagle*, 1971 AMC 236 (Arb. at N.Y. 1970), the panel held that the owner was justified in refusing the charterer's orders to send the ship to Macapa, on the Amazon River. The ship had stranded there on a previous voyage under the same charter. Moreover, the panel found that no accurate charts of the area were available, and that those navigational aids which did exist were "insufficient in number and functionally inadequate. There are no buoy markers, and there is no competent pilotage service available because no one really knows the varying depths of water in the approaches to Macapa." Accordingly, the port was held to be unsafe for the ship.

10A.27 The safe port warranty does not mean, however, that "every conceivable approach be free of hazards or even that every possible approach be risk-free." *H. Schuldt* v. *Standard Fruit & Steamship Co*., 1979 AMC 2470, 2477 (S.D.N.Y. 1978). In that case, the court held that the presence of rocky shoals in shallow water near a berth did not render it unsafe so long as there was

a safe approach open to the berth. See also *Trade Banner Line Inc*. v. *Caribbean Steamship Co*., 521 F.2d 229, 1975 AMC 2515 (5th Cir. 1975), holding that a berth was not unsafe because the ship broke from her moorings after being safely berthed and went aground on nearby shoals.

Ice

10A.28 Actual or expected ice conditions may render a port or berth unsafe. *The Banja Luka*, SMA 1293 (Arb. at N.Y. 1979), holding that the berth was unsafe because ice conditions rendered it inaccessible; *The Bennington*, SMA 940 (Arb. at N.Y. 1975), holding that the port was unsafe because of ice conditions. See also *The Tropical Veneer*, discussed above. See discussion at paragraph 35A.1.

Safety in use

10A.29 The safe berth warranty is quite simply a promise that the berth will be safe for the ship. Perhaps the most important element of this warranty is the obligation of the charterer to provide a berth where there is sufficient water for the ship in loaded condition. Thus, in *The Harding*, SMA 959 (Arb. at N.Y. 1975), the charterer was held liable for damages to the ship caused by insufficient water at the loading berth. The same result was reached in *The Federal Calumet*, SMA 1667 (Arb. at N.Y. 1982), where the ship touched bottom due to insufficient water at the berth. In *Appeal of U.S. Lines Inc*., 1977 AMC 318, 338 (A.S.B.C.A. 1976), it was held that the charterer breached the warranty by directing the ship to a berth that was obviously in disrepair and against which the ship sustained damage because of the absence of vertical pilings and horizontal stringers.

10A.30 Similarly, in *The Oceanic First*, SMA 1158 (Arb. at N.Y. 1977), the arbitrators held that a berth was unsafe because of the presence of an unprotected sharp steel angle-iron concrete reinforcement bar in the northeast corner of the pier, as well as a submerged concrete platform. The panel noted that:

> Charterer's contention that the vessel would not have suffered damage had she entered the centerline of the slip, the usual and recommended procedure for vessels berthing there, misses the mark somewhat. The safe berth provision of the charter party places upon the charterer not only an obligation to provide a berth that is safe but one as well that permits safe ingress and egress. Considering the physical characteristics of the berth and the size of vessels entering it, such as the *Oceanic First*, it seems reasonable to conclude that under certain circumstances some vessels will be forced to lay up against or use the northeast edge of the pier for turning purposes. The absence of any sort of protection for the menacing aspects of this corner as well as the water level concrete platform adjacent to it constitutes hazards of significant proportion for vessels berthing there.

10A.31 In *The Westwood Anette*, SMA 4189 (SMA Arb. at N.Y. 2012) (Berg, Martowski, Sheinbaum), the panel found that dolphins and fenders adjacent to the wharf were an integral part of the berth and further found that although they were not intended to be contacted by docking ships it was reasonably foreseeable that this might occur. Consequently, any latent or hidden danger in the dolphins had to be considered in analyzing owner's safe port claim. The panel also found that the port's assisting tugs were inadequately powered which, in addition to constituting another unsafe condition in the port, also rendered even more foreseeable the possibility that a docking or undocking ship might come in contact with the dolphins.

10A.32 Where the dock is in good order and condition, and the ship is damaged as the result of making contact with the bulkhead in heavy winds, it has been held that the charterer is not liable for the loss, on the theory that the damage was caused not by an unsafe berth, but by a danger of

navigation as to which the owner undertook to bear the risk. *The Schiffbek*, 1934 AMC 713, 716 (Arb. at N.Y. 1934).

10A.33 In general, poor weather conditions will not render a port or berth unsafe for purposes of the charterer's warranty. See *Esso Standard Oil S.A.* v. *The Sabrina*, 154 F.Supp. 720, 1957 AMC 691 (D.C.Z. 1957), where the court held:

> The Court does not think that the berth was proven unsafe in violation of the terms of the contract and is of the opinion that the same inevitable accident, the violent natural storm, one of the perils of the sea, that caused the damage to the 8-inch pipe of libelant, was responsible for the damage to the ship. . . [1957 AMC at 700.]

10A.34 In *The Stadt Schleswig*, 1971 AMC 362 (Arb. at N.Y. 1970), the owner claimed the charterer was liable for hull damages sustained as the ship was in the process of undocking from her berth at the port of Grindstone after she completed discharging cargo. The owner claimed the damages were the result of the charterer's breach of the safe port warranty. During the cargo operation, winds in the range of force 6–7 had developed, and the ship's lines had broken while she was in the process of undocking. The panel held for the charterer. The ship, and many others of her size, had been to the port without incident on many occasions, and the master had also been there on several occasions. Moreover, the storm had built up over a period of hours, and there had been ample time for the master to leave the pier before it reached its full force. According to the panel:

> It is the Panel's opinion that not even the safest port in the world is necessarily completely safe all the time. Major ports can become temporarily unsafe, as a result of storms and hurricanes, tidal waves and other acts of God. This does not *per se* make it unsafe or entitle that label at any given moment. Within the meaning of this charterparty, the Panel is concerned with the safety of the port of Grindstone for a vessel of the size and general characteristics of the *Stadt Schleswig*. The record and evidence shows that countless vessels of similar size and draft as the *Stadt Schleswig*, including over 20 calls by same Owners as in this charterparty had successfully made calls at Grindstone, during all navigable periods and that the record of the port is not one which entitles the Panel to believe that the port is unsafe during this season. The temporary and occasional problem of rising wind is a foreseeable hazard requiring prudence and in extreme cases the premature sailing of the vessel to a sheltered anchorage to ride out the weather. [1971 AMC at 365–366.]

10A.35 As a general rule, normal swell or tide at a port or berth will not be considered an unsafe condition for purposes of the safe port clause. Thus, in *The Maria G.L.*, SMA 2506 (1988), arbitrators denied the owner's claim for broken mooring lines and wires caused by swell conditions at Pohang, Korea. The panel found that the swell conditions at the berth did not differ from those normally to be expected there and did not make the port unsafe. In *The Nea Tyhi*, SMA 2571 (1989), a charter warranty of a safe berth with a depth of 10.5 meters under "normal conditions" was not breached when the overall depth was reduced.

Danger

10A.36 In *The Arietta Venizelos*, 1973 AMC 1012 (Arb. at N.Y. 1972), the ship was chartered on the Texacotime form. When the charterer nominated a loading port in Libya, which, because of threats of guerilla attacks on tankers, had been placed outside Institute Warranty limits by war risk underwriters, the owner withdrew the ship. A majority of the panel found that the loading port nominated by the charterer was in a danger zone and that the owner was justified in withdrawing the ship on the basis of the charterer's safe port warranty. According to the panel:

> Under Clause 3 of this Charter Party, Charterer was under a fundamental obligation to "exercise due diligence to ensure that the vessel is only employed between and at safe ports." There can be little doubt that ordering

a ship to an unsafe port is a breach of that fundamental charter party obligation. . . it is irrelevant to consider all the alternatives available to Owner following Charterer's breach. The alternative chosen, withdrawal of the vessel, was both permissible and justified. [1973 AMC at 1021–1022.]

10A.37 See also *The Amoco Texas City*, 1979 AMC 690 (Arb. at N.Y. 1977).

Political dangers

10A.38 In *Pan Cargo Shipping Corp*. v. *United States*, 234 F. Supp. 623, 1965 AMC 2649 (S.D.N.Y. 1964), *aff'd*, 323 F.2d 525, 1967 AMC 850 (2d Cir. 1967), *cert. denied*, 389 U.S. 836 (1967), the shipowner contended that the warranty meant that the port nominated by the charterer must be politically as well as physically safe. The ship had been prevented from loading a cargo of oil at Ras Tanura as a result of the Arab boycott on ships which had called at Israeli ports. While recognizing that there was some authority for the shipowner's position, the court found that "the danger to the ship apprehended in a port which is politically 'unsafe' seems to be something like seizure or 'certain risk of confiscation.'" The court then held that, in the circumstances, the safe port warranty could not be stretched so far as to place liability for the loss of the voyage on the charterer. According to the court:

In the circumstances here "safe port" should not be given the meaning "without risk of loading interference from the Arab boycott." The parties never considered such a meaning; the Navy knew nothing about the *Memory I* voyage to Israel, and certainly was not put on notice by the entry in the Houston Custom House. The word "safe" was not part of the provisions to which the Navy agreed at the time the Charter was fixed. It was added by libelant's broker and ought not to be given such effect as to shift the risk from the owner to the charterer. Other portions of the charter. . . indicate that the word "safe" is used in the sense of physically safe. Moreover, with full knowledge of all the facts, including facts as to the Israel voyage not known to the Navy, libelant and the master accepted the nomination of Ras Tanura and proceeded there without protest. [234 F.Supp. at 638.]

10A.39 A claim that a port was politically unsafe was raised in *The Universe Explorer*, 1985 AMC 1014 (Arb. at N.Y. 1984). The owner contended that the charterer nominated a politically unsafe port when it directed the ship to load a cargo of oil in Nigeria. The ship had loaded stores off Cape Town, South Africa and was denied entry to Nigeria under a Nigerian law which prohibited contacts with South Africa in the six weeks preceding a port call. Both owner and charterer were aware of the Nigerian regulation. However, only the owner had knowledge of the call at South Africa. The panel held that because the owner alone knew of the call at South Africa, the owner bore the risk that Nigeria would refuse permission to load.

Avoidability by good navigation and seamanship

10A.40 A port or berth will not be unsafe if the dangers are avoidable by good navigation and seamanship on the part of the master. The test is whether in the exercise of reasonable care in the circumstances, a competent master would be expected to avoid the dangers present at the port or berth.

10A.41 Courts and arbitrators have generally accorded great latitude to a master's decision to refuse to enter a port or berth on the grounds that it is unsafe. In *Atkins*, above, the court emphasized the right of the master to refuse to enter a port which, in his judgment, is unsafe for the ship. In *The Regent Ranger*, SMA 1564 (1981), for example, the arbitrators ruled that the master was justified in refusing to enter a berth at St. Croix because he considered that there was insufficient water on the dock side; insufficient length to accommodate the ship; and the ship was exposed to winds and rocks. See also *The Omina*, SMA 3116 (Arb. at N.Y. 1994).

10A.42 If damage is caused by the master's negligence rather than an unsafe condition at the port or berth, however, the owner will be responsible. See, e.g., *The Cepheus*, 1990 AMC 1058 (Arb. at N.Y. 1990), holding that a grounding was the result of an error in navigation rather than an unsafe condition at the port. If an unsafe port or berth condition combines with the master's negligence to cause damage or other compensable losses, liability can be apportioned between the owner and the charterer.

10A.43 In *The Atlantic Bulker*, SMA 3938 (Arb. at N.Y. 2006), the panel found that the ship grounded because it deviated from the channel, and the master should have waited for a pilot. The panel thus ruled that the grounding could have been avoided by the exercise of good navigation and seamanship, and the port was not unsafe.

10A.44 *The Roman Bernard*, SMA 1202 (Arb. at N.Y. 1978), involved a claim by the owner for losses resulting from the grounding of the ship after she broke away from the pier during a storm. The berth in question was an open roadstead pier located on the eastern coast of Nicaragua. While the panel noted that as an open roadstead pier it was "precariously exposed to the elements of wind, sea and swell" and frequent sudden changes of weather, the majority held that it was not unsafe. Rather, as stated by the majority:

> . . . the Master of a vessel moored there bears a special burden of ensuring that his vessel is both properly secured and in a ready position to quickly depart should a sudden change of weather occur, a not uncommon event for the Puerto Isabel area. During periods of heavy squalls, the area about the Puerto Isabel pier is quickly and substantially affected because the relatively low depth of water is aggravated by the wind, thereby creating swells which cause vessels alongside to surge and often break lines. When such conditions arise it becomes the master's responsibility to immediately depart from the berth and seek a safe haven for his vessel in deep and open waters where he may employ his engines to maneuver and ride out the storm.

10A.45 The panel majority found, however, that because he had not properly placed his starboard anchor, the master had negligently failed to secure the ship at the pier in a manner which ensured his ability to leave quickly. Moreover, when the storm arose, rather than immediately depart from the berth, the master decided to attempt to ride it out by remaining alongside the dock. The master's faulty decision in remaining at the pier, and his failure to properly locate the anchor, were held to have caused the loss, and the charterer was excused from liability.

10A.46 The owner also was denied any recovery in *The Pyrgos*, SMA 896 (Arb. at N.Y. 1974), for damages sustained as the result of a grounding at Pointe-a-Pierre. The panel held that the berth was safe, and the grounding was the result of the master's negligence. According to the panel:

> It is the opinion of this Panel that the Master could have done more to satisfy himself that the PYRGOS could safely load her cargo and then unberth at or near low tide. He was acquainted with the port, and the Texaco charts which were shown him indicated limited maneuvering area and some dangerous shoaling west of the berth. He could have taken soundings for himself. He need not have undocked at about the time of low water; this was a matter in which he could exercise his own discretion and for which he had sole authority.

10A.47 See also *Cook Inlet* v. *Amer. T. & P.*, 1976 AMC 160 (S.D.N.Y. 1976), where the court held that the terminal was safe, and that the damage to the ship was the result of negligence on the part of the master and the pilot during the ship's departure from the berth.

10A.48 Similarly, in *The Itel Taurus*, SMA 1220 (Arb. at N.Y. 1977), the owner was denied a recovery for damage sustained by the grounding of the ship at the berth. The panel found that the grounding was caused not by an unsafe condition, but by the master's disregard of principles of good seamanship when he chose to berth the ship with a draft in excess of depth representations received from the authorities. See also *The Caribbean Nostalgia*, SMA 1788 (Arb. at N.Y. 1983).

10A.49 See *The Adamastos*, SMA 3416 (Arb. at N.Y. 1998), where the panel majority held that the ship's grounding while attempting to leave port was due to the master's improper ship handling rather than the lack of safety of the particular port because the ship was not alert to an impending

storm, its crew and engines were not in a proper state of readiness, and its ballast condition made it impossible for the ship to extricate itself from the anchorage. See also *The Maryland Trader*, SMA 849 (1974), holding that a collision with a wharf resulted from excessive speed and the master's decision to berth without tug assistance; *The Michael C. Lemos*, SMA 1906 (1983), where the majority held that a grounding outside the channel was due to pilot error attributable to the owner pursuant to a pilotage contract.

10A.50 In *The Medita*, SMA 2347 (Arb. at N.Y. 1986), the panel denied the owner's claim for hull damage which occurred when the ship hit the pier during heavy swells while discharging a cargo of fertilizer. The panel found that the pier in question was a safe berth and whatever physical damage the ship sustained was attributable to the master's failure to take reasonable steps to protect the ship by removing it to the anchorage. Similarly, in *The Chesapeake Bay*, SMA 3677 (Arb. at N.Y. 2001), the panel majority found that the port in question was safe and the proximate cause of the ship's grounding was imprudent navigation by the master. The master's failure to ascertain whether a buoy was missing, his planning a change of course based solely on the position of a floating aid to navigation and his failure to have proper lookouts and use his GPS constituted unsound navigation practices.

10A.51 A master's refusal to load for fear of grounding must be reasonable. In *The Konkar Victory*, SMA 1798 (Arb. at N.Y. 1983), the panel held that the master had acted unreasonably in refusing to load despite assurances by the harbor master, an uninterested and unbiased party, that the berth was safe. The panel noted that the master should have called in his own independent surveyor to help support his contentions and concerns.

Acceptance of named port or berth

10A.52 Notwithstanding the "safe port" warranty, if the owner or master accepts the nomination of a loading or discharge port with full knowledge of local conditions which make it unsafe for that particular voyage, the charterer may be excused from any liability for damages for which he would otherwise be liable. *Tweedie Trading Co*. v. *New York & Boston Dyewood Co*., 127 F.278 (2d Cir.), *cert*. *denied*, 193 U.S. 669 (1903).

10A.53 For example, the master's conduct in entering a port he considers unsafe without raising a protest may result in a waiver of the safe port warranty. Perhaps the classic case on this point is *Atkins* v. *Fibre Disintegrating Co*., Fed. Cas. 78 (E.D.N.Y. 1868), *aff'd* 854.5. (18 Wall.) 272 (1873). The charterer had "the privilege of sending the vessel to a second safe port. . . " and this option was exercised. The port chosen by the charterer was Port Morant. The court found that Port Morant was not safe because coral reefs extended nearly across what was a narrow entrance to the port and a ship the size of the *Elizabeth Hamilton* could make it through only if there was a strong, steady breeze. As events transpired, the ship safely entered Port Morant, but struck the reefs on departing, suffering damage to the hull as a result. Because the port was unsafe, Judge Benedict wrote that the owner had been under no obligation to go there and "the master would have been justified in refusing to accept the designation of such a port within the privilege given in the charter." 2 Fed. Cas. at 79.

10A.54 The critical fact, however, was that the master did not protest the safety of the port. According to the court, by his conduct the master accepted Port Morant as safe and waived his right to rely upon the charterer's undertaking to provide a safe port. As stated by Judge Benedict:

> If, then, the port named was deemed an unsafe port for this vessel, and so not within the privilege given by the charter, it was the duty of the master, as the sole representative of the owners, to have made known his objections at the time. Not having done so, he must be deemed to have waived the right to object, and, the condition having been waived, no action can now be maintained for the breach of it. [2 Fed. Cas. at 79.]

10A.55 See also *Bunge Corp*. v. *The Furness Bridge*, 588 F.2d 790, 1977 AMC 2109 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Delta Commodities Inc*. v. *The Jo Oak*, 1990 AMC 820, 826 (E.D. La. 1989).

10A.56 In *The Zoe Christina*, SMA 2777 (Arb. at N.Y. 1991), the charter limited the charterer's warranty to provide a safe port/berth to losses caused by its fault or neglect. Further, the charter provided that charterer was not liable for losses "which could have been avoided by the exercise of reasonable care on the part of the Master or Owner." The panel dismissed the owner's claim for damages based upon the lack of evidence that the ship stranded when and where the owner alleged that it did. The panel found, however, that even if the ship did strand at such place, the charterer would not be liable for the grounding pursuant to the charter because (*a*) its instructions did not amount to "fault or neglect" and (*b*) both pilot and master were aware of the precise draft and specifics of the port, and proceeded there without reservation or objection.

10A.57 In *The Eva Borden*, SMA 219 (Arb. at N.Y.), the panel held that the owner's claim that the anchorage was unsafe was unfounded "if only for the reason of the master's complete acceptance of charterers' berthing designation." See also *Pan Cargo Shipping Corp*. v. *United States*, above; *The Breynton*, 1934 AMC 1473 (Arb. at N.Y. 1933).

10A.58 Where the charter is for a trip to a named port, the owner will be deemed to have accepted the port as being safe. See *The Naiad*, 1978 AMC 2049, 2056 (Arb. at N.Y. 1977); *The Challenger*, 1978 AMC 2037, 2044–2045 (Arb. at N.Y. 1978).

10A.59 In *The Bahama Spirit*, SMA 3849 (Arb. at N.Y. 2004), the charter named the port that was alleged to be unsafe. The panel concluded there was no safe port warranty at all, but even if there was, the warranty had not been breached because inclusion of the name of the port in the charter gave the owner constructive knowledge of existing port conditions.

Intervening negligence

10A.60 The charterer may be relieved from any liability for its breach of the safe port warranty if it can demonstrate that the casualty was caused by intervening negligence on the part of the master. *American President Lines Ltd*. v. *United States*, 208 F. Supp. 573, 1968 AMC 830 (N.D. Cal. 1961).

10A.61 In *Venore Transp. Co*. v. *Oswego Shipping Corp*., 498 F.2d 469, 1974 AMC 827 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974), the shipowner was awarded damages resulting from a collision with a wharf as the ship attempted to leave in a storm for an anchorage at sea. The charterer sought to avoid liability by contending that the collision was the result of intervening negligence on the part of the master, who had inspected the berth before docking and had been given assurances by the charterer's local agents that it would be safe to berth even though one pontoon was missing from the pier. The pontoon was designed to prevent the ship from striking against the concrete pier. The court held that the charterer was liable for breach of its safe berth warranty, and that "being unfamiliar with conditions in the harbor, the master was entitled to rely on [the] assurances" he had received from the local agents.

10A.62 In *The Sabrina*, 1957 AMC 691, 695 (D.C.Z. 1957), however, the court held that the grounding was caused by the master's failure to properly anchor and secure the ship at the mooring. Similarly, in *Trade & Transport Inc*. v. *Caribbean S.S. Co*., 384 F. Supp. 782, 1975 AMC 1065 (S.D. Tex. 1974), where the ship was damaged when she broke her moorings during a hurricane, the owner was denied any recovery against the voyage charterer. The court held that the cause of the damage was the master's negligent decision, based on the wharf owner's suggestion, to shift to another berth which was not adequate to protect the ship. See also *Nassau Sand & Gravel Co*. v. *Red Star Towing and Transp. Co*., 62 F.2d 356 (2d Cir. 1932).

10A.63 In *The Star B*, SMA 3813 (Arb. at. N.Y. 2003), the panel likewise concluded that the charterer had nominated an unsafe port. A divided panel concluded on the facts, however, that the master had been "so egregiously negligent and unseamanlike," that his negligence was primary and precluded any apportionment with the charterer. The panel majority found that the master had been negligent in not having charts on board and in disregarding the warnings of the local agent. The panel also found it significant that the master had moved the ship after its initial grounding, in spite of being advised not to do so by the average adjuster, and had changed the ship's log books, which impugned his credibility.

10A.64 In *The Zaneta*, 1970 AMC 807 (Arb. at N.Y. 1970), the shipowner was denied any recovery where, despite a grounding which should have put the master on notice that the berth was unsafe, he continued loading and the ship grounded a second time.

10A.65 The cases cited above certainly do not mean that the master or pilot can be held to a standard of perfection. Rather, there must be a finding of intervening negligence to impose liability on the owner. As the panel observed in *The Oceanic First*, SMA 1158 (Arb. at N.Y. 1977), in holding the charterer liable for damages sustained by the ship when she made contact with an unfendered angle bar in the corner of the berth:

> We do not consider that faulty navigation contributed materially to the casualty although it would be difficult to deny that a perfect or faultless berthing attempt would have averted the contact. Such a standard, without some margin, is not, however, required of masters or docking pilots.

10A.66 In *The Solomon*, SMA 3107 (Arb. at N.Y. 1990), the panel held that charterer breached the safe berth warranty in a voyage charter, finding that actions taken by the master in an effort to comply with charterer's instructions to proceed to an unsafe berth were not unreasonable, and did not constitute an intervening act of negligence.

Contributory negligence

10A.67 If both the master and the charterer are at fault, damages may be divided proportionally. See *United States* v. *Reliable Transfer Co. Inc*., 421 U.S. 397 (1975); *Cities Service Transp. Co*. v. *Gulf Refining Co*., 79 F.2d 521, 1935 AMC 1513 (2d Cir. 1935); *Paragon Oil Co*. v. *Republic Tankers S.A*., 310 F.2d 169, 1963 AMC 158 (2d Cir. 1962); *Ore Carriers of Liberia Inc*. v. *Navigen Corp*., 332 F.Supp. 72, 1971 AMC 505 (S.D.N.Y. 1969), *aff'd*, 435 F.2d 549, 1971 AMC 513 (2d Cir. 1970).

10A.68 In *The Oceanic First*, SMA 1054 (Arb. at N.Y. 1976), the panel held that damages sustained by the ship during her ninth call at Niigata, Japan, were the joint responsibility of owner and charterer, and divided damages on a 50/50 basis. Because of the prior calls at the port, both owner and charterer knew or should have known the conditions which could reasonably be expected at the port, and chose to disregard a protest from the master about continued calls. According to the panel:

> Both were guilty of taking a calculated risk which failed. Owners' right to rely upon the safe port, safe berth warranties of the Contract does not extend to their ignoring obvious unsafe and dangerous conditions that in all probability could exist. Likewise, the giving of such a warranty is an assurance that these obvious unsafe and dangerous conditions don't and won't exist. The damages which were sustained were brought about by a mutual lack of appreciation to the dangers that a call at this time of the year at Niigata would produce.

10A.69 The same result was reached in *Appeal of U.S. Lines Inc*., 1977 AMC 318, 343 (A.S.B.C.A. 1976), where the ship docked despite the berth's obviously deteriorated condition, and with full knowledge that heavy winds and seas could be expected.

10A.70 In *Board of Commissioners* v. *The Space King*, 1978 AMC 856 (E.D. La. 1978), the ship grounded at a berth where she was loading cargo because of falling river conditions and damaged

the adjacent dock in being freed from the river bottom. The court held that the owner was 70 per cent at fault since it was the responsibility of the master to prevent loading of cargo in a manner which would result in putting the ship aground. In addition, the master should have been aware of the danger to the ship posed by the changing river conditions. The charterer was held 30 per cent to blame because its agents failed to obtain available information concerning river conditions.

10A.71 In *The Westwood Anette*, SMA 4189 (SMA Arb. at N.Y. 2012) (Berg, Martowski, Sheinbaum), the panel observed as follows in finding each party 50 per cent at fault:

> In this case, each side strenuously argued that the faults of the other were the sole proximate causes of the holing of the vessel and/or were intervening or superseding acts of negligence or unsafe conditions that justified a finding of sole fault or exoneration. The Majority disagrees with any such a strained, narrow and unbalanced view of the flow, dynamics and contributing parts of what took place at Squamish on August 4, 2006, and finds Westwood's and Gearbulk's faults were all proximate causes of the casualty.

Effect of safe port warranty on third parties

10A.72 The safe port warranty does not create a duty on the part of the charterer to third parties who are strangers to the charter. See *Heretick* v. *Amberley Shipping Corp*., 277 F. Supp. 2d 575, 579, 2002 AMC 2516 (E.D.Va. 2002) (line handler's personal injury claim).

Owners may be a third party beneficiary of the safe port warranty in a sub-charter

10A.73 The court in *In re Frescati Shipping Company*, *Ltd*., 718 F.3d 184 (3d Cir. 2013)(*cert. denied*, 134 s. ct. 1279 (2014), held the shipowner was a third party beneficiary of the safe port warranty given by a sub-charterer to the vesssel's time charterer. The sub-charter was on the Asbatankvoy form. Although the time charter required only that charterer exercise "due diligence to ensure that the vessel is only employed between and at safe places. . .," the sub-voyage charter contained safe port and safe berth warranties. The Third Circuit held the ship and shipowner were intended beneficiaries of the sub-charter warranties. In so holding the court relied on *Paragon Oil Co*. v. *Republic Tankers*, *S.A*., 310 F.2d 169, 171 (2d Cir. 1962). In holding Frescati was a third party beneficiary of the Athos I sub-charter, the Third Circuit noted:

> Moreover, it would work an odd windfall if Star Tankers were allowed to collect on CARCO's safe berth warranty but not be required to pass on those remedial dollars to the ship's ultimate owner. That illogical result could occur where the owner (Frescati) received no safe berth warranty from the time charterer (Star Tankers), or where—as in the case before us—Frescati received a less comprehensive warranty from Star Tankers than Star Tankers received from the voyage charterer (CARCO). This would theoretically allow Star Tankers to collect for damages to the ship that were actually paid by Frescati. While we are mindful of the parties' ability to contract differently, there is no indication that Star Tankers bargained for the potential of such an unearned windfall—profiting from the mishaps of the vessels within its tanker pool when it did not pay for the repair of those mishaps. Instead, requiring warranties from voyage charterers like CARCO is a way to insure against claims asserted by vessel owners. *Per* this path, the promise made to protect a vessel flows through the intermediary party(ies) to the ultimate party who bore the pain of an unsafe port, here the vessel's owner.

CHAPTER 11

Maintenance Clause

"36. 1. That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the
37. insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her class and keep
38. the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service."

11.1 Clause 1 of the New York Produce form sets out the owners' principal obligations with respect to the running and upkeep of the ship during the charter period. Clause 6 of the NYPE 1993 form contains the same obligations, though it also adds an express obligation on the owners to maintain "a full complement of officers and crew": see Clause 6, Lines 78 to 82. Clause 3 of the Baltime form contains substantially the same obligations. Where, as is common, the charter incorporates the Hague or Hague-Visby Rules, those rules will also impose on the owners a duty to exercise due diligence to make the ship seaworthy before and at the beginning of each voyage performed under the charter: see paragraphs 11.15 and 34.13, below.

Wages and crew costs

11.2 "Wages" in this context means the remuneration to which the crew is lawfully entitled for its services. It was so held in *The Manhattan Prince* [1985] 1 Lloyd's Rep. 140, by Leggatt, J., who rejected an argument by the charterers, on a similar provision in Clause 5 of the Shelltime 3 form, that the owners were in breach of this provision by failing to pay the higher rates which the International Transport Workers Federation (I.T.F.) sought to impose on the owners by boycott.

Insurance of the ship

11.3 The provision in Lines 36 and 37 of the New York Produce form that the owners are to pay for the insurance of the ship is reinforced by Clause 26 which places on the owners the responsibility for insurance "same as when trading for their own account". These provisions require the owners to insure against war risks as well as against hull and machinery risks. The subject of insurance is discussed generally in paragraphs 35.11 *et seq*., below.

11.4 For comments on the effect of additional clauses providing for reimbursement of certain insurance premiums to the owners by the charterers, see paragraphs 5.33 to 5.39.

Maintenance

11.5 Under Clause 1 of the New York Produce form, the owners have an obligation to maintain the ship which continues throughout the charter period. It complements the owners' undertakings in Lines 5 and 22 as to the good order and condition of the ship at the start of the charter (as to which, see further paragraphs 3.40 *et seq*. and chapter 8).

11.6 Despite the categorical language of Lines 37 and 38, which requires the owners to "maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service", the duty that these words impose is not an absolute duty. It is a duty to exercise reasonable diligence. Consequently, the owners are not in breach of their obligation under Clause 1 of the New York Produce form merely because a breakdown occurs or the ship becomes unseaworthy. In *Tynedale* v. *Anglo-Soviet Shipping* (1936) 54 Ll.L.Rep. 341 (C.A.), at page 344, Lord Roche said that such a maintenance obligation does "not constitute an absolute engagement or warranty that the shipowners will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her services". However, some other types of maintenance clause are more strict: see paragraph 11.10, below.

11.7 The owners' obligation to maintain the ship has two aspects: (*a*) an obligation to keep up a prudent programme of inspections and surveys, replacements and renewals (preventive maintenance); and (*b*) in the event that the ship, its machinery or equipment becomes inefficient during the charter period, an obligation to take reasonable steps within a reasonable time to effect repairs (remedial maintenance). In relation to the latter, Greer, J., said in *Snia* v. *Suzuki* (1924) 17 Ll.L.Rep. 78, at page 88, that the maintenance obligation "does not mean that [the ship] will be in [a fully efficient] state during every minute of the service, it does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery [the owners] will take within a reasonable time reasonable steps to put her into that condition".

11.8 The question of what is reasonable maintenance is not to be judged by reference to the cost of the work required or by asking whether the cost of repair is proportionate to the nature of the defect. Cooke, J., held in *The Elli and The Frixos* [2008] 1 Lloyd's Rep. 262, at [59], "once the owners become aware of a deficiency, or more accurately, once they should have become aware of a deficiency, the duty to exercise reasonable care and skill to remedy the position arises". This requires that "Reasonable steps must be taken within a reasonable time, using reasonable care and skill". In so doing, although "[t]here may be some latitude about when, where and how the work is done, there cannot be a financial limit to the obligation, unless issues of frustration arise". No question of proportionality in terms of financial expenditure arises. (The facts of *The Elli and The Frixos* are set out at paragraph 11.16, below.)

11.9 On the other hand, the question whether the owners have exercised reasonable diligence in maintaining the ship must depend to some extent on whether the charterers' use of the ship has allowed the owners a reasonable opportunity to carry out maintenance: see for example Lond. Arb. 24/91 (LMLN 315).

Absolute maintenance clauses

11.10 Although the maintenance clause in the New York Produce form imposes only an obligation to exercise reasonable diligence to maintain the ship, other forms of maintenance clause may be so worded that the obligation is absolute, subject to any applicable exceptions. For example, in *Adamastos Shipping* v. *Anglo-Saxon Petroleum* (*The Saxon Star*) [1957] 1 Lloyd's Rep. 271 (C.A.), it was held by the Court of Appeal that an absolute obligation was created by a clause reading, "being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted". This maintenance provision had been included as part of the initial warranty of seaworthiness; it also contained its own exception of perils of the sea, which would not have been necessary if it was intended to impose an obligation that was less than absolute. As Parker, L.J., said at page 280: "The nature of the obligation to maintain must depend on the exact words used."

11.11 *Adamastos Shipping* v. *Anglo-Saxon Petroleum* (*The Saxon Star*), above was dealt with

by the House of Lords on other grounds at [1958] 1 Lloyd's Rep. 73 (H.L.). Its facts are set out at paragraph 34.5, below.

An intermediate term, not a condition

11.12 The owners' obligation under this provision, like the initial undertaking of seaworthiness, is an intermediate obligation, not a condition. So the charterers cannot treat the charter as discharged merely because the owners have not complied in some respect: see the judgment of Salmon, J., in *The Hongkong Fir* [1961] 1 Lloyd's Rep. 159, at page 173, approved by the Court of Appeal at [1961] 2 Lloyd's Rep. 478. For the facts of this case, see paragraph 8.44.

11.13 The charterers can terminate however if they can show that the breach was so serious as to deprive them of substantially the whole benefit of the contract – for example, if the owners' failure to remedy deficiencies in the engines were to result in a delay that would frustrate the contract: see the judgment of Sellers, L.J., in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.), at page 489. In the same case at first instance, [1961] 1 Lloyd's Rep. 159, Salmon, J., commented on the decision in *Snia* v. *Suzuki* (1924) 18 Ll.L.Rep. 333, summarised at paragraph 8.45 above, in which the charterers had been held entitled to terminate a charter after a defect was discovered in the ship's propeller. He said, at page 174: "The facts of that case were exceptional. The charterers, after the failure of repeated efforts of the owners to make the vessel seaworthy, had good reason to believe that the shipowners would never be able to do so."

11.14 Where the owners refuse to remedy a defect in the ship, that refusal might amount to a renunciation of the contract. That is, it might evince an intention no longer to be bound by it. But for there to be a renunciation, the owners' conduct must be unequivocal and the breach must be sufficiently serious that, left unremedied, it would ultimately go to the root of the contract.

The *Hermosa* was chartered on the New York Produce form for a period of two years with options to extend the period for a further four months in certain circumstances. She was sub-chartered by the head charterers on the same form for a similar period. Following delivery in December 1974 there was serious damage to the cargo carried on her first voyage, as a result of seawater ingress. Surveys at the discharge port revealed that the hatch covers were in a poorly maintained condition. Because of the repairs which were then carried out, and which took from mid-January to the end of March 1975, the sub-charterers lost their next employment for the ship. On the subsequent ballast voyage in April the ship was in collision and had to put into Curaçao for further repairs. Since the sub-charterers could obtain no satisfactory reassurances as to the time the further repairs would take to complete, or as to their efficacy, they obtained a court order to survey the ship on 9 August 1975. This survey revealed that the deficiencies in the ship's hatch covers remained unrepaired and that the ship was in bad condition in other respects. Having received no firm assurances from the head charterers (who were without information from the owners) that these defects were being satisfactorily dealt with, the sub-charterers purported to terminate the sub-charter on 29 August 1975. Unknown to the sub-charterers the owners had arranged for the repair of these defects prior to 29 August and the repairs were properly completed by 22 October.

It was held by Mustill, J., and the Court of Appeal that:

(1) the sub-charterers were not justified in treating the charter as discharged by reason of the ship's unseaworthiness because the remaining defects were capable of being put right within a relatively short time and thereafter the sub-charter would still have had 16 to 20 months to run;
(2) there was no repudiation of the charter by the head charterers, because their conduct was not such as to lead a reasonable person to conclude that they did not intend to fulfil their part of the contract. The sub-charterers were justifiably suspicious that the hatch covers might not be properly repaired, but that was not enough. Their action was premature.

The Hermosa [1980] 1 Lloyd's Rep. 638 and [1982] 1 Lloyd's Rep. 570 (C.A.).

The effect of a Clause Paramount

11.15 Where the charter is made on the New York Produce form, it will, unless the form is amended, include the Clause Paramount in Clause 24. In such a case, the Clause Paramount supplements the owners' undertaking as to the maintenance of the ship during the charter period, imposing an additional requirement that the owners exercise due diligence to make the ship seaworthy, before and at the beginning of each voyage performed under the charter, whether laden or in ballast. A discussion of this duty is contained in paragraph 34.13.

Particular maintenance issues

Maintaining 'legal fitness'

11.16 As discussed in paragraphs 8.48 to 8.53 above, the owners' obligation to ensure that the ship is fit for the service when she is delivered does not relate only to her physical condition. The owners must also ensure that the ship is 'legally fit' for the service. That is, she must be in possession of any documents, certificates or legal permissions that she needs in order to be able to perform the services that the owners are required to provide. What then is the extent of the owners' obligation to *maintain* the 'legal fitness' of the ship? Under Clause 1 of the New York Produce form, the owners are obliged to exercise due diligence to maintain the ship's class and to keep her "in a thoroughly efficient state in hull, machinery and equipment for and during the service". It is thought that, in this context, "efficient" probably means both physically and legally efficient. If that is right, then it is assumed that the owners must exercise due diligence to ensure that the ship has such documents and permissions as she needs at any particular time in order to be efficient for the service. However, difficult questions may arise if there is a change in the law or a change of policy by some relevant certificating body. In that event, in order to be legally efficient to perform the charter service, the ship may need some physical modification. In such a case, are the owners required to modify the ship? This issue was considered at first instance and in the Court of Appeal in *The Elli and The Frixos*, below. In that case, the charters in question required the owners to maintain the *fitness* of the ships for the service, rather than their *efficiency*. At first instance, Cooke, J., held that in order to maintain that fitness, the owners were required to make any physical modifications necessary to ensure that the ships continued to be legally fit for the service. The Court of Appeal, on the other hand, declined to decide whether that conclusion was correct.

Two tankers, the *Elli* and the *Frixos*, were time chartered in 2003 and 2004 on the Shelltime 4 form for a period of about three and a half and two years respectively, for the carriage of "all lawful merchandise crude and/or dirty petroleum products, including fuel oil". The maintenance clause of the charter required the owners to 'exercise due diligence so to maintain or restore' the ships so that they continued to be (i) 'in every way fit for the service' and (ii) 'in every way fit to carry. . . dirty petroleum products'. Fuel oil is a dirty petroleum product. Separately, by two further terms of the charters, the owners also undertook that (i) the ships would at all times fully comply with all legal requirements, including the IMO Convention on marine pollution, MARPOL and (ii) that they would have on board all certificates and documents required from time to time to enable them to perform the charter service without delays.

In 2005, while the charters were still being performed, new MARPOL regulations came into force. These regulations made it unlawful for any ship to carry fuel oil unless it was either double-hulled or double-sided. A double-sided ship is one which has a layer of tanks which are not used for the carriage of oil between the ship's outer hull and its cargo spaces. The *Elli* and the *Frixos* were partly, but not entirely, double-sided. In order to be made double-sided, each ship required modifications which would have cost US$500,000 or more. The question arose whether the owners were obliged to modify the ships so as to make them double-sided.

At first instance, Cooke, J., held as follows, at [57] – [58]. The owners had undertaken that, at delivery, the ships would be in a fit condition to carry fuel oil and their maintenance obligation was to exercise due diligence to keep them in that condition. If subsequent regulatory changes made the ships legally unfit to

carry fuel oil, it was the owners' duty to exercise due diligence to make them once again legally fit to carry fuel oil. He commented that, "the obligation to 'maintain' or 'restore' is one which relates to the fitness of the vessel and not to its specific physical structure". Accordingly the owners were obliged to make any necessary physical modifications that MARPOL required.

In the Court of Appeal, Cooke, J.'s decision was upheld, but, it seems, on narrower grounds. Longmore, L.J., with whom the other members of the court agreed, held that the owners' promises (a) that at all times the ships would comply with all legal requirements, including MARPOL, and (b) would carry all documents required from time to time, were sufficient to impose on them an obligation to modify the ships to make them MARPOL-compliant. However, he declined to decide whether the maintenance clause had the same effect. (At [21], he seems to suggest a fine distinction between cases in which the owners have promised merely that the ship will be maintained 'fit for the service' – in which case, the owners might not be obliged to modify the ship to ensure that she continued to be legally fit to carry all contractual cargoes – and cases in which the owners have specifically promised that the ship will be maintained in a fit condition to carry a particular kind of cargo – in which case, the owners would be obliged to modify the ship to ensure that she retained that fitness.)

The Elli and The Frixos [2008] 1 Lloyd's Rep. 262, [2008] 2 Lloyd's Rep. 119 (C.A.).

11.17 As noted above, the New York Produce form differs from the Shelltime form in that it requires the owners to maintain the *efficiency* of the ship for the service, rather than her *fitness*. It is not thought, however, that this makes any difference to the substance of the owners' obligations. The Baltime form uses another slightly different wording, requiring the owners only to maintain the ship "in a thoroughly efficient state in hull and machinery during service", which omits the requirement that she be efficient *for* the service. Again, it is thought unlikely that this affects the substance of the obligation.

Hold and tank cleaning

11.18 A ship may require cleaning between cargoes. Often charters contain additional clauses which deal expressly with responsibility for such cleaning. In the absence of such a clause, the owners – and their crew – are responsible for exercising due diligence to clean the ship, which means that they must clean her with reasonable care, skill and speed. That responsibility arises under three separate provisions of the charter. It arises under the maintenance clause, as part of the owners' obligation to keep the ship in a condition fit for the charter service: see Rix, J.'s comments in *The Liepaya* [1999] 1 Lloyd's Rep. 649, at page 668. It is also implicit in the owners' obligation to ensure that the master prosecutes his voyages with the utmost despatch and renders all customary assistance with the ship's crew: see the comments of Evans, J., in *The Aditya Vaibhav* [1993] 1 Lloyd's Rep. 63, at page 65. It may also arise as part of an implied term in the charter that the ship's master, officers and crew should perform their services with due diligence: see *The Liepaya*, above, *per* Rix, J., at page 668. Unless otherwise agreed, the owners must also pay for the expenses of cleaning.

11.19 Cleaning and maintenance of the cargo spaces can usually be carried out by the crew using the ship's own cleaning equipment. However, that is not always the case. It is sometimes necessary to engage outside contractors. What the crew can reasonably be expected to achieve unaided is a question of fact; it must depend on the circumstances of the case. However, in *The Bela Krajina* [1975] 1 Lloyd's Rep. 139, the court considered an arbitration award made by Mr Cedric Barclay as umpire, which contains some useful guidance: "The removal of soft non-adhering rust is the duty of the crew, and can be performed, albeit with difficulty in ships of the size of the *Bela Krajina*, always given time and calm weather. . . The removal of hard adhering rust is a major operation which cannot be done by the crew during the course of a ballast voyage. It necessitates the erection of staging, and mechanical de-rusting equipment. . . It cannot be done efficiently and completely by the crew on a vessel of the size of the *Bela*

Krajina. . . Cleaning of holds does not include chipping steel. It does include removal of large loose rust patches in accessible locations. Customary assistance does not extend to scaling operations requiring the use of sophisticated tools like pneumatic chipping hammers, high pressure water jets or sandblasting equipment."

11.20 In some cases extraordinary cleaning may be made necessary by the charterers' choice(s) of cargo(es) carried. If so, it is suggested that, unless there is agreement to the contrary, the owners' reasonable costs of an extraordinary cleaning operation should be recoverable from the charterers under the implied indemnity discussed in chapter 19, below.

Bottom fouling

11.21 Where a ship is used for trading in warm waters, it is very likely to be affected by bottom fouling or marine growth. The obligation to maintain the ship in an efficient condition for the charter service requires the owners to exercise reasonable diligence to ensure that such growth does not materially impair the performance of the ship. This may require the owners to arrange for work to be carried out on the hull whilst the ship is in the water; it will also require the ship to be dry-docked from time to time. The expenses that owners incur in dealing with marine growth are normally regarded as ordinary expenses of trading the ship under a time charter. For that reason, the owners will not usually be entitled to recover such costs under the owners' implied indemnity: see *The Kitsa* [2005] 1 Lloyd's Rep. 432, *per* Aikens, J., at page 439. On the subject of the owners' implied indemnity, see chapter 19. On the subject of drydocking, see chapter 33. On the subject of bottom fouling and off-hire, see paragraph 25.79.

Damages

11.22 In case of breach of the maintenance obligation, the charterers will be entitled to damages, awarded on ordinary principles (see the Glossary, below, at G.10–G.11). One potential consequence of such a breach is delay. Where delay so caused resulted in the loss of a profitable sub-fixture concluded by the charterers, Hamblen, J., in *The Sylvia* [2010] 2 Lloyd's Rep. 81, upheld an award of damages in respect of the resulting loss of profit. The arbitrators had found that such loss was within the reasonable contemplation of the owners when entering into the time charter and nothing in *The Achilleas* (above, paragraphs 4.58 to 4.63) prevented damages from being awarded on that basis.

U.S. Law

11A.1 The maintenance clause reinforces the express warranty of seaworthiness provided in the preamble, and imposes on the owner the duty of maintaining the ship in a seaworthy condition throughout the charter term. The warranty is satisfied only if the ship is seaworthy at the outset of each voyage performed under the charter, or, if the charter so provides, the owner has exercised due diligence to make her seaworthy before each voyage. *Luckenbach* v. *McCahan Sugar Co*., 248 U.S. 139 (1918). In that case, the Supreme Court explained the warranty as follows:

> It is also urged that, as between the owners and the Insular Line, the original warranty of seaworthiness was exhausted upon delivery of the ship to the charterers and that the maintenance clause relied upon does not import a warranty of seaworthiness at the commencement of each voyage under a time charter, but merely an obligation to pay the expense of keeping her hull and machinery in repair throughout the service. Neither the language of the clause nor the character of time charters afford support for this contention. The charter of the ship states clearly that the ship "being, on her delivery, tight, staunch, [and] strong," the owners will "maintain her in a thoroughly efficient state in hull and machinery for and during the service,"—*not pay the expense* of maintaining her. This duty to maintain the ship in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage. [248 U.S. at 149–150.]

11A.2 See also *The Fort Gaines*, 21 F.2d 865, 1927 AMC 1778 (D. Md. 1927); *Strong* v. *United States*, 154 U.S. 632 (1878); *Mondella* v. *The Elie V*., 223 F. Supp. 390 (S.D.N.Y. 1963); *The Captain John*, 1973 AMC 2005 (Arb. at N.Y. 1973).

11A.3 While in respect of cargo there is thus imposed on the shipowner a non-delegable duty of due diligence, the maintenance clause will not ordinarily be interpreted as imposing a similar duty in so far as non-cargo matters are concerned. Thus, in *The Bjorneford*, 271 F. 682, 683 (2d Cir. 1921), the ship was in dry dock and a crack was discovered in the propeller. The repair yard negligently damaged the spare propeller while it was being installed, and a new one had to be cast, causing a delay of two weeks. The charterer's suit to recover loss of earnings for that period was dismissed on the ground that the owner was not in breach of the charter because of the repair yard's negligence. In fulfilment of its duties under the charter, all the owner was "required to do was to exercise reasonable and ordinary care to restore the ship to a thoroughly efficient state for her service." According to the court, by engaging a reputable and fully equipped repair yard, the owner complied with this obligation.

11A.4 In *The Argo Leader*, SMA 2065 (Arb. at N.Y. 1985), during the fourth year of a five-year time charter, the ship suffered engine damage which required the ship to be placed off-hire. Based upon surveyors' reports, charterer concluded that the owner could not or would not restore the ship to a seaworthy condition and cancelled the charter while the ship was still undergoing repairs. The panel held that the cancellation was premature and improper. The panel stated that the owner was entitled to an opportunity to comply with the seaworthiness and readiness requirements and that the charterer was obligated to wait until the owner gave notice of readiness before carrying out surveys to confirm the ship's condition.

11A.5 A ship is not seaworthy simply by virtue of the fact that she is in class, and the owner will not be considered to have exercised due diligence merely by obtaining certificates of seaworthiness from a classification society. See *Ionian S.S. Co*. v. *United Distillers of America Inc*., 236 F.2d 78 (5th Cir. 1956); *Petition of Southern Transp. Co*., 211 F. Supp. 940 (E.D.Va. 1963).

11A.6 A classification society certificate has been held to be *prima facie* evidence of seaworthiness, however, which shifts the burden of proving unseaworthiness to the charterer in a non-COGSA case. *The Seaford*, 1975 AMC 1553 (Arb. at N.Y. 1975), is an extreme example of the difficulties the charterer may face in meeting this burden where COGSA is not incorporated in the charter. In that case the shipper had chartered the ship under a Gencon form of voyage charter to carry a cargo of steel. The ship stranded and the panel, finding COGSA inapplicable, held that the charterer had the burden of proving that the grounding was caused by a "personal want of due diligence" on the shipowner's part. Moreover, the panel stated that while the existence of a classification society's certificate did not conclusively establish the ship's seaworthiness, it did constitute *prima facie* proof sufficient to put the burden of proving the contrary on the charterer. The latter attempted to show that the grounding was caused by improper manning and the owner's failure to have the ship's radio direction finder properly calibrated. The panel held that the evidence did not support these contentions, and that the proximate cause of the stranding was an error in navigation for which the owner was not liable.

Responsibility for hold cleaning expenses

11A.7 During the charter, owner has a duty to present the ship and the cargo spaces in a seaworthy condition at the commencement of each voyage. Hold cleaning expenses required because of a condition of the ship will be for the owner's account. For example, if the holds have to be cleaned to remove rust scale or paint chips, the owner is responsible for the resulting expense and loss of time. See *The Bjorn Ragne*, SMA 1298 (Arb. at N.Y. 1979); *The Pacsea & Pacsun*, SMA 746 (Arb. at N.Y. 1972). If the holds have to be cleaned because of residue from prior cargoes loaded by the charterer, however, the cost and time is for the charterer's account. See *The Long Hope*, SMA 2664 (Arb. at N.Y. 1990). See discussion at paragraphs 8A.1 to 8A.16.

Changed legal requirements

11A.8 A very difficult problem that has arisen, particularly where long-term time charters are involved, concerns the obligation of the owner to maintain the ship in accordance with changed legal requirements of either the flag state or countries within the allowed trading limits. When, during the period of the charter, laws come into force which impose new requirements on ships, how are the relations between owner and charterer affected? The question is particularly difficult when large costs or major capital improvements to the ship are required to comply with the new requirements.

11A.9 Cases involving these issues will always depend on the particular circumstances involved. In certain circumstances, principles of frustration may be applicable. This would be so where the parties had not anticipated or allocated the risk of the particular requirement and the cost of continued performance of the charter rendered the venture commercially impracticable. See discussion at paragraphs 26A.30 to 26A.33.

11A.10 Where the factors involved do not frustrate the charter, the main factors to be considered are whether the requirements of the law call, on the one hand, for substantial capital improvements or, on the other, for maintenance items which the owner would ordinarily expect might be required during the charter. In the former case, it would seem from the few cases which have been decided that the owner would not be under a duty under the charter to comply. This appears to be true especially where the owner is under a duty to exercise due diligence to maintain the ship. In the latter case, the owner's duty to maintain the ship would be clear.

11A.11 In *The Endeavor*, 1978 AMC 1742 (Arb. at N.Y. 1977), the charterer successfully

claimed that the owner was obligated under the charter to install special hold ladders required for trading in Australia. The charter was on the New York Produce form and was for a period of five years. The ship was delivered to the charterer in June 1973. In May 1977 the charterer demanded that the owner install "WWF Ladders" required by the Australian longshoremen's union. The majority of the panel held that the charterer was justified in its demand, and stated:

> This controversy touches upon the sensitive albeit diversified subject of separation of duties and responsibilities as between Owners and Charterers in an era of constant technical evolution and universal concern over human safety and environmental protection. This written Award is for the purpose of formalizing and refining the decision rendered at the termination of the hearing session, a decision which was requested to be made at that time.
>
> The majority of this Panel considers that, although the WWF ladder requirements evidently necessitate a modification or alteration of the existing shape, design and perhaps location of the present hold ladders fitted on board the *Endeavor*, these modifications do not constitute structural changes of such a nature and magnitude as to override Owners' duty of maintaining the Vessel in a state which imposes no restrictions on the ability of the Vessel to perform in the manner called for in the Charter Party. In this respect, the Vessel should be capable of trading within the geographic areas permitted by the Charter Party and carrying such lawful cargoes as are allowed by this agreement. The WWF ladder requirement, if unattended to, imposes such a restriction as respects Australian ports which are serviced by the WWF and on cargoes which require the presence of WWF longshoremen in the holds. [1978 AMC at 1764–1767.]

11A.12 See also *The Guldborg*, 1932 AMC 1206 (S.D.N.Y. 1932), holding that the owner was obligated to bear the cost of fire-extinguishing equipment as a maintenance item; *The Amerocean*, 1952 AMC 1559 (Arb. at N.Y. 1952), holding the owner liable for the cost of repairs to the ship's tackle and gear necessary for compliance with regulations at the load port.

11A.13 In *The Stolt Lion*, SMA 1188 (Arb. at N.Y. 1977), the charterer contended that the owner was obligated to install a high level audio-alarm system required by a Ministerial Decree of the Netherlands which was based upon IMCO [now IMO] recommendations. The charterer based its claim on a provision in the charterparty which stated:

> The vessel shall at all times satisfy the requirements for the carriage of solvents, chemicals as set forth by national or international authorities, etc. . . . Owners shall exercise due diligence to maintain the vessel and her equipment as on delivery on this Charter Party, normal wear and tear excepted.

11A.14 The panel unanimously held, however, that this clause did not require that the owner bear the expense of what was in fact a capital improvement necessary for employment of the ship in the Netherlands. According to the panel:

> Under the provisions of the Time Charter, Owners had accepted the contractual obligation to furnish a specific vessel to the Charterers, a vessel which would be suitable for a specific trade contemplated by the Charterers. In the acceptance of the vessel into this Time Charter, coupled with the prior approval of the vessel based on the plans and specifications, Charterers confirmed vessel's suitability for their trade at the time of the delivery and vessel's compliance with the specifications and requirements for which they had bargained. Whereas Owners' warranty "to maintain her in such a state during the currency of this Charter" is a continuous one, the Panel does not consider the purchase and installation of the audio-alarm system to fall under this warranty. The careful reading of all other clauses relating to the condition of the vessel, do not, in the Panel's opinion, allocate the responsibility for the installation of any equipment such as the audio-alarm unto the Owners. The purchase and installation of such system, even if required under inter-governmental regulations, by its nature is a capital improvement and as such not a maintenance item but an upgrading of the vessel.

11A.15 In *The Angantyr*, 1971 AMC 2503 (Arb. at N.Y. 1971), the ship was without an approved grain loading plan as required under the 1960 SOLAS Convention, and the building of an additional bulkhead in the No. 1 hold was necessary to enable the ship to load grain. The panel held that the owner was under no liability to the charterer for this expense:

> Quite apart from the question of the burden of proof of damages not being met by Charterers, the crux of the matter is there is nothing contained in the Time Charter on which Charterers can rely to render Owners

liable for the failure to supply suitable documentation permitting the vessel to load under SOLAS rules. The arbitrators know of Time Charters specifically calling for this requirement. The mere fact that grain was not contemplated by Charterers (or Owners) at the time of entering into the Charter Agreement, cannot by any stretch of the imagination shift the burden of the grain fitting from Charterers to Owners when the Charter is silent on the point. [1971 AMC at 2507.]

11A.16 These issues were also raised in *The Ultramar*, 1981 AMC 1831 (Arb. at N.Y. 1981). The ship was an American flag OBO of about 82,000 dwt built in 1973. In that year, the ship was chartered on the Mobiltime form to the charterer for a period of 10 years. During the performance of the charter, the United States Port and Tanker Safety Act entered into force. Under that Act, the ship was required to be fitted with, among other things, an inert gas system by June 1, 1981. The arbitrators were asked to decide whether the owner was required to perform the changes required by the Port and Tanker Safety Act. The majority held that the owner was so obligated by reason of its duty to furnish and maintain a ship capable of trading as a crude oil carrier. The panel majority noted that while there was no express wording in the charter requiring that the ship be in compliance with the Port and Tanker Safety Act, under the charter terms the owner remained under a duty to exercise due diligence to maintain the ship during the period of the charter "in every way fitted for the service and carriage of crude oil and/or dirty petroleum." Since the ship would not have been permitted to carry crude oil if she were not in compliance with the Port and Tanker Safety Act, the owner would be in breach of its duty to maintain the ship were it to fail to retrofit.

CHAPTER 12

Charterers to Provide and Pay for

"39. 2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions,
40. Consular Charges (except those pertaining to the Crew) and all other usual expenses except those before stated, but when the vessel puts into
41. a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of
42. illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this
43. charter to be for Charterers account. All other fumigations to be for Charterers account after vessel has been on charter for a continuous period
44. of six months or more.
45. Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but
46. Owners to allow them the use of any dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards
47. for dunnage, they making good any damage thereto."

General nature of charterers' duty to provide

12.1 In general the obligation cast upon the charterers by Lines 39 and 40 of the New York Produce form and by Clause 4 of the Baltime form is 'absolute', in the sense that they must actually provide the stipulated items rather than merely exercise due diligence towards that end. Thus, in a voyage charter case, where the charterers undertook to provide icebreaker assistance in the event of the loading port being inaccessible by reason of ice, it was held by the House of Lords that they were under an absolute obligation to do so: *Anastassia* v. *Ugle-Export* (1934) 49 Ll.L.Rep. 1. Lord Wright in that case said: "[T]he charterers have contracted to supply the assistance, and that, in my opinion, means either by themselves or by others, so that they cannot justify a failure to do so on the pretext that they had not the icebreakers under their control and could not get them supplied by those who controlled them. In that sense the obligation is absolute. The charterers assumed the obligation and the risk. It follows equally that the charterers' obligation is not limited to an obligation to do their best to supply." But in some circumstances there may be a duty upon the owners to give information to the charterers to enable them to make proper provision and the owners cannot complain if the charterers fail to make such provision because of the inaccuracy of that information: see below.

12.2 The charterers' obligation (and corresponding entitlement) to provide fuel (and, it is suggested, other matters within Clause 2) does not entitle them to require the ship to take on bunkers (or other goods or services covered by Clause 2) not required for the performance of the chartered service: see *The Captain Diamantis* [1978] 1 Lloyd's Rep. 346, paragraph 13.3, below.

Fuel

12.3 Provision is made in Clause 3 of the New York Produce form and Clause 5 of the Baltime form for the purchase by the charterers of fuel on board on delivery and by the owners of fuel on board on redelivery: see paragraphs 13.1 *et seq*. Fuel so purchased by the charterers becomes their property, together with fuel provided by them during the charter service: see paragraph 12.12. See also *The Yuta Bondarovskaya* [1998] 2 Lloyd's Rep. 357, in which time charterers were held not to have implied actual authority, or apparent authority, to purchase bunkers so as to bind owners to pay bunker suppliers for bunkers ordered for the ship.

Quantity

12.4 Of necessity, the ability of the charterers to provide the ship with the correct quantity of bunkers requires the co-operation of the owners and their officers, upon whom the charterers must largely rely for the provision of information as to previous and current consumption. The owners or their officers may also indicate the further quantities that will be required for safe completion of the next voyage or voyages ordered by the charterers. If the charterers reasonably rely upon such information, and it turns out to be wrong, they cannot be held responsible for the consequent losses.

The *Patapsco* was time chartered for a round voyage from Liverpool to the River Plate and back. Owing to a miscalculation by the ship's engineer, the ship did not take on sufficient bunker coals for the first stage of the homeward voyage and she had to deviate for additional bunkers. The owners contended that the extra expenses incurred were the charterers' responsibility since, under the terms of the charter, the charterers were to "provide and pay for all coal". But the Court of Appeal, affirming Kennedy, J., held that the obligation on the charterers to provide coal did not cut down the owners' initial warranty of seaworthiness, which included the obligation to arrange for sufficient bunkers at each stage of the round voyage.

Vaughan-Williams, L.J., said, at page 128: "The argument based on this provision of the charterparty is that, the charterers being bound to 'provide' as well as to 'pay for' all the coal, all responsibility in respect of the coaling of the ship was put upon the charterers, and that the shipowners were therefore relieved from their duty of rendering the ship seaworthy in respect of coal, which, it was admitted, would have existed in the absence of such a special provision. In my opinion, this is to endeavour to give far too extensive an operation to the provision that the charterers are to 'provide and pay for all coal'; I think that it leaves untouched the duty of the shipowners to render the ship seaworthy by seeing that there is on board sufficient coal for the use of the ship when she starts on each stage of her voyage."

MacIver v. *Tate* (1903) 8 Com. Cas. 124 (C.A.).

12.5 Commenting on the above case in *The Captain Diamantis* [1977] 1 Lloyd's Rep. 362, at page 367, Ackner, J., said: "The provision [to provide and pay for fuel] does not relieve the shipowners from the obligation of seeing that the vessel is in a seaworthy condition in respect of the supply of fuel. . . Thus it is the duty of the master to give the charterers correct information, to enable them to provide the requisite quantity of fuel. . . ". It is suggested that the owners' responsibility for providing information is not confined to matters of seaworthiness. Under the owners' general duty of co-operation they must not unreasonably fail to provide the charterers with information about the needs and characteristics of their ship that may reasonably be required to enable the charterers to perform their duty to provide what the ship needs.

12.6 Conversely, although the Court of Appeal in *MacIver* v. *Tate* based its decision on the ground that the owners were not relieved of their obligations in regard to seaworthiness by the charterers' obligation to provide and pay for fuel, the seaworthiness obligation is not overriding in this context. Thus it would not, it is suggested, prevent the owners raising as a defence to a claim by the charterers a plea that the charterers were in breach of their obligation. Kennedy, J., whose decision at first instance in *MacIver* v. *Tate* (1902) 18 T.L.R. 379 was approved by the Court of

Appeal, remarked that the position would have been different had the master asked for more coal and had the charterers failed to supply it. If in such circumstances the owners had discharged their obligation as to seaworthiness (for example, by obtaining the required fuel themselves, either prior to sailing or, if unavailable, at an intermediate port) the charterers would, it is thought, have been responsible for any losses or extra expenses which the owners thereby incurred.

Quality

12.7 It is submitted that there is an 'absolute' duty on the charterers to provide bunkers that are of reasonable general quality and suitable for the type of engines fitted to the particular ship. They will not be obliged to meet any unusual requirements of the engines, beyond those to be expected of their type, unless these have been drawn to their attention by the owners in advance. Here, as in paragraph 12.5 above, the co-operative nature of the commercial adventure should be emphasised. The owners must not unreasonably fail to furnish information that may reasonably be needed to inform the selection of suitable bunkers.

12.8 In *Nippon Yusen Kaisha* v. *Alltrans* (20 February 1984, unreported), arbitrators held that there was an absolute duty on charterers under Clause 2 of the New York Produce Form to provide proper bunkers. The charterers were given leave to appeal on the question of law whether the duty on the charterers was absolute, as decided by the arbitrators, or was a duty to exercise reasonable care or due diligence only. In the event it became unnecessary for the court to decide the question because of a further finding, made subsequently by the arbitrators, that the charterers had failed to exercise due diligence in the provision of bunkers. It was therefore academic whether the duty was absolute or not; the charterers were liable in either case and the arbitrators' decision could not be challenged.

12.9 In view of the prevalence of sub-standard bunkers it has become commonplace for the charter to include express requirements as to the type and grade of the fuel to be supplied; where such a stipulation exists the charterers must comply with it.

12.10 If a problem with bunkers supplied by charterers results in delay, the charterers will not be entitled to put the ship off hire: see *Nourse* v. *Elder Dempster* (1922) 13 Ll.L.Rep. 197, and paragraph 25.49, below.

NYPE 93

12.11 Clause 9(b) of the 1993 revision of the New York Produce form expressly requires the charterers to supply bunkers of a quality suitable for the ship's engines and auxiliaries and conforming to agreed specifications, failing which the owners may claim for damage to the engines or auxiliaries and will be protected against claims for reduced speed, increased consumption, loss of time or any other consequences: see Lines 117 to 124.

Property in bunkers

12.12 In *The Saint Anna* [1980] 1 Lloyd's Rep. 180 it was held by Sheen, J., that charterers under a Shelltime 3 form of charter retained the property in fuel which had been supplied and paid for by them and which was on board the ship. Referring to the provision in Clause 6 of that charter that the charterers "shall provide and pay for all fuel (except galley fuel)" he said: "It seems to me that if the charterers purchase fuel, that fuel is their property unless the parties clearly and unequivocally agree that the property shall vest in the owners." The decision in *The Saint Anna* was approved by the House of Lords in *The Span Terza* [1984] 1 Lloyd's Rep. 119, who held that

the position was the same under the New York Produce form. There is a similar provision in Clause 4 of the Baltime form. For the effects on the property in bunkers of termination of the charter, see paragraphs 13.4 *et seq*.

Safety of bunkering place

12.13 The charterers may in certain limited circumstances be responsible for damage done to the ship as a result of the unsafety of the bunkering place to which the ship is directed by bunker suppliers if the bunker suppliers are the charterers' agents for this purpose, or if the charterers' orders as to bunkering are properly to be construed as orders to bunker at such place as the bunkering suppliers may direct: see *The Mediolanum* [1984] 1 Lloyd's Rep. 136 (C.A.); *The Erechthion* [1987] 2 Lloyd's Rep. 180, and paragraphs 10.89 and 10.90, above, where these cases are discussed. (As to the charterers' right to choose the ports at which the ship is to bunker, see paragraph 13.10.)

Port charges

12.14 Port charges include all charges which a ship has to pay before she leaves a port, even if some of those charges relate to benefits which will accrue to the ship only after she has left the port.

The charterers of the *Apex* were obliged by a special clause to pay the port charges at Deptford if they ordered the ship to discharge deck cargo there, which they did. The port charges payable at Deptford included Trinity House dues in respect of lights to be passed during the remainder of the voyage to Leith where the under deck cargo was to be discharged. Had the ship gone straight to Leith without calling at Deptford these dues would have been payable by the owners. Mathew, J., held that the charterers were responsible for these dues. He said: "The ordinary meaning of the phrase seems to me to be those charges which a vessel must pay before she leaves a port."

Newman & Dale v. *Lamport & Holt* [1896] 1 Q.B. 20.

12.15 But it is only those charges which are payable during the period of the charter for which the charterers are responsible. Thus, where light dues were paid at the delivery port shortly before delivery was made, the owners could not recover these from the charterers, despite the Baltime form provision that the charterers were to provide and pay for "port charges" and "lights": see *Scales* v. *Temperley Steam Shipping* (1925) 23 Ll.L.Rep. 312.

Baltime form

12.16 It should be noted with regard to the Baltime form that Clause 4 expressly provides that the charterers are to pay "all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery)". Thus these particular charges are made an exception to the general rule and will be payable by the charterers even if incurred or paid before delivery or after redelivery. As these words place on the charterers an obligation to pay for charges incurred or paid outside the period of the charter they are to be narrowly construed. Thus in *Scales* v. *Temperley Steam Shipping*, above, Roche, J., did not construe them as embracing the light dues, which had been mentioned earlier in the clause. No corresponding words appear in the New York Produce form.

Pilotages

12.17 Where pilots are necessary, either to meet local regulations or to ensure the safety of the ship, the charterers must provide and pay for them under Line 39 of the New York Produce form or Line 50 of the Baltime form.

12.18 It seems that, in accordance with the general principle that the charterers' obligations to provide are absolute (see paragraph 12.1 above), such pilots must be provided and the charterers do not discharge their obligation by trying but failing to provide them, even where their availability depends upon authorities over which the charterers have no control. It may also be that the charterers will be in breach if a pilot supplied lacks a reasonable degree of competence: see, for a case referring to the competence of a stevedore appointed by charterers, *The Sinoe* [1972] 1 Lloyd's Rep. 201 (C.A.).

12.19 However, it has been held that a pilot, although provided and paid for by the charterers, does not become the servant of the charterers so as to make the charterers responsible to the owners for his negligence.

The time charterers of the *Sir Bevis* were to provide and pay for pilotages. One of the pilots provided by them negligently put her aground and she was damaged. The owner argued that the off-hire clause did not excuse the charterers from paying hire during the repairs because the pilot was the servant of the charterers and they were therefore responsible for his negligence. Mathew, J., rejecting this "extraordinary contention", said: "The fact that the charterers had to pay the pilot did not make him their servant."

Fraser v. *Bee* (1900) 17 T.L.R. 101.

It should be noted that the owners' case in *Fraser* v. *Bee*, above, was put squarely on the assertion, which Mathew, J., rejected in a short judgment, that the pilot had been the servant of the charterers. An alternative argument for the owners could have been that, although the pilot was not the servant of the charterers, responsibility for his work had been shifted on to the charterers as between them and the owners. This argument would be analogous to the decision of Greer, J., in *Brys* v. *Drysdale* (1920) 4 Ll.L.Rep. 24, that the effect of a clause in a voyage charter reading "the Charterers. . . are to provide and pay a stevedore to do the stowing of the cargo under the supervision of the Master" was to "transfer the duty and obligation, which would otherwise rest on the shipowner, to the Charterer, of stowing the cargo in the way it ought to be stowed". This decision was cited with approval by the House of Lords in *Court Line* v. *Canadian Transport* (1940) 67 Ll.L.Rep. 161, see paragraph 20.24, below, and must be regarded as authoritative. It is suggested, nevertheless, that the approach taken in *Fraser* v. *Bee* – which would make the owners primarily responsible for pilot negligence – is correct and would be followed today. Unlike loading and discharging, which is rightly described as a joint operation between charters and owners, navigation of the ship is the master's sole responsibility and a pilot's role is to assist the master in performing that responsibility.

12.20 Moreover, support for the argument against a transfer to the charterers of the risk of pilot negligence is provided by Lines 170 and 171 of the New York Produce form: "The owners to remain responsible for the navigation of the vessel. . . same as when trading for their own account."

NYPE 93

12.21 Line 282 of the 1993 revision of the New York Produce form adds to those things for which the owners are to "remain responsible" under Clause 26 of the 1946 version, "acts of pilots and tug boats", putting the point just considered beyond all doubt where the 1993 form is used.

Agencies

12.22 By Line 39 of the New York Produce form and Line 57 of the Baltime form, the charterers are obliged to provide and pay for agencies. It is suggested that a competent agent must be chosen, at least where such a firm or person exists in the particular port or area. Whether the charterers are responsible to the owners for the negligence of a generally competent agent whom they have appointed is unclear but may depend upon the type of work being done and the extent, if at all, that it relates to the ship as opposed to her cargo.

12.23 In considering a similar provision in Clause 20 of the Beepeetime 2 form, Staughton, J., said in *The Sagona* [1984] 1 Lloyd's Rep. 194, at page 199: ". . . the agents, being appointed and paid by the charterers, are as between the owners and charterers to be considered the agents of the charterers for all the ordinary business of a ship in port. That solution avoids some difficulties which might arise if the charterers appoint incompetent or negligent agents. But there may be some business which, as between the owners and the charterers, the master ought to do himself, and not delegate to the agents. If the master does nevertheless entrust such a task to the agents, then it may be that the agents' omission to perform it would be an omission on behalf of the owners and not on behalf of the charterers." See also *Strathlorne Steamship* v. *Andrew Weir* (1934) 49 Ll.L.Rep. 306, *per* Roche, J., at page 310.

12.24 Clause 9 of the Baltime form adds that the master is to be "under the orders of the Charterers as regards. . . agency, or other arrangements". A similar clause was considered by the House of Lords in *Larrinaga Steamship* v. *The Crown* (1944) 78 Ll.L.Rep. 167, summarised at paragraph 19.26, below. Lord Wright said of the words just quoted that: "The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charter-party is to be consigned as agent. The selection is here left to the charterers. . . . 'Arrangements' is a wider term. It is also used in this charter-party [T.99A, a wartime version of the Baltime form] in Clause 3. There it refers to disbursements which have to be made for services in connection with operating the ship, and I think it has a similar scope in Clause 9."

All other usual expenses

12.25 There is a lack of judicial authority as to what is covered by these words from Line 40 of the New York Produce form. It seems probable, however, that they include "tug-assistance", which appears in the fuller list of charterers' items in Clause 4 of the Baltime form. Assuming that the charterers do have the obligation to provide tugs, it is suggested that the extent of that obligation should be similar to that in respect of pilots, discussed above. As to the 1993 revision of the New York Produce form, see paragraph 12.21, above.

Off-hire periods

12.26 The obligations of the charterers under this clause continue throughout the period of the charter, save only where there are express words to the contrary. Thus, under the equivalent provision (Clause 4) of the Baltime form, the charterers remain liable to pay for fuel used even while the ship is off-hire.

The *Arild* was off-hire during certain periods of repair. Bunker coal was consumed during these periods. The charterers were obliged by the charter to "provide and pay for all the coals, fuel", but argued that this obligation should be suspended during off-hire periods. McCardie, J., held that the charterers' obligation continued.

Arild v. *Hovrani* [1923] 2 K.B. 141.

12.27 The position with regard to fuel used during off-hire periods would be the same under the New York Produce form in accordance with Line 39 were it not for the express provision to the contrary in Clause 20, Lines 133 and 134 (on which see paragraphs 25.72 and 32.1 below). The same effect can be achieved under the Baltime form by the frequently employed insertion at the very beginning of Clause 4 of the words "While on hire". This insertion shifts to the owners the responsibility during periods of off-hire for the other matters mentioned in Clause 4 as well as for fuel consumed. Although the insertion of similar words at the beginning of Line 39 of the New York Produce form is not necessary to protect the charterers so far as fuel is concerned, it is necessary to make the owners responsible during off-hire periods for the other matters mentioned in Lines 39 and 40 and that amendment to Clause 2 is therefore frequently made.

12.28 However, the obligations of the charterers do not commence before delivery nor extend beyond redelivery, save only where expressly provided (as in Clause 4 of the Baltime form): see further under "Port charges" above.

NYPE 93

12.29 The equivalent to this Clause 2 in the 1993 revision of the New York Produce form, Clause 7, starts "The Charterers, while the Vessel is on hire, shall provide and pay for"; see the comments above on the effect of the insertion into Line 39 of the 1946 form of "While on hire". Clause 7 of the 1993 revision also adds points of detail to the 1946 wording: see Lines 84 to 98.

Special trades

12.30 Lines 45 and 46 of the New York Produce form require the charterers to provide and pay for any extra fittings required for a special trade or unusual cargo: see further, paragraphs 8.66 *et seq*., above.

U.S. Law

Charterers to provide and pay for . . .

12A.1 Clause 2 allocates to the charterer the duty to pay for such items as fuel, port charges, pilotage, and agents' fees, unless these expenses are incurred by reason of a cause for which the ship is responsible. The charterer remains responsible for these items for as long as the charter remains in force, unless there is a specific exception provided elsewhere in the charter. For example, under Clause 20 of the New York Produce form, the charterer is excused from the obligation to pay for fuel while the ship is off-hire.

12A.2 The charterer will remain responsible for these costs even if, by reason of a material breach of charter on its part, the ship is withdrawn from its service while cargo remains on board. This situation arose in *The Athenian Horizon*, SMA 1197 (Arb. at N.Y. 1977). The charterer had defaulted in making its hire payment while the ship was en route to the discharge port, and the owner sent the charterer a notice of withdrawal which the arbitrators held was justified. The ship was loaded with cargo when the notice was sent, however, and the arbitrators held that the charter remained in effect until the cargo was discharged. Because the charter was still in force, notwithstanding the owner's notice of withdrawal, the charterer remained responsible for port charges at the discharge port.

12A.3 Similarly, in *The Arizona*, SMA 1259 (Arb. at N.Y. 1978), the charterer was held liable to pay for fuel consumed during the period between the time the notice of withdrawal was given and the cargo was discharged.

12A.4 Fuel provided by the charterer becomes its property. This concept can be important in situations where the charterer's creditors may seek to attach the bunkers on board or the charterer goes into bankruptcy and its assets become property of the bankruptcy estate. See *Madredeus Shipping Co. Ltd*. v. *Century Bridge Chartering Co. Ltd*., 2000 AMC 950 (S.D.Fl. 2000), in which fuel provided by charterer was found to have been consumed prior to the ship's arrival at port and additional fuel on board was found not to be charterer's property subject to a maritime attachment. See generally *In re Riffe Petroleum Co*., 601 F.2d 1385, 1979 AMC 1611 (10th Cir. 1979).

Bunkers

Quantity

12A.5 It is the charterer's responsibility to supply and pay for bunkers. It is the master's responsibility, however, to determine what quantity of fuel shall be brought on board the ship. Moreover, it is the master's obligation to make sure that there is an adequate supply of fuel for the voyage the charterer instructs him to make.

12A.6 In *The Venetia*, SMA 1351 (Arb. at N.Y. 1979), the ship was held to be off-hire for time lost on the voyage when she had to put into Cape Town to load fuel oil. The unscheduled call was necessary because the master had miscalculated the bunkers required for the voyage given the ship's speed and consumption. The charterer had supplied the quantity requested by the master at the outset of the voyage and, according to the panel, could not be held liable for hire for time lost by reason of the master's miscalculations.

12A.7 Similarly, in *The Argentine Transport*, 1956 AMC 1772 (Arb. at N.Y. 1956), the owner was held responsible for the cost of excessive bunkers ordered by the master. The ship arrived at the discharge port with 475 tons of bunkers remaining, having consumed 493 tons on the voyage. According to the panel, the safety margin of nearly 100 per cent required by the master was

excessive; rather, "a 25 per cent margin is customarily recognized as an equitable safety factor." Because the bunkers were more expensive at the loading port than at the discharge port, the owner was held liable for the price differential.

12A.8 In *The Galaxy*, SMA 3219 (Arb. at N.Y. 1995), the master loaded a lesser quantity of fuel than had been ordered by the charterer, causing the charterer to subsequently lift replenishment fuel at a more expensive port. The panel held that the charterer was not entitled to deduct the cost differential from hire because the master had properly taken on as much added deadweight as a safe sailing draft would allow.

12A.9 In *The Silver Hawk*, SMA 1857 (Arb. at N.Y. 1983), the panel held that the charterer had grossly oversupplied the ship with bunkers. Because the master did not protest when the fuel was delivered, however, owner had no practical recourse against charterer. Nevertheless, the panel held that the charterer had injured owner by deprivation of cash flow.

12A.10 In *The Mandolyna*, SMA 2115 (Arb. at N.Y. 1985), the panel held that though the charterer had accepted and paid for bunkers upon delivery in excess of the quantity stipulated in the charter, the charterer was not required to redeliver the ship with the same excess.

12A.11 In *The Zannis*, SMA 2074 (Arb. at N.Y. 1985), the charterer redelivered the ship with bunkers in excess of the amount stipulated in the charter. The panel awarded the owner damages consisting of the difference between the charter rate and the market rate for the excess fuel which owner was forced to purchase.

12A.12 In *The Packing*, SMA 2858 (Arb. at N.Y. 1992), the charter required the charterer to redeliver the ship with "about the same quantity" of bunkers as on delivery. The panel held that the charterer's redelivery with an excess of approximately 158.6 metric tons was not beyond a reasonable and expectable norm, just as the owner's delivery with approximately 112 metric tons in excess of the charter's stated expectation was not unreasonable.

12A.13 In *The Northern Light*, SMA 2645 (Arb. at N.Y. 1990), the charterer redelivered the ship with a lesser amount of bunkers than was stipulated in the charter. The owners then bought bunkers itself, but purchased a quantity in excess of what the charterer was obliged to supply. The panel, therefore, limited the owner's recovery to the quantity the charterer was required to supply.

12A.14 In *The Hua Guang*, SMA 3774 (Arb. at N.Y. 2003), the charter required redelivery with "about" 400 metric tons of fuel. Prior to redelivery, the master instructed the charterer to supply an additional 230 tons. The charterer supplied 250.216 tons, or 20.216 tons more than requested. A sole arbitrator concluded that redelivery with 20.216 tons of excessive bunkers (a total of 420.216 tons) tons would have satisfied the charter condition requiring redelivery with "about" 400 tons. The arbitrator found, however, that the master should have requested only 167.87 tons. The arbitrator required the owner to fully credit the charterer for the excess bunkers, and denied the owner's claim for damages it allegedly sustained due to redelivery with excessive bunkers.

Quality

12A.15 The New York Produce form contains no express provisions as to the quality of the bunkers the charterer will provide during the period of the charter, except to say that it must be "best grade." The absence of any detailed provisions concerning specifications for the fuel would seem to indicate that so long as the charterer supplies fuel which meets generally accepted standards for bunkers, the owner would not have a basis for claiming damages should problems arise because of the quality of the fuel. At the same time, it appears that if the parties agree to include specifications in the charter as to the type or quality of fuel to be used, the charterer would be liable for any losses resulting from the use of fuel which does not meet the charter description.

The problems which may result from defective bunkers are quite serious, and include physical damage to the engines, reduced levels of performance, and loss of time.

12A.16 In *The Royal Prince*, 1927 AMC 62 (S.D.N.Y. 1926), Judge Augustus Hand held the charterer liable for losses resulting from its failure to supply bunker coal of merchantable quality.

12A.17 In *The Senicoli Sierra*, SMA 3528 (Arb. at N.Y. 1999), the panel held that the owner had not satisfied its burden to establish that bunkers supplied by the charterer were faulty and had caused engine damage.

12A.18 In *The Maro*, SMA 2533 (Arb. at N.Y. 1988), the charter described the fuel the charterer was to furnish as IFO 1550 SECS and MDO. The owner claimed that the fuel oil supplied by the charterer was off specification, improperly blended or contained excessive contaminants. The panel agreed with the owner's argument that the charterer has a non-delegable duty to supply bunkers that meet the charter specifications:

> Clearly, it is the charterer and not the fuel merchant who bears the responsibility of furnishing bunkers which meet charter party standards. Essentially, the charterer orders and pays for the fuel and it is its obligation *vis-à-vis* the shipowner. The fuel merchant undertakes to supply fuel in accordance with industry standards and its instructions without guaranty that it will be suitable for the particular vessel's machinery. In addition to meeting the viscosity stated in the fuel purchase order, the bunkers should also meet current standards for compatibility and freedom from excessive levels of harmful contaminants.

12A.19 The panel found, however, that the owner had failed to meet its burden of proving that the bunkers supplied by the charterer caused engine damage.

12A.20 In *The Leslie*, SMA 1341 (Arb. at N.Y. 1979), the owner made a claim for engine damage and reduced speed caused by off-specification bunkers. The preamble of the charter contained a reference to the ship's fuel consumption, and stated: ". . . on a consumption of about nine tons intermediate fuel oil maximum viscosity 300 seconds Redwood." The owner proved from samples taken from the ship that the fuel oil supplied by the charterer had a viscosity of 750 seconds. The arbitrators unanimously held that "to the extent that the owner can demonstrate that the ship was damaged having used this off-specification oil charterer is liable for the reasonable costs thereof."

12A.21 The burden of proof on the owner is a heavy one. *The London Glory*, SMA 1771 (Arb. at N.Y. 1982), is perhaps the best illustration of this point. There, the panel found that the ship's main diesel engine sustained excessive wear which was caused by contaminants, including catalytic fines, introduced into the engine through the fuel system. The panel further ruled, however, that the owner failed to meet its burden of establishing by a preponderance of the evidence that the contaminants were in the fuel supplied by the charterer rather than bunkers used by the ship previously.

12A.22 In *Antilles Shipping Co. Ltd*. v. *Texaco Inc*., 321 F. Supp. 166, 1971 AMC 1291 (S.D.N.Y. 1970), the owner failed to establish that engine breakdowns were caused by the unsuitability of the ship's lubricating oil. The court noted that to prove its case, the owner had to show that it used the fuel property, that there was no crew negligence, and that the damage was not caused by other foreign substances in the ship's lubricating system.

12A.23 In *The M/V Fomalhaut*, SMA 4145 (Arb at N.Y. 2011) (Szostak, Mordhorst, Berg), the panel found that the charterer had supplied off-specification bunkers but that the owner had failed to obtain prompt information about the samples before burning the bunkers and thus was responsible for resulting engine damage. The panel, however, awarded owner all other costs relating to the off-specification bunkers.

12A.24 In some cases, arbitrators have apportioned responsibility for engine breakdowns between owner and charterer. In *The Hoegh Mallard*, SMA 2679 (Arb. at N.Y. 1990), the arbitrators held that the owner had not demonstrated by a preponderance of credible evidence that the ship's engine breakdown was due solely to defective bunkers which the charterer had supplied.

Because the panel did find, however, that the bunkers supplied were "of questionable quality" and contributed in part to the engine damage, charterer was awarded only 85 per cent of the hire it had paid to owner.

12A.25 In *The Lumber Carrier*, SMA 252 (Arb. at N.Y. 1955), the arbitrators held the charterer and the owner both to blame for losses resulting from fuel which had excessive water content. The owner was held to blame because the master and chief engineer had reason to know that the fuel was defective, and failed to take steps to correct the situation. The arbitrators concluded that the charterer was liable for damages directly caused by his breach of charter in supplying fuel which had excessive water content.

12A.26 The charterer is not only required, but is entitled to supply the "best grade" fuel oil even over the owner's objections. In *The Derrynane*, 1954 AMC 1015 (Arb. at N.Y. 1954), for the last voyage the charterer supplied a high-priced fuel described by the oil company as "Marine Diesel Medium" and this was accepted by the master without objection. When the ship was redelivered, the owner claimed that it was only obliged to pay charterer for the fuel at the lower price of a lesser grade fuel called "Marine Diesel" which would have been usable in the ship's engine. The panel held, however, that the charterer was fully justified in buying the highest quality fuel oil and that the owner was obliged to pay the actual cost of that fuel for the quantity remaining on board on redelivery.

12A.27 Had the situation in *The Derrynane* been reversed, with the charterer desiring to supply a lower grade fuel over the owner's objection, there can be little doubt that the owner would have been entitled to insist on the highest quality or "best grade" available.

Pilotage

12A.28 A voluntary pilot aboard a ship under time charter is the borrowed servant of the owner and not the charterer, even though the charterer is obliged to pay for pilotage. *H. Schuldt* v. *Standard Fruit & Steamship Co*., 1979 AMC 2470, 2478 (S.D.N.Y. 1978); *California* v. *The Norfolk*, 435 F. Supp. 1039, 1046 n.2, 1978 AMC 144, 153 n.2 (N.D. Cal. 1977). The decision whether to employ a pilot remains the responsibility of the owner. The charterer is under an implied duty, however, to exercise due diligence to provide a pilot who is reasonably fit and qualified for the particular assignment. *California* v. *Norfolk*, above.

12A.29 The charterer's obligation to provide and pay for pilotage does not give it authority to bind the owner to the terms and conditions of the pilotage contract. In *A/S Acadia* v. *Curtis Bay Towing Co*., 304 F. Supp. 1050 (E.D. Pa. 1967), the *Acadia* collided with another ship and a pier while in tow of two tugs. The owner commenced an action against the tug owners and the pilot whose negligence was claimed to have caused the accident. The towage company raised a defense based on the "pilotage clause" contained in the dockage contract. This provided in substance that when a pilot went on board the ship he became the servant of the ship, and that neither the towage company, the tugs, nor the pilot would be liable for any damage resulting from the pilot's handling of the ship. The dockage contract was entered into by the charterer with the towage company. The ship owner moved to strike the defense on the ground that the charterer had no authority to bind the owner to the terms of the dockage contract, arguing that the charterparty merely provided that the charterer was to "provide and pay for . . . ." The court agreed with the owner and held that this clause did not give the charterer authority to commit the owner to the pilotage clause in the extraneous docking contract.

12A.30 *Royal Insurance* v. *Cineraria Shipping Co*., 894 F. Supp. 1557, 1996 AMC 2051 (M.D. Fl. 1995), involved the question whether the charterer was liable to the owner under the charter for a general average contribution for expenses incurred due to pilot error. The rudder was damaged

by the pilot backing the ship too far and striking the bank of a channel in Tampa Bank. The court ruled that the charterer was liable for a general average contribution even though the pilot's negligent acts caused the damages which required a general average declaration. The charter contained a standard pilotage clause which provided that pilots were not employees or agents of the charterer. The court noted that by virtue of the pilotage clause, the owner would be precluded "from bringing an independent lawsuit for damages against the charterers caused in this case by the pilot's negligence." 894 F. Supp. at 1565. The charterer was nonetheless liable for a general average contribution because of the New Jason Clause.

Hold cleaning expenses

12A.31 The cost and time incurred in cleaning residue from prior cargoes loaded during the period of the charter are for the charterer's account. See discussion at paragraph 11A.7.

CHAPTER 13

Bunkers

"48. 3. That the Charterers, at the port delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on
49. board the vessel at the current prices in the respective ports, the vessel to be delivered with not less than ..... tons and not more than
50. ..... tons and to be re-delivered with not less than ..... tons and not more than .....tons."

Quantity on delivery and redelivery

13.1 The fact that the ship may have less than the minimum quantity of bunkers required on delivery under this clause (or more than the stipulated maximum) will not normally entitle the charterers to refuse to accept the delivery of the ship, provided that the deficiency or excess does not make the ship unfitted for the service within the meaning of Lines 21 to 24: see *The North Sea* [1999] 1 Lloyd's Rep. 21 (C.A.), the facts of which are set out at paragraph 8.72, above. However, ultimately, the question depends on the construction of the charter as a whole, including, of course, any amendments to the printed form or additional clauses. If the provision as to bunkers on delivery were to be expressly or impliedly linked to the delivery requirements of Lines 21 to 24, it would probably be construed strictly: see the remarks of Hobhouse, L.J., in *The North Sea*, above, at page 25, quoted at paragraph 8.73, above.

13.2 Sometimes there will be included within this clause an estimate of the amount of bunkers that will be on board at the time of delivery. It has been held that where the estimate is expressed as 'expected about' so many tons, there is an obligation on the owners to provide an estimate which is not only honest but is based on reasonable grounds, having regard to the information which those responsible officers have or ought to have. This is by analogy with the authority on the "expected ready to load" provisions, mentioned at paragraphs 3.58 *et seq*., above.

The *Pantanassa* was time chartered for a trip. The charter provided that the charterers were to pay for the bunkers on board at delivery, she "to be delivered with bunkers as aboard at the current Moji price, plus barging (expected about 6/700 tons). . .". On delivery she had on board 936 tons. The owners' London agents had inserted the figures in the charter in good faith but on the basis of erroneous figures cabled to them from the ship. Diplock, J., held that the owners were in breach of contract. Having acknowledged that the figures had been inserted honestly, he said: "but, when I look to see whether [the owners] have reasonable grounds for their estimate, I see no reason why I should not take as the knowledge of the shipowners – and it is they who are proffering the estimate—such knowledge as their responsible officials have or ought to have."
The Pantanassa [1958] 2 Lloyd's Rep. 449.

13.3 The provision that the charterers shall provide and pay for fuel (see paragraph 12.3, above) does not confer on the charterers a power to require the master to take on fuel which is clearly not required for the service under the charter.

The *Captain Diamantis* was chartered on the New York Produce form for three to four months. Clause 3 had been amended to read as follows: "That the Charterers, at the port of delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel at U.S.$85 per long ton for IFO

and U.S.$120 per long ton for Diesel Oil, the vessel to be delivered with bunkers as on board but sufficient to reach nearest main bunkering port."

As the ship approached her redelivery port she had on board ample bunkers for the remainder of the service and to enable her to reach the nearest main bunkering port, but the charterers gave orders that she was before redelivery to bunker to her full capacity, they having found IFO at U.S.$56 and diesel at $103 per long ton. The master, on his owners' instructions, refused to obey these orders and the charterers sued for the loss of the profit that they would otherwise have made under Clause 3 as amended. Ackner, J., held that the charterers had no power to order that fuel be taken on which was "in no way required for charterparty purposes". His decision was affirmed by the Court of Appeal. Lord Denning, M.R., said, at page 348, that "all the fuel" in Clause 2 means "all the fuel which is 'reasonably required in the course of the charter service and for the purpose thereof'" and that "the charterers should be allowed considerable discretion as to what is reasonably required", but they could not (which were the facts before the court) "take on these additional amounts solely in order to make a trading profit thereafter".

The Captain Diamantis [1977] 1 Lloyd's Rep. 362 and [1978] 1 Lloyd's Rep. 346 (C.A.).

Property in bunkers

13.4 The provision of Clause 2 of the New York Produce form that the charterers are to provide and pay for fuel (see chapter 12, above) coupled with the provision of Clause 3 that the charterers shall take over and pay for all fuel at the port of delivery, vests in the charterers the property in bunkers during the currency of the charter, the owners merely having the possession of bunkers on board the ship as bailees: see *The Span Terza* [1984] 1 Lloyd's Rep. 119. The further provision of Clause 3, that the owners shall take over and pay for all fuel remaining on the ship at the port of redelivery, has the effect, when read together with Clause 4 of the charter, of transferring the charterers' property in those bunkers to the owners upon redelivery of the ship at the end of the charter period at a port within the redelivery range. But where the charterers are prevented from redelivering the ship in accordance with the terms of the charter, because the owners fail to pay for repairs and the ship is still laid up unrepaired and off hire at the end of the charter period, no property in the bunkers is transferred to the owners: see *The Eurostar* [1993] 1 Lloyd's Rep. 106. Nor does Clause 3 apply where, during the currency of the charter, the charterers cancel the charter under a clause giving an option of cancellation upon the happening of a specific event. In such circumstances the property in the bunkers remains in the charterers following cancellation. The owners remain bailees of the bunkers, but any contractual right they had to retain possession against the charterers comes to an end. If, however, the charter were to be cancelled under such a clause while the ship was at sea or at a time when she still had cargo on board, terms might have to be implied as to the right of the owners to continue to use fuel on board: see the House of Lords decision in *The Span Terza*, above.

13.5 Clause 15 of the Shelltime 4 form differs from Clause 3 of the New York Produce form in that it expressly provides that the owners shall accept and pay for bunkers remaining on board on redelivery, whether it occurs at the end of the charter period or on earlier termination of the charter. Clarke, J., in *The Saetta* [1993] 2 Lloyd's Rep. 268, held that under the Shelltime 4 form the charterers' property in bunkers would pass to the owners when they withdrew their ship for non-payment of hire, that express provision distinguishing the case from the decision in *The Span Terza*, above, on the more restricted wording of New York Produce form Clause 3: see further paragraph 37.84, below.

13.6 Where, however, the charterers never have property in the relevant bunkers, because their suppliers have retained title to them pending payment and no payment has been made, whether the owners acquire property in those bunkers at the end of the charter depends, under English law, on the application of section 25(1) of the Sale of Goods Act 1979 and, if they do not acquire such property, they may be liable in conversion to the unpaid suppliers if they subsequently assert

ownership and use them for their own purposes. In *The Saetta*, above, the owners incurred such liability because they took over the bunkers upon a termination of the charter imposed by them on the charterers, so there was no delivery or transfer of the bunkers by the charterers as required by section 25(1). By contrast, in *The Fesco Angara* [2011] 1 Lloyd's Rep. 61, the charter was terminated early, at the charterers' request, by express agreement and the owners' claim to have acquired good title under the statute was upheld.

Price

13.7 Where the charter – unlike the New York Produce or Baltime forms, if completed as intended – makes no provision for the price to be paid for bunkers by the charterers on delivery or the owners on redelivery, the price will be the market price then prevailing in the delivery or redelivery area, without regard to the price actually paid by the originally purchasing party: see *The Good Helmsman* [1981] 1 Lloyd's Rep. 377. Ackner, L.J., said, at page 419, that if there is no express term stipulating the price payable, then "the market price prevailing at the port when and where the vessel is delivered or. . . redelivered. . . will be implied", since "the charterers on delivery and the owners on redelivery take over for their own use property which they would usually otherwise have to buy on the open market".

NYPE 93

13.8 The 1993 revision of the New York Produce form includes in Clause 9(a) spaces for the insertion by the parties of prices for bunkers on delivery and on redelivery: see Lines 110 to 115.

Quality

13.9 See paragraphs 12.7 to 12.10, above.

Choice of bunkering ports

13.10 The charterers have the right to select the ports at which a time-chartered ship is to take on bunkers, regardless of what may be "usual" in the relevant area or trade. In *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 157, Lord Hobhouse said: "The provision of bunkers is the charterers' responsibility and the charterers can give orders as to the bunkering ports to be visited; no question of what is usual arises."

U.S. Law

Quantity

13A.1 See discussion at paragraphs 12A.5 *et seq*.

Price

13A.2 It is customary for the owner and charterer to provide in the charter for a specific price for bunkers at delivery and redelivery. See, e.g., *The Efplia*, SMA 1359 (Arb. at N.Y. 1979).

13A.3 Under the New York Produce form, the price to be paid for bunkers by the charterer on delivery and the owner on redelivery is the current market price at the time and place these events occur. If the charter is silent on price, however, it would seem correct that the same rule should apply, even if the market price is different from the price actually paid.

Quality

13A.4 See discussion at paragraphs 12A.15 *et seq*.

CHAPTER 14

Computation of Time

"51. 4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of .....
52. ..... United States Currency per ton on vessel's total deadweight carrying capacity, including bunkers and
53. stores, on ..... summer freeboard, per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at
54. and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery . . . "

Local or elapsed time

14.1 Because delivery often takes place in a different time zone from redelivery, the question arises whether the charterers have to pay hire for the number of hours that the ship has actually been in service ('elapsed time'), or whether they must pay hire for the period calculated on the basis of the times shown on the local clocks at the ports of delivery and redelivery.

14.2 In *The Arctic Skou* [1985] 2 Lloyd's Rep. 478, the question had to be decided under a New York Produce form charter in which the references in the printed form to payment of hire "per Calendar Month" and "part of a month" in Lines 53 and 54 were deleted and substituted by references to payment of hire "per day" and "part of a day". Leggatt, J., held that payment of hire had to be made by reference to elapsed times and not to local times. He said, at page 480: "It seems to me that, upon any sensible commercial approach when one is concerned with a time charter, the principal question must be for how long the vessel has been on hire; and that must be the period for which any charterer would expect to have to pay and any owner would expect to be reimbursed. The ingenuity of lawyers enables an argument to be mounted such as would attribute to the parties an intention that the calculation of time should instead be calculated by reference to the local times prevailing. It seems to me that, on looking at a time charter such as this, one would need to find clear language pointing to or affirming that intention before one could safely attribute it to the parties."

14.3 The judge considered the various references to time in the charter, including particularly the reference in Line 54 to hire continuing "until the hour of the day of her re-delivery", but took the view that this did not refer to the time which would show on a clock at the place of redelivery; it only pointed to the actual time of redelivery. He accordingly concluded that there was nothing in the charter which compelled him to conclude that hire was to be calculated by reference to local times, but on the contrary, the language used, particularly the references to "day" instead of "calendar month", made appropriate the calculation of the actual period that had elapsed, in computing the period of hire.

14.4 As the judgment in *The Arctic Skou* was based at least in part on the material changes which the parties had made to the printed form, the decision arguably leaves open the question whether calculations should also be made by reference to elapsed time when the form is unamended. As was pointed out in previous editions of this work, the reference in printed Line 53 to hire being payable "per Calendar Month" does not suggest an intention to insist upon the exact number of elapsed

days and hours since this is itself (by contrast with "per 30 days" in the Baltime form) a varying period. But it seems likely that in future cases the courts will adopt the initial premise of Leggatt, J.'s judgment, namely that in the computation of hire under a time charter there is a presumption in favour of elapsed time and that this will prevail unless the words of the charter show a clear intention that local time is preferred.

NYPE 93

14.5 The 1993 version of the New York Produce form resolves this issue definitively in favour of elapsed time by specifying that for the purpose of hire calculations times "shall be adjusted to GMT": see Lines 137 and 138.

U.S. Law

14A.1 The majority of U.S. cases have determined that the computation of time under the charter is to be made by reference to local dates and times at the places of delivery and redelivery rather than by elapsed time. To avoid disputes over this issue, however, the parties should expressly provide what time shall govern.

14A.2 In *The Fernglen*, 1971 AMC 213 (Arb. at N.Y. 1970), the panel stated that "the accepted method of computing the duration of a charter is the difference in local times" at the port of delivery and at the port of redelivery. "If the Charterer intended to use Greenwich Mean Time as a method of doing this, he should have specifically stated it in the Charter Party." 1971 AMC at 215.

14A.3 See also *The Bordatxoa*, SMA 891 (Arb. at N.Y. 1974), holding that "If the contract does not so specify we believe that under the N.Y. Produce Exchange form the hour of delivery and redelivery should be measured by the local clock." *The Cape Palmas*, SMA 3865 (Arb. at N.Y. 2004) (local time applied where the parties had struck "GMT" from the charterparty, and the panel also ruled that there was no deduction for daylight savings time); *The Toxotis*, SMA 855 (Arb. at N.Y. 1974); *The Haverton*, SMA 743 (Arb. at N.Y. 1973); *The Thunderhead*, SMA 617 (Arb. at N.Y. 1971); *The Argo Sky*, SMA 627 (Arb. at N.Y. 1971).

14A.4 This view was rejected, however, in cases such as *The Pacglory*, SMA 2737 (Arb. at N.Y. 1990); *Probulk Carriers Ltd. & Pacific Commerce Line*, SMA 2817 (Arb. at N.Y. 1991); *The Packing*, SMA 2858 (Arb. at N.Y. 1992); *The Constellation*, SMA 3012 (Arb. at N.Y. 1993); *The Pollux I*, SMA 3004 (Arb. at N.Y. 1993); *The North Hills*, 1973 AMC 2318 (Arb. at N.Y. 1972). There the panel held that the fact that the ship was delivered on the U.S. Pacific Coast and redelivered in Thailand did not entitle the owner to recover hire for an additional 14 hours because of the difference in time zones. According to the panel:

> Let us assume that two vessels were delivered simultaneously to the same Charterer in the same West Coast port, for a voyage across the Pacific with option to be used as a warehouse in the port of delivery. If both vessels were delivered at the same Pacific Standard Time and one vessel only went across the Pacific, the Charterer would have to pay 14 hours more hire for the vessel redelivered in the Far East, had local time been applied at both ends, which would be irrational.
>
> Accordingly, this panel unanimously finds in favor of the Charterer and disallows the claim of the Owner. [1973 AMC at 2320.]

14A.5 In *The Atlantic Glory*, SMA 76 (Arb. at N.Y. 1962), the panel majority held that it would be inequitable to use local time since the charterer had the right to deduct hire for time the ship was not at its disposal and the ship was not at the charterer's disposal during the 14-hour time differential between the U.S.-East coast and Japan, the place of redelivery. The majority concluded that "a New York Produce Exchange form of time charter. . . is based on a 'calendar month', is an expression of lapsed time and accordingly should be adjusted for hire payment purposes to the lapsed period of Time Charter and not the local clock." See also *The Doros*, SMA 616 (Arb. at N.Y. 1971), where the panel rejected the "local time" approach.

14A.6 In *Steamship Co. Gorm* v. *United States Shipping Bd. Emergency Fleet Corp.* (*The Knud II*), 285 F. 142 (2d Cir. 1922), the charter contained an express provision for payment of hire for fractional parts of a month, as follows:

> That the said charterers shall pay as hire. . . pro rata for any fractional part of a month (the days to be taken as fractions of a month of 30 days) . . .

14A.7 The court held that the quoted provision of the charter provided a workable method of calculating hire for fractional parts of a month, including those periods when the ship was off hire. According to the court:

> The theory of a time charter party is that the vessel is maintained by the owner in the service of the charterer, and the charterer pays the owner for the time of such service; if there is any interruption in such service, then the hire ceases, and the question then becomes: How long was the vessel in the charterer's service; that is, how long was she on hire? This clause provides a method of calculation for any fractional part of the month, and that is applicable to cessation of hire in the middle of the term, as well as to a period of overlap. [285 F. at 144.]

CHAPTER 15

Redelivery

[Clause 4 continued]

"54. . . . hire to continue until the hour of the day of her re-delivery . . . in like good order and condition, ordinary
55. wear and tear excepted, to the Owners (unless lost) at .....
56. ..... unless otherwise mutually agreed. Charterers are to give Owners not less than ..... days
57. notice of vessel's expected date of re-delivery, and probable port."

Redelivery

15.1 The ship is said to be redelivered when the charterers' use of the ship comes to an end and the ship is once again put at the disposal of the owners. In *Italian State Railways* v. *Mavrogordatos* [1919] 2 K.B. 305, at page 311, Bankes, L.J., said, "When the [charterers'] use [of the ship] is determined and the vessel is replaced at the owner's disposal that is described as 'redelivery'." As discussed elsewhere (see paragraph I.13, above), the term "redelivery" is figurative: there is no transfer of possession.

15.2 In order to tender the ship for redelivery, the charterers simply notify the owners or the master that the ship is at the owners' disposal. In *Italian State Railways* v. *Mavrogordatos*, above, also at page 311, Bankes, L.J., said that under a time charter, "the only redelivery possible is to make such arrangements as will enable the owner to resume control on the expiration of the charter, and it may be, if necessary, to inform the master that he is no longer under the charterer's orders but must consider himself under the orders of the owners".

15.3 As Line 54 of the New York Produce form makes clear, the charterers remain liable for hire until the ship is redelivered. So even in cases where the ship is redelivered after the end of the agreed charter period, the charterers remain liable for hire until redelivery takes place: see paragraphs 4.2 *et seq*., above.

Charterers' duty to redeliver at the end of the charter period

15.4 The charterers are under two implicit duties arising from the parties' agreement as to the period of the charter.

15.5 First, they are under a duty to employ the ship in the charter service until the end of the minimum charter period. They are not entitled to redeliver the ship before the end of that period and, if they try to do so, the owners do not have to accept the tender of redelivery: see paragraphs 4.31 *et seq*., above. In other words, it is a condition precedent to the charterers' right to redeliver the ship that the minimum period of the charter has elapsed (absent circumstances justifying the early termination or cancellation of the charter). On the other hand, if the owners choose to accept a wrongful early redelivery of the ship, they will be entitled to damages: see paragraphs 4.37 *et seq*., above.

15.6 Second, the charterers are under a duty to redeliver the ship no later than at the end of the maximum charter period. This duty and the measure of damages the charterers must pay if they break it are discussed at paragraphs 4.46 *et seq*., above.

Charterers' other duties with respect to redelivery

15.7 The charterers are under three further duties in relation to the redelivery of the ship under the New York Produce form: (*a*) they undertake that the ship will be redelivered at the place (or within the range of places) stipulated in the charter; (*b*) they must serve notice of the expected time and port of redelivery, as required by Lines 56 to 57; and (*c*) they must procure that the ship is redelivered in the same good order and condition as she was in at delivery, ordinary wear and tear excepted. These three duties are considered in turn below. However, it should be borne in mind in relation to all three that they are qualified by the exceptions in Clause 16: see further, chapter 27.

Redelivery at the agreed place

15.8 The charterers promise to redeliver the ship at the port or place named in Lines 55 and 56 of the New York Produce form or Box 21 of the Baltime form. If they fail to do so, they will be liable in damages. However, the fact that the ship is not at the agreed place of redelivery does not prevent the charterers from redelivering her: see *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, *per* Colman, J., at [361]. In other words, it is not a condition precedent to redelivery that the ship should be at the agreed place for redelivery.

Measure of damages

15.9 Where the charterers redeliver in the wrong place, it has been held that the proper measure of damages is the profit that the owners would have made on a final voyage to the agreed redelivery place (less any profit that they in fact made from any substitute employment): see Mustill, J., in *The Rijn* [1981] 2 Lloyd's Rep. 267, at page 270. It seems that this is the case even where that final voyage would have occupied the ship beyond the maximum agreed period of the charter.

The *Rijn* was time chartered for about four months, 20 days more or less in charterers' option, with redelivery at a safe port in "South Japan. . . Singapore Range". The ship suffered various delays during the course of the charter. When the maximum charter period expired, the ship was still on the U.S. east coast. The charterers thereafter purported to redeliver her at Galveston in the U.S. Gulf. In the High Court, it was common ground that by so doing the charters had repudiated the charter. The issue between the parties was about damages. The charterers argued that the owners were entitled only to compensation for their loss in having the ship returned to them in Galveston rather than at a port in the Far Eastern range. The owners argued that they were entitled to the net profit that they would have earned if the charterers had sent the ship on a voyage to a port in that range, less the profit they had in fact made under a substitute fixture.

Mustill, J., held the owners' approach was the correct one (and that the notional voyage would be one in ballast to Yokohama, being the nearest port in the stipulated range). At page 270 he said: "So far as concerns the law, the contractual service is defined in terms of the place or time, or both, at which the ship is redelivered. . . [the owner] has a contractual right to have the ship kept in employment at the charter rate of hire until the service is completed. This does not happen until the ship reaches the redelivery range, and the voyage to that range forms part of the chartered service. In a case such as the present, therefore, the tender is not only in the wrong place but also at the wrong time; and full compensation for the breach requires the charterer to restore to the owner the hire which he would have earned if the voyage had in fact been performed." In coming to his decision, Mustill, J., adopted the reasoning of Parker, J., in *The Bunga Kenanga* [1981] 1 Lloyd's Rep. 518, in which he held that arbitrators had not erred in law when they applied the same measure of damages, namely the profit that the owners would have made on a final voyage to the redelivery range, less the profit in fact made from substitute employment.

The Rijn [1981] 2 Lloyd's Rep. 267.

(This decision was followed by Colman, J., in *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, at [361].)

15.10 The justification for this approach appears to be Mustill, J.'s view that the owners have a right to have their ship kept in employment by the charterers until both the period of the charter has elapsed and the redelivery port has been reached: see page 270.

15.11 However, with respect, that view seems doubtful. Take, for example, the facts of *The Rijn* itself. Mustill, J.'s decision entails that when the charterers purported to redeliver they were under a duty to order the ship on a final voyage to Japan/Singapore. Yet, since the period of the charter had already elapsed, any such order would have been an illegitimate order which the owners would not have been obliged to follow: see paragraphs 4.64 *et seq*., above. Indeed it is probably right to say that even the giving of that order would have constituted a breach of the charter: see paragraph 4.65. As a matter of principle, it is difficult to see how the charter can have the effect that the charterers are simultaneously under a duty to give the ship an order to sail to Japan/Singapore and under a duty not to give that order.

15.12 Accordingly, when it comes to measuring damages for the charterers' failure to redeliver the ship in the right place, it seems wrong to use an award of damages for one breach (redelivering in the wrong place), to put the owners in the position they would have occupied if the charterers had committed a different breach (redelivering in the right place, but late). Damages should create (the monetary equivalent of) redelivery at the right time in the right place, whereas Mustill, J.'s measure replicates redelivery in the right place but at the wrong time.

Notice of redelivery

15.13 Under Lines 56 and 57 of the New York Produce form, the charterers are required to serve notice of their intention to redeliver the ship. It is thought that, as is the case with advance notices of delivery, such notices must be given honestly and on reasonable grounds: see paragraph 7.18, above.

Can charterers redeliver without serving proper notice?

15.14 Does a failure to serve the required redelivery notice or notices prevent the charterers from redelivering the ship? It is thought that it does not; if service of proper notice were a precondition to the charterers' right to redeliver, then, in any case where the charter period had elapsed, the charterers would find themselves in a position where they could neither employ the ship (because the owners would no longer be bound to follow their orders) nor redeliver her. For discussion of the analogous question whether the *owners* can *deliver* the ship without serving the required notices of delivery, see paragraphs 7.19 *et seq*., above.

Date of breach

15.15 What is the effect of the charterers' redelivering the ship without giving any notice? It is thought that the charterers commit a breach of charter on the date that the ship is redelivered, consisting in having failed to serve notice of redelivery the necessary number of days previously: see *The Niizuru* [1996] 2 Lloyd's Rep. 66, at page 73, where an analogous point in relation to laycan narrowing notices is discussed by Mance, J.

15.16 Similarly, where the charterers give shorter notice of redelivery than the charter requires (say, three days' notice when the charter requires seven), they are probably guilty only of a threatened breach until they actually redeliver upon that short notice. Accordingly, the owners are under no duty to mitigate until the ship has been redelivered: see *The Liepaya* [1999] 1 Lloyd's Rep. 649, *per* Rix, J., at page 672.

Measure of damages

15.17 Where the charterers fail to give the requisite notice of redelivery at all, or fail to give the required number of days' notice, it is thought that the proper measure of damages is damages putting the owners in the position in which they would have been, if notice as required by the charter had been given the requisite number of days prior to redelivery.

Effect of a notice of redelivery

15.18 The giving of due advance notice of redelivery ensures that when the charterers redeliver, they do not commit the breach of charter just discussed (paragraphs 15.14 to 15.17, above). The question what further legal effect a notice of redelivery may have, if any, has to date been considered only in *The Zenovia*, below, and merits, we suggest, consideration by the Court of Appeal. It is thought, first, that by serving notice of redelivery the charterers do not undertake that the ship will be redelivered on the date indicated, and this was also the view of the arbitrators and of Tomlinson, J., in *The Zenovia*. The redelivery notice is not a promise that the ship will encounter no delay in any remaining employment under the charter. Always allowing for that, nonetheless the main purpose for requiring the charterers to give advance notice of redelivery is so that the owners may plan the ship's future employment. The ordinary expectation, when advance notice of redelivery is given, is that the owners will indeed rely on it in planning and arranging such employment. Despite this, in *The Zenovia*, Tomlinson, J., held that the redelivery notice in that case had no legal effect other than preventing a breach at redelivery. Pending further case law on the point, we respectfully adhere to the view that the gist of a redelivery notice is a statement or promise that there will be no further employment orders under the charter that are inconsistent, when given, with redelivery in accordance with the notice. If that be right, it is less easy to say whether such a statement or promise is capable of operating as an election, immediately binding the charterers not to give any such inconsistent orders, or is capable only of giving rise to an estoppel, precluding the charterers from claiming to be entitled to give inconsistent orders if, but only if, reliance on the notice by the owners in the meantime has rendered it unjust for the charterers to do so. There are arguments in favour of, and also difficulties with, either approach. Tomlinson, J., held in *The Zenovia* that what was said by the charterers in that case as to their future conduct was too uncertain to generate an unequivocal abandonment of rights. We respectfully suggest that a different view could easily be taken or that, if *The Zenovia* is correctly decided on its facts, then its proper explanation might be that the charterers had so qualified their "30-day notice" that it was in fact no such notice at all.

The *Zenovia* was chartered on the New York Produce form, as amended by the parties, for a minimum of 11 months, up to about 13 months (about meaning +/- 15 days). The ship was to be redelivered on dropping last outward sea pilot one safe port Aden/Japan range and the charterers were to give "not less than 30 days followed by 20/15/10/7 days notice of approximate redelivery date and intended port thereafter 5/3/2/1 days definite notice of redelivery date and port". The charterers gave a 30-day notice "of redelivery . . . at . . . 1 sp China on about 4 Nov 2007 basis agw, wp, wog, uce . . .", which would usually be taken to mean "all going well, weather permitting, without guarantee, unforeseen circumstances excepted", although the arbitrators reached the unappealing, but also unappealable, conclusion that "wp" here meant "without prejudice", not "weather permitting". In reliance on that notice, the owners fixed new employment for the ship with a laycan of 1/11 November 2007. The charterers then insisted they could change their mind about when to redeliver, so as to squeeze in further employment, and the owners treated that insistence as a wrongful repudiation. Arbitrators agreed with the owners and dismissed the charterers' claim of wrongful termination. They held that the charterers had promised to redeliver at the end of a particular voyage and not at the very end of the charter period, giving rise to a promissory estoppel, and that there was an implied term prohibiting deliberate action by the charterers preventing redelivery by the date indicated in the 30-day notice. An appeal by the charterers was allowed by Tomlinson, J., who overruled the arbitrators on both points.

In relation to promissory estoppel, Tomlinson, J., said at [31] that "The charterers said nothing from which it could reasonably be inferred that they were abandoning any contractual rights. The charterers said nothing from which the owners could reasonably infer that the charterers intended what they said to affect the legal relationship between them. In any event what was said by the charterers, either expressly or impliedly, as to their future conduct was far too uncertain to generate an unequivocal abandonment of rights."

The Zenovia [2009] 2 Lloyd's Rep. 139.

Redelivery in like good order

Nature of the obligation to redeliver in like good order and condition

15.19 Under Clause 4 of the New York Produce form, the charterers are under an obligation to redeliver the ship "in like good order and condition, ordinary wear and tear excepted". Under Clause 7 of the Baltime form, the charterers are under the same obligation.

15.20 This wording would make sense in a demise charter, where possession of the ship is given to the hirer, who will normally be responsible for insuring her. However, it is less obvious why a clause of this kind should be included in a time charter, where the charterers are never given either possession or care of the ship and the owners remain responsible for her condition and insurance.

15.21 Given that it is the owners, not the charterers, who are responsible for keeping the ship in good order and condition during the period of the charter, and insuring her, it is difficult to see why this allocation of responsibility should be abruptly reversed at the end of the charter period. It seems illogical that the owners should have to bear the cost of repairs effected during the currency of the charter, but that the charterers should have to bear the cost of all residual damage at the end of the charter, whether caused by them or not.

15.22 Further, a time charter typically requires the owners to insure the ship against marine and war risks. It is difficult to see the point of that if Clause 4 would make the charterers liable for damage caused by insured perils, even where the damage was not caused in any way by the charterers.

15.23 Scrutton, L.J., recognised these difficulties in *Limerick* v. *Stott* (1921) 7 Ll.L.Rep. 69, at page 71. Referring to a clause that seems to have been much like Clause 7 of the Baltime form (which provides "the Vessel shall be re-delivered. . . in the same good order as when delivered to the Charterers (fair wear and tear excepted)"), he said, "It is not clear what this means as the clause is difficult to reconcile with the shipowners' obligation to maintain the ship efficient under clause [3] [and] to insure her. . . When it is necessary to construe the clause it will be desirable to consider what is covered by 'fair wear and tear', and whether the clause applies to damage not caused in any way by the charterers."

15.24 It is suggested therefore that the obligation to redeliver the ship "in like good order and condition" should be construed as imposing on the charterers an obligation to redeliver in the same condition as upon delivery, but only in so far as that lies within their control. The only control the charterers exercise over the condition of the ship is through the employment orders they give, so in effect the charterers' duty is to employ the ship in such a way that she will be, at the time of her redelivery, fully discharged, clean, and free of previous cargoes.

15.25 However, another construction is possible. It may be that the obligation to redeliver the ship "in like good order and condition, ordinary wear and tear excepted" should be construed as imposing on the charterers an obligation to indemnify the owners against the cost of restoring the ship to the condition she was in at delivery, in so far as any damage has been caused by compliance with the charterers' orders, but always provided that the damage is not ordinary wear and tear. This seems to have been the view that Colman, J., took of this stipulation in *The Pamphilos* [2002] 2 Lloyd's Rep. 681. In that case, the owners had claimed that the charterers were in breach of their

redelivery obligation because of barnacle growth on the ship's hull. The arbitrators had found that there had been no breach: the growth was an ordinary incident of trading in accordance with charterers' lawful orders. Colman, J., in refusing permission to appeal, said, *obiter*, at page 691: "The scheme of the contract involved that charterers bore. . . the cost of restoration of the vessel to her on-delivery condition where the deficiency was due to compliance with their orders *and* was not fair wear and tear."

15.26 Colman, J.'s *dictum* in the *The Pamphilos* is consistent with the decision of Acton, J., in *Chellew* v. *Appelquist* (1925) 22 Ll.L.Rep. 190. This is a somewhat unsatisfactory case, not only because the umpire's findings of fact were inadequate, but also because it makes no reference to whether the owners were under obligation to insure the ship, as would normally be the position under the Baltime form.

The *Pencarrow* was chartered on the Baltime form for a Baltic round voyage from the United Kingdom. She carried coal out and iron ore back. During the loading and discharging of the ore, damage was caused to the holds. The owners did not prove any negligence by the charterers, but claimed from them for failing to redeliver their ship "in the same good order as when delivered to the charterers (fair wear and tear excepted)". The umpire found that none of this damage was "fair wear and tear" and that the charterers must pay for its repair. Before the High Court, the charterers argued that if, in using the ship in permitted trades and without negligence, damage was caused, such damage could only be "fair wear and tear". Acton, J., rejected this argument and found for the owners. He said: "I think that there may be things done to that which is hired or lent, as the case may be, without any negligence, and such as may possibly have been in the contemplation of the parties as things which might perhaps be done by a tenant or a hirer without any actual breach of the contract of letting or hiring, which may still not be within the words 'fair wear and tear'."

Chellew Navigation v. *Appelquist* (1933) 45 Ll.L.Rep. 190.

15.27 The result in *Chellew* v. *Appelquist* was to hold the charterers liable for damage to the ship caused as a direct result of the charterers' orders to load a particular kind of cargo, even though there was no negligence in the conduct of the loading operation. It may be that the same result could have been achieved if the claim had been put on the basis of the express indemnity in Clause 9 or, as regards the New York Produce form, the implied indemnity under Clause 8: see chapter 19.

Redelivery of a damaged ship

15.28 The fact that the ship is damaged, or otherwise not in the same good order and condition as at delivery, does not prevent the charterers from redelivering. That is so even if the damage has been caused by a breach of the charterers' obligations under the charter. The owners cannot refuse the redelivery and are left to their claim for damages.

The *Wye Crag* was to be redelivered at the end of her time charter "in same good order as when delivered". The charterers were responsible for damage to her bottom and the owners refused to accept redelivery from them until the necessary repairs had been completed. McCardie, J., held that good redelivery could be made and the obligation to pay hire thereby terminated despite the condition of the ship, in respect of which damages were claimable.

Wye Shipping v. *Compagnie du Chemin de Fer Paris-Orleans* (1922) 10 Ll.L.Rep. 85.

The *Puerto Buitrago* was demise chartered for 17 months. The ship was to be redelivered "in the same good order and condition as on delivery" and it was agreed that "Charterer before redelivery, shall make all such repairs and do all such work. . . at its expense and time". It was, nevertheless, held by the Court of Appeal that after the end of the charter period the charterers might make a good redelivery of the ship in badly damaged condition, subject to the owners' claim for damages. The damage was such that the necessary repairs would have greatly exceeded her value when repaired.

The Puerto Buitrago [1976] 1 Lloyd's Rep. 250 (C.A.).

Ordinary wear and tear

15.29 Whether damage is or is not "ordinary wear and tear" depends upon the particular trade for which the ship is chartered. In *The Pamphilos* [2002] 2 Lloyd's Rep. 681, arbitrators found that barnacle growth was ordinary wear and tear on the basis that such growth was "an ordinary incident of trading in accordance with the charterers' lawful orders". Similarly, in *Canadian Pacific Railway* v. *Board of Trade* (1925) 22 Ll.L.Rep. 1, where a ship was chartered for use as a troop carrier, the House of Lords construed the expression "expenses ordinarily incurred in running the ship" as meaning "expenses ordinarily incurred in running the ship *as a troop carrier*" (emphasis added).

Measure of damages

15.30 Where the charterers are liable for damage to the ship, the owners are normally entitled to recover the reasonable cost of repair. However the owners will not necessarily be able to recover damages on this measure. The cost of repair is not recoverable where to repair would be an unreasonable expense, judged from a commercial perspective: see the judgment of Phillips, J., in *The Rozel* [1994] 2 Lloyd's Rep. 161 (a bareboat charter case), drawing on *The Puerto Buitrago*, above, and *The Alecos M* [1991] 1 Lloyd's Rep. 120 (C.A.). Of *The Alecos M*, Phillips, J., said at page 168: "This decision demonstrates that in a commercial context a plaintiff will not recover damages on a 'cost of cure' basis if that cost is disproportionate to the financial consequences of the deficiency." See also *Ruxley Electronics* v. *Forsyth* [1996] A.C. 344 (H.L.). In *The Griparion* (*No. 2*) [1994] 1 Lloyd's Rep. 533 (another bareboat charter case), the ship was redelivered early in a badly damaged condition. It was uneconomic to repair the ship, but the owners recovered damages for the difference between her market value as redelivered and the market value that she would have had if she had been redelivered in good order and condition. The owners also claimed the hire that they had lost during the remaining period of the charter. In response, the charterers argued that the owners should have repaired the ship and then sought fresh employment for her. Rix, J., accepted the owners' response that since, in the prevailing market, it would have been uneconomic to repair, the owners had acted reasonably in laying up the ship unrepaired to await an upturn in the chartering market. The owners therefore recovered as damages for the lay-up period their lost earnings at the contract rate, net of saved operational costs.

U.S. Law

Redelivery in like good order

15A.1 *The Jaramar*, 1969 AMC 354 (Arb. at N.Y. 1969), concerned the charterer's responsibility under the New York Produce charter form to redeliver the vessel "in like good order and condition. . . ." A joint survey held on delivery established that "all cargo compartments were swept clean." On redelivery, however, a survey showed that the holds were unswept. The owner therefore ordered the holds cleaned, and commenced an arbitration proceeding to recover the cost of and an allowance for the time required for the cleaning. The charterer did not contest its liability for the cleaning costs. The panel held that the owner also was entitled to hire until the ship was cleaned and in like good order and condition as upon delivery.

15A.2 Where the necessity for fumigation arises out of the ship's service under the charter, the charterer is bound to bear the cost and the loss of time. See *Dampskibs* v. *Munson Line S.S. Co*., 20 F.2d 345 (2d Cir.) *cert. denied,* 275 U.S. 561 (1927); *The Muggenburg*, SMA 898 (Arb. at N.Y. 1974), holding the charterer liable for fumigation expenses and delay attributable to the inherent vice of grain cargo; *The Ellen Klautschke*, SMA 361 (Arb. at N.Y. 1965), holding that where the charterer redelivered after trading in tropical ports without fumigating the vessel and the New Orleans Board of Trade found live infestation on board, the owner was entitled to hire until the fumigation was completed plus the expense of the fumigation.

15A.3 Where the charterer retendered the vessel to the owner with unrepaired structural damages, it was held that the owner could not refuse to accept redelivery "unless the damages [were] such as to make the vessel unseaworthy and thereby deprive the Owner of the immediate use of his ship." *The Chris*, SMA 199 (Arb. at N.Y. 1958).

15A.4 The charterer's duty to redeliver the vessel in "like good order and condition" does not encompass damage to the vessel resulting from mutually excepted causes such as those listed in Clause 16 of the New York Produce form. See, e.g., *The Lysland*, SMA 419 (Arb. at N.Y. 1969), denying the owner's claim for hull damage caused by negligent navigation; *The Napier*, SMA 525 (Arb. at N.Y. 1970), holding that the charterer was not liable for damage resulting from an explosion caused by crew negligence.

15A.5 The owner need not immediately carry out repairs after redelivery in order to have standing to recover damages from the charterer under Clause 4. In *The Prometheus*, SMA 1154 (Arb. at N.Y. 1977), the charterer was held liable for the established cost of deferred repairs where the ship was not redelivered in like good order and condition as required by Clause 4. If the damages are not repaired, the method usually used to compute the owner's loss is to determine the diminution of the vessel's value, that is, to compare her value in sound condition with her value in damaged condition. *The Arizona*, SMA 1259 (Arb. at N.Y. 1978).

15A.6 In *The Theofilos J. Vatis*, SMA 1994 (Arb. at N.Y. 1984), a hard film of cement had coated the vessel's cargo holds after having carried warm bulk cement. The charterer was held to have failed to redeliver in "like good order and condition, ordinary wear and tear excepted." The panel ruled, however, that the cleaning and repairing had left the holds in a better condition than required under the charter. The panel thus awarded owner the cost of cleaning and repairing the holds, less an amount representing the increase in value.

15A.7 In *Zidell Inc*. v. *Pacific Northern Marine Corp*., 1990 AMC 922 (D. Or. 1990), the bareboat charterparty required that the ship be maintained in "as good order and condition as it [was] upon delivery. . . excepting ordinary wear and tear." Prior to formal redelivery of the ship, an off-hire survey was conducted which made recommendations for repairs to the ship's exterior structure that exceeded ordinary wear and tear. The charterer argued that it could submit a cash

settlement to the owner instead of making repairs. Further, although the charterer conceded that it was liable for hire/loss of use damages during the repair time, it argued that the liquidated damages provision of the charter was void as a penalty. The panel held that, based on the terms of the charter and industry custom, the owner was not required to accept a cash settlement, and was entitled to redelivery in good condition, excepting ordinary wear and tear. Further, the panel found the charter's liquidated damages clause of $1,100 per day to be a reasonable forecast of actual damages, and accordingly awarded the owner such damages.

15A.8 *Sea Link Cargo Services Inc*. v. *Marine Centre Inc*., 380 Fed. Appx. 460, 2010 AMC 2102 (5th Cir. 2010), involved the sub-charter of several barges used in the "mud trade" until they were damaged, after which sub-charterer used them to haul pipe. The charterer allowed the sub-charterer to use the damaged barges in the pipe trade for about five months and then recalled them pursuant to the charterparty. The charter obliged the sub-charterer to repair the barges and return them in like condition once recalled. The ships were fleeted and not repaired for several months. The sub-charterer asked charterer if the barges could in the meantime be used to haul pipe. The charterer denied the request and continued to invoice the sub-charterer at the daily hire rate pursuant to a charter provision that the barges would remain "on-hire status until repairs are completed." The sub-charterer did not pay and the charterer sued. The sub-charterer argued that the charterer failed to mitigate its loss by not allowing the sub-charterer to use the barges while they were fleeted and awaiting repairs. The court disagreed, finding that "on-hire" was not equivalent to "available for use," since the barges could not be undergoing repair and be available for use at the same time.

Ordinary wear and tear excepted

15A.9 "Ordinary wear and tear" was defined in *Moran Towing Co*. v. *Gammino Constr. Co*., 363 F.2d 108, 1966 AMC 2263, 2271–2272 (1st Cir. 1966), in the following manner:

> Wear and tear means normal depreciation. . . No doubt what is "normal" must be responsive to practices in the service for which the vessel is intended. . . The effects of negligence are not wear and tear and they do not become wear and tear merely because they may be anticipated.

15A.10 In *The Managua*, SMA 352 (Arb. at N.Y. 1966), the panel stated:

> It is well known, as confirmed by the testimony of two marine surveyors, that scratches, nicks, gouges, dents, bendings and shearings of the metal parts of a ship's holds, hatches and decks that are inherent in the usual method of discharge of most bulk cargoes by grab buckets, bulldozers, payloaders or other mechanical equipment, but which, when not major, do not affect the strength or function of the structural members of a ship's holds, hatches, bulkheads and decks, . . . are considered "normal wear and tear."

15A.11 Accord, *The Mare Felice*, SMA 1954 (Arb. at N.Y. 1984), holding that damages from the handling of scrap cargoes fell within the scope of "fair wear and tear."

15A.12 A similar approach was taken in *Neubros Corp*. v. *Northwestern Nat. Ins. Co*., 359 F. Supp. 310, 320 (E.D.N.Y. 1972), holding that liability for damage to the vessel would be imposed on the charterer unless it could show that the damage resulted despite the exercise of due care.

15A.13 Similarly, in *Hudson Valley Light Weight Aggregate Corp*. v. *Windsor Bldg. & Supply Co*., 446 F.2d 750 (2d Cir. 1971), a barge operating under a demise charter sustained damage while carrying a cargo of heavy aggregate. The court held that the owner makes out a *prima facie* case of negligence against the charterer when it shows that the barge was delivered in good condition and returned in damaged condition. The charterer must then come forward with proof that the accident occurred without any negligence on its part, and that it exercised due care in the handling of the barge.

15A.14 In *Otto Candies Inc*. v. *McDermott International Inc*., 600 F.Supp. 1334 (E.D. La. 1985), *aff'd,* 785 F.2d 1033 (5th Cir. 1986), two barges which were bareboat chartered to the defendant sustained extensive damage while under its control. The charters required that the charterer maintain the barges in the same class and condition they were in when delivered. The charterer was held to have breached the charters by failing to return the barges in the same condition and class they had been delivered in. The court denied the charterer any credit for wear and tear, finding that there was no evidence of the parties' alleged intent to equate structural damage with wear and tear as the charterer had argued. Thus, the court awarded the owner damages for the cost of repairs to both barges, unpaid charter hire for the time of repair, miscellaneous expenses, prejudgment interest and reasonable attorneys' fees pursuant to the terms of the charterparties.

15A.15 *In the Matter of Hygrade Operators Inc. and Leevac Marine Inc*., SMA 2851 (Arb. at N.Y. 1992), the arbitrators held that in the absence of greater specificity in the charter as to what was meant by "ordinary wear and tear," the parties' reliance on the industry practice of conducting a joint survey demonstrated their intent to apply the standards established by the surveyors. See also *The Plod and The Voce*, SMA 2719 (Arb. at N.Y. 1990), awarding the owner only those damages which were attributable to the charterer, with damages appearing on the on-hire survey and ordinary wear and tear excluded. *B.H. Inc*. v. *Anthony M. Meyerskin Inc*., 149 F.Supp. 219 (E.D.N.Y. 1957); *The G.G. Post*, 64 F.Supp. 191, 195 (W.D.N.Y. 1945); *Wilson Shipping Corp. Ltd*. v. *Tamarack Corp*., SMA 645 (Arb. at N.Y. 1971); *The Elna II*, SMA 576 (Arb. at N.Y. 1957); *The Theokeetor*, SMA 604 (Arb. at N.Y.); *The North Marchioness*, SMA 77 (Arb. at N.Y. 1962); and *The Stavros Commantaros*, 1961 AMC 370 (Arb. at N.Y. 1961).

15A.16 The phrase "ordinary wear and tear excepted" has been held not to apply to the cleanliness of the ship. *The Argo Sky*, SMA 627 (Arb. at N.Y. 1971).

Redelivery at a place other than that agreed

15A.17 The charterer must redeliver the ship at the specific place or within the range stated in the charter. See *The Trafalgar*, 1938 AMC 463 (Arb. at N.Y. 1938), holding that redelivery in Limerick, Ireland, was a violation of the charterer's duty to redeliver at a safe port in the United Kingdom. According to the panel, Irish Free State ports were not part of the United Kingdom. See also *The Severoles*, 1935 AMC 1135 (Arb. at N.Y. 1935); *The Gerdt Oldendorff*, SMA 1981 (Arb. at N.Y. 1984).

15A.18 A redelivery at any place other than that stated in the charter would give the owner the right to recover damages caused by the charterer's breach. The damages would consist of the owner's lost profits during a hypothetical voyage to the required place of redelivery. The owner, of course, remains under a duty to mitigate damages. If employment for the ship is found during the period the hypothetical voyage would require, the owner's damages would be reduced by its earnings from the alternative employment.

15A.19 In *The Christin T*, SMA 2527 (Arb. at N.Y. 1988), the charterer was held in breach of the charter for redelivery of the ship at a place other than the one stated in the charter. The owner, however, was denied any recovery because of the lack of proof that it sustained any damage.

15A.20 In *The New York Getty*, SMA 2200 (Arb. at N.Y. 1986), although the charter provided for redelivery at a U.S. Gulf port, redelivery was accepted by the owner when the ship entered a dry dock for repairs at Jacksonville. The charterer sought a refund of hire it had paid in advance on the assumption that the ship would redeliver at a U.S. Gulf port. The panel held that the charterer was entitled to a refund:

When a charterer is prepared to redeliver at the place stipulated in the charter but the owner elects to take delivery at a place short of the stipulated place, charterer is not required to pay additional hire or for additional fuel beyond the place where the actual redelivery occurs, absent a special agreement to the contrary.

15A.21 See discussion at paragraphs 4A.45 to 4A.46.

Dunnage

15A.22 In *The Milly Gregos*, SMA 2190 (Arb. at N.Y. 1986), the charterer redelivered the ship with substantial quantities of dunnage on board after the discharge of its last cargo. The owner claimed for hire and expenses incurred in removing the dunnage. The charter contained a clause which permitted the charterer to redeliver the ship with unclean holds and pay a lump sum in lieu of hold cleaning. The panel ruled, however, that this clause did not encompass the cost of removing substantial quantities of dunnage. The quantity left on board was on the order of 250/300 tons of dunnage and the panel ruled that this was an unreasonable amount to be left on board. It would seem to follow from the panel's decision that very minor quantities of dunnage left on board would have been covered by the lump sum provision for hold cleaning. The panel awarded the owner damages, including loss of hire for the time required to clean the holds as well as fuel consumed, and other disposal expenses.

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CHAPTER 16

Hire and Withdrawal

"58 5. Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or
59. part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes
60. due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the
61. hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Char-
62. terers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. . . "

General

16.1 Clauses 4 and 5 of the New York Produce form deal with the charterers' obligation to pay hire. Clause 4 stipulates that the charterers are to "pay for the use and hire" of the ship from "the day of her delivery. . . until the hour of the day of her re-delivery" – although this obligation is qualified by the off-hire clause, Clause 15, which stipulates that "payment of hire shall cease" in certain circumstances. Clause 5 stipulates that the charterers are to pay the "said hire. . . semi-monthly in advance".

16.2 The question how these clauses operate together is discussed further in paragraphs 16.5 *et seq*., below. However, the general scheme of these two provisions was succinctly described by Bingham, J., in *The Lutetian* [1982] 2 Lloyd's Rep. 140, at page 149, as follows: "Clause 4 of the charter-party deals with the computation of hire both as to amount and period. Clause 5 governs the mechanics of payment. . . ."

16.3 The charterers' obligation to pay on or before the due date is an absolute one. Lord Porter, in *Tankexpress* v. *Compagnie Financière Belge des Pétroles* (1948) 82 Ll.L.Rep. 43, said, at page 51: "Apart from some special circumstances excusing performance, it is enough to constitute default that payment has not in fact been made: neither deliberate nonperformance nor negligence in performing the contract is required." If hire is not paid punctually, then under clause 5, the owners are to have the right to withdraw the ship. The right to withdraw is a right to terminate the charter. The same right is also included in all the standard forms of time charter. It reflects the importance to the owners of the regular receipt of hire. Also in the *Tankexpress* case, above, Lord Wright said, at page 53: "The importance of this advance payment to be made by the charterers, is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long as the charter-party continues. Hence the stringency of his right to cancel."

16.4 The main topics dealt with in this chapter are: (*a*) the obligation to pay hire in advance; (*b*) the time and mode of payment; (*c*) the charterers' right to make deductions from hire; and (*d*) the owners' right to withdraw.

Payment in advance and the charterers' right to payment of an adjustment

In advance

16.5 Under Clause 5 of the New York Produce form, hire is to be paid "semi-monthly in advance". Under clause 11(a) of the NYPE 93 form, this has been changed to "15 days in advance". However, this means, "*every* 15 days in advance". So, for each period of 15 days, hire is to be paid no later than midnight on the day before that period begins.

16.6 Where payment is made in advance for, say, 15 days, it relates to the ensuing 15 calendar days. It is not payment for the next 15 days during which the ship may in fact be on hire: *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, *per* Scrutton, L.J., at page 564. Consequently, if any hire is not earned during those 15 days, the charterers are entitled to repayment of what was not earned.

16.7 Where hire is payable for a particular period in advance, the charterers' obligation under Clause 5 is to pay in advance hire sufficient to cover every hour of that period (although in the case of the last hire instalment this obligation is modified: see paragraph 16.26, below). This is the case even if the charterers believe, or know, that the ship will be off hire for part of that period: *The Li Hai* [2005] 2 Lloyd's Rep. 389, *per* Jonathan Hirst Q.C. at page 398. On the other hand, if the ship is off hire at the moment that the payment of hire falls due, it may be that the charterers' obligation to pay is suspended: see paragraph 16.18, below.

The owners' obligation to pay an adjustment of hire

16.8 Obviously, the obligation to pay hire in full for a month (or half-month) in advance may have the consequence that the charterers are subsequently found to have paid the owners in advance for time during which the ship was off hire under Clause 15. Likewise, it sometimes happens that a ship is redelivered earlier than was expected when the last instalment of hire was paid, so that more hire is paid in advance than is eventually earned (as to "earned" here, see paragraphs 16.13 *et seq*., below).

16.9 In such circumstances, the charterers have a right to be paid an adjustment of hire. That right is expressly stipulated by Clause 11(A), Lines 151 and 152, of the Baltime form. It is also expressly provided for (though less clearly) in Clause 18, Lines 111 and 112, of the New York Produce form.

16.10 Where a charter does not contain an express right to payment of an adjustment, such a right will be implied. In *The Trident Beauty* [1994] 1 Lloyd's Rep. 365 (H.L.), at page 368, Lord Goff said, "the charter will usually make express provision for the repayment of hire which has been overpaid. In the present charter [which was made on the New York Produce form], such a provision is to be found in cl. 18 of the printed form, which provides that 'any overpaid hire' is 'to be returned at once'. This provision gives rise to a contractual debt payable in the relevant circumstances by the shipowner to the charterer. But even in the absence of any such express contractual provision, advance hire which proves to have been paid in respect of a period during which the ship was rendered off hire under a term of the contract must ordinarily be repaid, and if necessary a term will be implied into the contract to that effect. . . All this. . . means that, as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire." For an example of the application of this decision, see *The Riza and The Sun* [1997] 2 Lloyd's Rep. 314, *per* Timothy Walker, J., at pages 320 to 321.

16.11 The obligation to pay an adjustment of hire arises in relation to hire paid in respect of: (*a*) time that the ship is off hire; and (*b*) time after redelivery of the ship or the termination of the charter. Hire paid in respect of any period of time after the ship has been withdrawn falls within the

latter category: see *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303, *per* Lord Diplock at pages 307 to 308. See further paragraph 16.114, below.

16.12 In *The Trident Beauty*, above, however, it was held that an assignee of the owners' right to receive hire in advance was not bound by the owners' contractual obligation to pay an adjustment of hire. The facts of the case are at paragraph 16.115.

The language used to refer to the owners' obligation to pay an adjustment of hire

16.13 When speaking of the owners' obligation to pay an adjustment of hire, it is usually said that the owners have a duty to repay hire which has not been "earned" (and this usage is reflected in the language of Clauses 16 and 18 of the New York Produce form). That simply means the hire in question has been paid in respect of time during which, in the event, the ship was not on hire. It does not imply that the hire was not fully due and payable when paid. In *French Marine* v. *Compagnie Napolitaine* [1921] 2 A.C. 494, the House of Lords held that a payment of hire in advance was not a mere deposit, out of which payment is to be taken at a later stage: see *per* Lord Dunedin at page 513, and Lord Sumner at page 519.

16.14 Similarly, it is sometimes said that hire paid in advance is 'provisional' or 'conditional'. These terms "mean no more than that the payment is not final since under the contract there is an obligation, express or implied, to repay to the charterer any part of the hire payment which has not been earned": *per* Lord Goff in *The Trident Beauty* [1994] 1 Lloyd's Rep. 365, at page 369.

16.15 In a number of cases, it is said that the charterers are entitled to recover unearned hire on the ground that the consideration for the unearned hire has wholly failed: see, for example, *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, *per* Scrutton, L.J., at page 564. It is perhaps doubtful whether there is a total failure of consideration where only a proportion of hire paid in advance is not earned: see Lord Sumner's comments in *French Marine* v. *Compagnie Napolitaine* [1921] 2 A.C. 494, at page 520. Be that as it may, the charterers' right to payment of an adjustment is a contractual right, in the nature of a debt. The charterers have no claim for restitution. In *The Trident Beauty* [1994] 1 Lloyd's Rep. 365, at page 368, Lord Goff said that in most cases where hire has been paid but not earned, "there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration. It is true that sometimes we find in the cases reference to there having been in such circumstances a failure of consideration. . . But it should not be inferred that such statements refer to a quasi-contractual, as opposed to a contractual, remedy."

When and how the adjustment of hire is paid

16.16 In principle, where the owners come under an obligation to pay the charterers an adjustment of hire, their obligation is to pay that adjustment forthwith: see Scrutton L.J.'s comments in *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, at page 564. Indeed Clause 18 of the New York Produce form expressly requires that overpaid hire is returned "at once". So if, for example, if the ship is off hire, the owners' obligation to pay the consequent adjustment accrues each day that the ship is off hire.

16.17 However, in practice adjustments are normally made by way of set-off against the following month's hire. In *The Trident Beauty* [1994] 1 Lloyd's Rep. 365 (H.L.), at page 367, Lord Goff commented as follows: "given the circumstances that the charter hire was payable in advance and that the ship might be off hire under one or other of the relevant clauses during a period in respect of which hire had been paid, it was inevitable that, from time to time, there might have to be an adjustment of the hire so paid. Such adjustments are a normal feature of administration of time charters. The usual practice is, I understand, for an adjustment to be made when the next instalment of hire falls due, by making a deduction from such instalment in respect of hire previously paid in advance which has not

been earned. . . If the relevant period is the last hire period under the charter, such a deduction may not be possible. Any overpayment will then have to be repaid by the shipowner, and no doubt this will normally be taken care of in the final account drawn up at the end of the charter period."

Suspension of the obligation to pay hire in advance

Where the ship is off-hire on the due date

16.18 In *The Lutetian* [1982] 2 Lloyd's Rep. 140, Bingham, J., held that under the New York Produce form the charterers were not obliged to pay an instalment of hire on the due date if the ship was off hire at that time, as Clause 15 provided that when time was lost from the listed causes "the payment of hire shall cease". He accepted the contention that in such circumstances the charterers' obligation to make payment of the next monthly instalment of hire in advance was suspended until immediately before the ship was again at the service of the charterers: see particularly at pages 150 and 153. This is a fair reading of the language of Clause 15, but, perhaps, not the only possible reading. It is suggested that, unless and until confirmed by the Court of Appeal, charterers should be cautious about relying on Bingham, J.'s view.

Where the use of the ship is being withheld on the due date

16.19 Where the owners are wrongfully withholding the services of the ship, and the charter is on the New York Produce form, it is thought that the ship will be off hire under the "or any other cause" wording: see paragraph 25.37, below. Accordingly, the obligation to pay hire may be suspended, as discussed above. However, other off-hire clauses may not put the ship off hire in these circumstances. If the ship is not off hire, the charterers will be entitled to damages from the owners in respect of hire paid for the relevant period and will be entitled to set those damages off against subsequent hire payments: see paragraphs 16.58 *et seq*. However, the obligation to pay hire is probably not suspended.

16.20 In *Tankexpress* v. *Compagnie Financière Belge des Pétroles* (1946) 79 Ll.L.Rep. 451, Atkinson, J., held that the charterers were not in breach of charter in failing to make a particular payment of hire because on the due date the master was, on the owners' orders, wrongfully refusing to obey their instructions to load the ship. A two-judge Court of Appeal was split on this point: (1947) 80 Ll.L.Rep 365. The House of Lords decided the case on other grounds ((1948) 82 Ll.L.Rep. 43), but Lord Porter and Lord du Parcq made comments, *obiter*, suggesting that Atkinson, J., was in error and that the obligation to pay hire continued (unless of course the conduct of the owners amounted to a repudiation of the whole contract and the charterers decided to accept it and treat the contract as discharged). Lord du Parcq said, at page 60: ". . . I have not been persuaded that a charterer who has agreed to pay a month's hire in advance is absolved from making the payment if, although the owners have not sought to repudiate the contract, the ship is not in fact at the disposal of the charterer for some days immediately before and after the first day of the month of hire."

Other issues relating to time of payment

Semi-monthly and monthly

16.21 Line 58 of the New York Produce form requires hire to be paid "semi-monthly" in advance, but that is often altered by the parties to "monthly". A month in this context means a calendar month. Monthly hire will be due on the same numbered day in each calendar month. In *Freeman* v. *Reed* (1863) 4 B. & S. 174, Cockburn, C.J., said: "the calendar month. . . is complete

when, starting from the given day in the first month, you come to the corresponding day in the succeeding month whatever be the length of either." If a month does not have a corresponding day, hire will be due on its last day. For a more recent review of this subject see *Dodds* v. *Walker* [1980] 1 W.L.R. 1061, where a majority of the Court of Appeal followed the 'corresponding day' rule and held that four calendar months from 30 September expired on 30 January, despite the fact that the period then began at the end of the first month but finished before the end of the fourth. Their decision was affirmed by the House of Lords, [1981] 1 W.L.R. 1027.

16.22 In the absence of express agreement or settled practice, the charterers have until midnight on the due day in which to effect each periodic payment, regardless of the hour at which the obligation to pay hire had commenced at the beginning of the charter period: see *The Afovos* [1982] 1 Lloyd's Rep. 562 (C.A.), and [1983] 1 Lloyd's Rep. 335 (H.L.). It is suggested that, again in the absence of express agreement, the last moment for timely payment should be calculated by reference to the place where payment is to be made so that (for example) a payment to be made in New York and due on 30 April is timely if effected late in the afternoon that day in New York even if the ship is then in the Far East so that for her it is 1 May.

NYPE 93, Baltime

16.23 The Baltime form avoids the difficulty of long and short months by providing in Line 85 that hire be paid "every 30 days". For this calculation months can be disregarded. The NYPE 93 form deals with the same difficulty by stipulating payment intervals of 15 days. The phrase "15 days in advance" means "*every* 15 days in advance".

Payment due on a non-banking day

16.24 If the due day for a particular payment falls on a Sunday or some other non-banking day the charterers are not entitled to defer making payment until the next banking day: see the judgment of Ackner, J., in *The Zographia M* [1976] 2 Lloyd's Rep. 382. Similarly, in *The Laconia* [1977] 1 Lloyd's Rep. 315, at page 323, Lord Salmon made the following (*obiter*) remarks: "Punctual payment cannot be made on the day after it falls due, but I cannot see any reason in the present case why it could not be made before that day. If the hire is to be paid to the owners' bank semi-monthly in advance and an instalment happens to fall due on a Sunday when the banks are closed, then as the banks are also closed on Saturday, payment, in my view, should be tendered on the previous Friday. This will be payment in advance. If it is not tendered until the Monday it will not be made in advance of the period for which it is tendered."

The first instalment of hire

16.25 The obligation to pay hire in advance probably applies to the first instalment just as it applies to subsequent instalments. Branson, J., so held in *Kawasaki* v. *Bantham Steamship* (1938) 60 Ll.L.Rep. 70 (but compare the judgment of Roche, J., in *Budd* v. *Johnson*, *Englehart* (1920) 2 Ll.L.Rep. 27, where he reached the opposite conclusion). Thus under the New York Produce form the charterers must pay either before the expiry of the Clause 5 notice period or before they use the ship pursuant to that clause. In *The Zographia M* [1976] 2 Lloyd's Rep. 382, it was submitted that the obligation to pay in advance did not apply to the first payment of hire. The court was referred to *Budd* v. *Johnson*, *Englehart* but *Kawasaki* v. *Bantham Steamship* was not cited. It was also submitted that a term should be implied that the owners must give reasonable notice of when they will deliver. Ackner, J., at page 392, accepted these submissions.

The final instalment of hire in advance

16.26 If the charter does not expressly provide to the contrary, hire payable in advance for a month or half a month will be payable in full even where it is clear that the ship will be redelivered before the end of the month or half month: see *Tonnelier* v. *Smith* (1897) 2 Com. Cas. 258. After redelivery, the amount overpaid is to be calculated and repaid by the owners: see *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560. This general rule in *Tonnelier* v. *Smith* applies to the Baltime form.

16.27 The New York Produce form provides to the contrary in Lines 58 to 60: "for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers. . ." Thus less than the full semi-monthly hire may be paid in advance where redelivery is expected to be made before the end of that period. In that case, the charterers are obliged to pay in advance only an amount calculated in accordance with their estimate as to the probable date of redelivery. But they must pay hire for the whole period up to that date. Thus Mocatta, J., held the charterers in breach in *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, when they paid hire for a period which ended three days before their own estimate of the redelivery date. Moreover, the charterers' estimate must be made on reasonable grounds; it is not sufficient that it should have been made bona fide: see *The Mihalios Xilas* [1978] 2 Lloyd's Rep. 397 (C.A.) and [1979] 2 Lloyd's Rep. 303 (H.L.), *per* Lord Diplock at page 308, where the relevant clause read: "the last month's hire to be estimated and paid in advance, less bunker cost. . . up to such time as vessel is expected to be redelivered. . .". Although the words of Lines 59 and 60 of the New York Produce form are somewhat different from those in *The Mihalios Xilas*, it is anticipated that they would be construed in the same way so far as this point is concerned.

16.28 Where the words of the charter permit deductions of specified items from the last hire payments, the amount of such deductions must also be made on objectively reasonable grounds: see *The Mihalios Xilas*, above.

NYPE 93

16.29 Clause 11(c) of the 1993 revision of the New York Produce form expands on the provisions in Lines 58 to 60 of the 1946 version, embracing the penultimate as well as the last anticipated payment if this falls during the final voyage to the redelivery port and requiring account to be taken of bunkers on board at redelivery and of owners' disbursements: see Lines 168 to 174.

Mode of payment

16.30 Line 58 requires the charterers to pay hire "in cash". However, this stipulation should not be read literally. In *The Brimnes* [1972] 2 Lloyd's Rep. 465, at page 476, Brandon, J., said: "In my view these words must be interpreted against the background of modern commercial practice. So interpreted it seems to me that they cannot mean only payment in dollar bills or other legal tender of the U.S. They must. . . have a wider meaning, comprehending any commercially-recognised method of transferring funds, the result of which is to give the transferee the unconditional right to the immediate use of the funds transferred." Edmund Davies, L.J., in the Court of Appeal [1974] 2 Lloyd's Rep. 241, at page 248, specifically agreed with that definition. Brandon, J.'s, definition was referred to with approval and clarified by the House of Lords in *The Chikuma* [1981] 1 Lloyd's Rep. 371: see paragraph 16.35, below. At page 375, Lord Bridge agreed with Robert Goff, J., who had taken "unconditional" in Brandon, J.'s, definition to have a wide and liberal sense "equivalent to unfettered or unrestricted", and added this: "The underlying concept is surely this, that when

payment is made to a bank otherwise than literally in cash, i.e. in dollar bills or other legal tender (which no one expects), there is no 'payment in cash' within the meaning of cl. 5 unless what the creditor receives is the equivalent of cash, or as good as cash."

16.31 Similarly, in *The Laconia* [1976] 1 Lloyd's Rep. 395, at page 402, Lawton, L.J., said: "The construction of the word 'cash' provides no difficulty. Amongst business men engaged in international shipping it now means such banking arrangements as can be treated as cash."

Bankers' drafts

16.32 A bankers' draft is a form of payment equivalent to cash: see *The Brimnes* [1972] 2 Lloyd's Rep. 465, *per* Brandon, J., at page 476. However, where payment is made by a bankers' draft, the issue may arise as to when the payment takes place: is it on delivery of the draft to the owner's bank or when the money is credited to his account? The answer is probably the former. This is despite the fact that the owners may not be able to make immediate use of the money because there is a period of internal processing before the owners' bank will actually credit the owners' account. As Lord Salmon pointed out in *The Laconia* [1977] 1 Lloyd's Rep. 315, in a case about payment orders, even if the charterers had literally paid in cash, a certain amount of processing would be needed before a credit was raised in an owner's account: see page 326.

16.33 In *The Brimnes* [1972] 2 Lloyd's Rep. 465, at page 468, Brandon, J., concluded that where payment was made by presentation of a bankers' draft, the payment was effected at the time of presentation. This conclusion was not challenged in the Court of Appeal: see [1974] 2 Lloyd's Rep. 241, *per* Edmund Davies, L.J., at page 247.

Electronic transfers of funds

16.34 A more common substitute for cash is an electronic funds transfer. Where the transfer is international, it is almost always made by means of a payment order sent through the SWIFT secure message system. The order is sent by the charterers' bank to the owners' bank. It instructs the owners' bank to credit the owners' account with a sum of money and tells them how they will be reimbursed. The reimbursement is effected by a transfer of funds, typically through a correspondent bank which holds accounts with both the owners' and the charterers' banks or through a chain of correspondent banks. The SWIFT message has a value date, which is the date on which the funds are to be transferred between the relevant banks.

16.35 Where a payment is made by a payment order of this kind, the order may be received by the owners' bank some days before the interbank value date. Where that is the case, the charterers are not treated as having made a payment at least until the interbank value date.

The charterers of the *Chikuma* paid an instalment of hire using a payment order. The payment order was sent by the charterers' bank to the owners' bank in Italy. It bore a 'for value' date falling four days after the date of the order. In those circumstances, in accordance with Italian banking practice, the owners' bank credited the owners' account immediately, but the credit was made on terms that the owners would not earn interest on the money until the bank had been reimbursed four days later. The House of Lords held that, in those circumstances, the receipt of the charterers' payment order and the credit made to the owners' account were not payment for the purposes of the charter: they did not provide the owners with unconditional and immediate use of the funds. Having referred to the statement of Brandon, J., in *The Brimnes*, see paragraph 16.30, above, Lord Bridge said, at page 376: "The book entry made by the owners' bank on Jan. 22 in the owners' account was clearly not the equivalent of cash. . . It could not be used to earn interest. . . It could only be drawn subject to a (probable) liability to pay interest. . . . It follows, in my view, that on Jan. 22 there was no 'payment in cash' . . . and the owners. . . were entitled to withdraw the ship, as they did, on Jan. 24."

The Chikuma [1981] 1 Lloyd's Rep. 371 (H.L.).

16.36 In practice, payments made by SWIFT transfers are normally completed on the interbank value date: that is, completed in the sense that the funds are made available to the owners on that day. Where this happens, the payment is regarded as having been made on the day on which it is completed. It is not necessary that the owners should have been advised of their bank's decision to credit their account: *per* Kerr, J., in *Momm* v. *Barclays Bank* [1977] 1 Q.B. 790.

16.37 However, in some cases the owners' bank may not complete the transfer of funds the same day. In particular, this may happen if the payment order is for immediate value, that is to say, if the interbank value date is the date on which the order is sent. In that event, the question may arise whether payment has taken place only when the owners' bank credits the owners' account or whether it can be regarded as having taken place at an earlier stage. On this point, the authorities are not entirely clear.

16.38 The general rule is that payment is made when the owners' bank *decides* to credit the owners' account. In *The Brimnes* [1972] 2 Lloyd's Rep. 465 and [1974] 2 Lloyd's Rep. 241 (C.A.), at first instance and in the Court of Appeal, it was held that a payment made by payment order took effect at the moment that the owners' bank took the decision to credit the owners' account. In that case, the charter required payment to be made to the owners' account at their bank in New York, MGT. The charterers' bank in London, Hambros, had their own account with MGT in New York. Hambros sent an order to MGT instructing them to credit the owners' account and draw the funds from Hambros own account. The charterers argued that the payment had been made as soon as MGT received the payment order from Hambros. However Brandon, J., said, at page 477 of the first instance report, "I can see no answer to the shipowners' contention that the time of payment was the time of MGT's decision to debit Hambros account and credit the shipowners' account." The Court of Appeal ([1974] 2 Lloyd's Rep. 241) agreed. Megaw, L.J., said, at page 257, that "there is no useful analogy between, on the one hand, a payment made by delivery of cash or a cheque (where a cheque is a permissible method of payment) and, on the other hand, telex instructions to pay. . . The receipt of a cheque is not the receipt of mere instructions. It is the receipt of an instrument – a chose in action – which has an inherent value, because the holder of its obtains, by virtue of his holding of the document, a legal right to a sum of money, which right he can enforce, if necessary by action. The receipt of a telex containing instructions to transfer funds from one account into another account confers on the holder of the telex no such right. It is instructions to pay, not a payment".

16.39 However, this rule may be subject to one important qualification. It seems that where the charterers' payment is made using an *irrevocable* payment order, the charterers may be regarded as having made a payment as soon as the order is received by the owners' bank (or at least as soon as it has been received and authenticated).

16.40 This point was touched on in *The Brimnes*, where the evidence before the court suggested that the payment order that had been used was revocable until the owners' bank took the decision to credit the owners' account: see [1974] 2 Lloyd's Rep. 241, at pages 248 and 257. At page 257, Megaw, L.J., said, "There might, I suppose, in a case such as this be evidence that such instructions from one banker to another have as a matter of banking or commercial practice the same status. . . as bankers'. . . drafts, that they are treated as irrevocable, and that they are treated as payment as soon as instructions are received." Subsequently, this approach has been applied in a number of cases.

A charter of the *Zographia M* required hire to be paid to the owners' dollar account with the First National City Bank in the Strand, London. The charterers' bank, Société Générale, sent a payment order to the First National's New York branch, asking them to transfer funds to their London branch for the owners' account. In compliance with that instruction, the First National's New York branch then instructed its Strand branch to pay the owners, saying that it had transferred the necessary funds to the account of the Strand branch.

Ackner, J., found, at page 390, that the order sent by First National's New York branch to its Strand branch was irrevocable and that therefore payment had been made when the First National's Strand branch received and verified that order.

The Zographia M [1976] 2 Lloyd's Rep. 382.

A charter of the *Laconia* required the charterers to pay hire to owners' dollar account with the First National City Bank's branch in Moorgate, London. The charterers' bank in London, the Midland Bank, sent the First National Moorgate a payment order issued under the (now defunct) London Currency Settlement Scheme, a paper-based system. This instructed the First National to make a payment to the owners' account and stated that the First National's account with the Midland had been credited with the necessary funds. Under the scheme, the payment order was regarded as the equivalent of cash. However, since the payment order had to be processed, the owners' account was not credited until about 24 hours after the order had been presented to their bank. In the Court of Appeal, [1976] 1 Lloyd's Rep. 395, at page 399, Lord Denning, M.R., said, "The paying bank is the agent of its own customer to make the payment. The receiving bank is the agent of its customer to receive it. The banks themselves regard the 'payment order' as equivalent to cash. . . If the paying bank had sent actual currency, the payment would be made when it was handed over the counter to the receiving bank. . . So also with the 'payment order'."

The case went to the House of Lords, [1977] 1 Lloyd's Rep. 315 but was decided on other grounds. However, three members of the House expressed tentative opinions on the point. Two considered that payment was effective upon delivery of the payment order to the owners' bank. Lord Salmon expressed the view, at page 327, that, "there is no real difference between a payment in dollar bills and a payment by payment orders which in the banking world are generally regarded and accepted as cash". Lord Salmon rejected the idea that because time was necessary for processing the payment order, the payment order did not give the owners immediate use of the funds. He pointed out that even a cash deposit requires processing before a credit is raised on a customer's account: see page 326. Lord Russell said, at page 333: "I would as at present advised incline to the view that, a payment order being as between the banks the equivalent of cash – meaning I take it irrevocable and 'good' – it should suffice for punctual payment that such cash equivalent be tendered in due time to the nominated bank to be credited to the named account: this was the method of payment laid down: you cannot pay 'into' an account, whether you are tendering cash or its equivalent." Lord Fraser expressed the contrary view, that payment should be made in sufficient time to enable the owners' account to be credited by the due date.

The Laconia [1976] 1 Lloyd's Rep. 395 (C.A.); [1977] 1 Lloyd's Rep. 315 (H.L.).

The charterers of the *Afovos* tendered payment of hire using a payment order. The order was sent by tested telex – a precursor to the SWIFT system – from the charterers' bank to the owners' bank, instructing the latter to credit the owners' account. Lloyd, J., said, at page 473, "I would hold that when payment is made by telex transfer from one bank to another, for the account of a customer, the payment is complete when the telex is received and tested by the receiving bank; so that if the owners were to make an enquiry at their bank they would be told, 'Yes, the money has arrived for your account'. It is unnecessary that the funds should have been credited to the owners' account. Still less is it necessary that the owners should have been in a position to transfer the funds out of the account. It is enough that the funds should have been received by the bank *for* the owners' account."

Nothing more was said on this issue in the Court of Appeal ([1982] 1 Lloyd's Rep. 562). The House of Lords ([1983] 1 Lloyd's Rep. 335) declined to decide the issue. Lord Roskill merely observed (at page 342) that it was likely to depend in most cases upon the proof of the practice of bankers current at the time in question, rather than upon any determination of the question as a matter of law.

The Afovos [1980] 2 Lloyd's Rep. 469; [1982] 1 Lloyd's Rep. 562 (C.A.); [1983] 1 Lloyd's Rep. 335 (H.L.).

16.41 It is not obvious how this distinction between revocable and irrevocable payment orders is to be applied to the case of an ordinary SWIFT transfer of funds. The rules of the SWIFT system do not prohibit cancellation or revocation of a payment order; rather they leave it up to the individual members whether to allow revocation or not. In practice, a SWIFT payment order is usually revocable before the interbank value date, but not thereafter because, on the value date, the relevant balances are transferred between banks and, ultimately, credited to the account of the owners' bank. It would seem to follow from this, applying the decisions set out above, that where payment is made by SWIFT transfer, the payment should generally be regarded as having

been made on the interbank value date, even if the owners have not yet had a credit made to their account. However, this issue should be approached with caution pending further consideration by the courts. It has been argued that there are good reasons why a payment should not be treated as having been made until the owners' bank has decided to credit the owners' account: see *Brindle and Cox*, paragraph 3–139.

16.42 In all events, it cannot be said that a payment has been made to the owners *before* a payment order has been received by the owners' bank. In *The Effy* [1972] 1 Lloyd's Rep. 18, the charterers' bank had credited the value of the hire payment to the owners' bank *before* they had sent them a payment order requesting that a credit be made to the owners' account. In other words, the owners' bank had been reimbursed before it had been asked to make funds available to the owners. The charterers argued that the payment, for the purposes of the charter, was made as soon as the owners' bank was credited with the money, even though no payment order had yet been issued. Mocatta, J., rejected this, holding that merely crediting the owners' bank, without issuing a payment order, was not sufficient to constitute payment.

NYPE 93

16.43 Lines 146 and 147 of the 1993 revision of the New York Produce form require that hire be paid "in funds available to the Owners on the due date".

Accepted departures from the contractual method of payment

16.44 The parties may of course agree to adopt a method of payment which departs from the strict terms of the charter. Sometimes the parties expressly agree to vary their obligations under the charter. In other cases, it is found that the parties have tacitly adopted some method of performing the charter which is different from that which, strictly, the terms of the charter require. In such cases, the owners cannot insist upon strict compliance with the terms of the charter—at least until they have given the charterers reasonable notice that strict compliance will in future be required.

The *Petrofina* was time chartered by her Norwegian owners to Belgian charterers for seven years from 1937. By Clause 11, the hire was to be paid "In cash, monthly, in advance in London" and her owners were entitled to withdraw her "In default of such payment". In practice the charterers invariably posted a cheque for the relevant amount from Brussels to Hambro's Bank in London, at the same time advising the owners in Oslo and their brokers in Paris that they were doing so. The cheques were posted two days before the day the hire was due, to allow for the ordinary course of post. It was found as a fact that this had become the "accepted method between the parties". These cheques always reached the bank on time until a payment in late September 1939 was delayed in the post by the outbreak of war. On the day after the due day this payment had not been received and the owners withdrew their ship. It was held by the House of Lords that they were not entitled to do so. The parties had agreed that the charterers were to tender payment of hire by posting a cheque and the effect of that agreement was that the owners bore the risk of the cheque being delayed in the post. The charterers had fulfilled their obligation to tender payment by posting a cheque at the proper time.

Their Lordships reached these conclusions by more than one route. Lord Du Parcq (and Lord Morton who agreed with him) held that the parties had not varied the terms of the charter, but mutually consented to a substituted mode of performance. This consent could be withdrawn on reasonable notice: see page 58. Lord Porter took a very similar view, finding, at page 51, "the method accepted by both parties for payment of hire. . . was effected by sending a cheque in favour of Hambro's Bank to be placed by them to the credit of the owners. . . No doubt the [owners] could at any time have insisted upon a strict performance of the contract after due notice, but they were not, in my view, entitled suddenly to vary the accepted method of performance without first notifying the respondents in time to enable them to perform the contract in the manner demanded."

Lord Wright and Lord Uthwatt, on the other hand, seem to have viewed the parties' practice as a collateral agreement, supplementing the charter terms by filling their gaps. At page 56, Lord Uthwatt referred to the fact that

the charter terms did not specify *whom* the charterers were to pay in London. "But for the parties coming to some working arrangement, the charterers – a Belgian Corporation – with cash in hand, would have had to search for the shipowners – a foreign corporation in London. . . Some arrangement was obviously necessary in the interests of the shipowners as well as the charterers. The [method accepted between the parties] contains the arrangement, and it is indeed a sensible arrangement from the point of view of both parties. So long as the arrangement stood, it represented an agreed method of working out the obligation as to payment imposed by the charterparty, as distinct from an agreement to vary its terms. So long as it stood, the shipowners could not demand, nor the charterers insist on making, payment otherwise than in accordance with the terms of the arrangement". See also Lord Wright's comments to the same effect at pages 53 to 54. On this analysis, it is not obvious that the owners could unilaterally have chosen to dispense with the agreed arrangements for effecting payment. (As an alternative, Lord Wright was prepared to accept the analysis preferred by Lord Du Parcq and Lord Porter: see page 55.)

Tankexpress v. *Compagnie Financière Belge des Pétroles* (1948) 82 Ll.L.Rep. 43 (H.L.).

16.45 The majority analysis in *Tankexpress* is probably best understood as an application of the principle of equitable estoppel. Certainly, Mocatta, J., so concluded in *The Effy* [1972] 1 Lloyd's Rep. 18, at page 30, where he said, ". . . in my view the principle of law applied in the *Tankexpress* case was that of equitable estoppel. This principle can apply where, in the performance of a contract the terms of which are full and clear, there is some departure in practice from those terms. . . Even. . . if the payment provisions in this charter. . . were perfectly clear, if the parties chose to accept a method of payment in some respect differing from or supplementing what the charter. . . provided, the principle of the *Tankexpress* case would, in my judgment, apply to such method."

16.46 Equitable estoppel is founded on an express or implied representation made by one party to the other that he will not insist on his strict contractual rights. That representation can be revoked. A party is entitled to revert to the strict terms of the contract. However, he can only do so after giving his counterparty reasonable notice: see Lord Porter's comments in the *Tankexpress* case, above, at page 51 and also Lord Wright's comments at page 55.

16.47 In the *Tankexpress* case and in *The Effy*, equitable estoppel was relied upon to support the plea that the parties had mutually consented to a mode of payment different from that stipulated by the terms of the charter. In *The Scaptrade* [1983] 1 Lloyd's Rep. 146 (C.A.) (appealed on other grounds [1983] 2 Lloyd's Rep. 253 (H.L.)), equitable estoppel was relied on to support the narrower plea that the owners had waived or surrendered their right to withdraw the ship in the event of late payment. For a discussion of that case, see paragraph 16.82, below.

Charterers' right to make deductions from hire

16.48 The general rule is that the charterers must pay the full amount of each hire instalment. However, in certain circumstances, the charterers are entitled to make deductions from hire or to set off against hire. The charterers' right to deduct, or to set off, arises in three principal cases: (*a*) where the charterers have an express right of deduction under the terms of the charter; (*b*) where the charterers are entitled to an adjustment of hire following a period of off-hire; and (*c*) where the charterers have claims for damages which they are permitted to set off against hire.

When can the charterers make their deduction? And how much may they deduct?

16.49 Where the charterers have the right to make a deduction from hire, they can make their deduction from any subsequent hire payment. They may do so even though the amount of the deduction has not yet been ascertained by arbitration or agreed with the owners. An argument by owners to the contrary was rejected by Kerr, J., and by the Court of Appeal in *The Nanfri* [1978] 1 Lloyd's Rep. 581 and [1978] 2 Lloyd's Rep. 132 (C.A.), see *per* Lord Denning, M.R., at pages 140 and 141.

16.50 However, if the charterers choose to deduct a sum that has not yet been either determined or agreed, how much can they lawfully deduct? More particularly, do they deduct at their peril, so that the owners may withdraw their ship if, for any reason, the charterers deduct a larger amount than that which is eventually held to be correct?

16.51 In *The Nanfri*, above, Kerr, J., said that the charterers are not in default if in respect of a permitted deduction they withhold "any sum which they claim *bona fide* and assess on a reasonable basis". This approach was approved by Lord Denning, M.R., in the Court of Appeal. Dealing with how a deduction is to be quantified where a charterer has a claim for damages giving rise to a right of set-off, he said, at page 140: "If the charterer quantifies his loss by a reasonable assessment made in good faith – and deducts the sum quantified – then he is not in default. The shipowner cannot withdraw his ship on account of non-payment of hire nor hold him guilty at that point of any breach of contract. If it subsequently turns out that he has deducted too much, the shipowner can of course recover the balance. But that is all." Turning later to the question whether the same principle applied where the charterers had an express right of deduction, he held that it did, saying, at pages 141 and 142, "It seems to me that [the charterer] is entitled to quantify his loss by a reasonable assessment made in good faith – and deduct the sum so quantified from the hire." However, the judgment of Goff, L.J., proceeded on the harsher view, namely that in deciding how much to deduct the charterers act at their peril. (Neither Cumming-Bruce, L.J., nor the House of Lords gave any guidance on this point.)

In November 1974 the *Nanfri*, *Benfri*, and *Lorfri* were fixed to the same charterers by three separate but virtually identical Baltime charters for about six years. To the usual Baltime off-hire Clause 11(A) and 11(B), was added, as 11(C), part of the New York Produce form off-hire clause reading "If upon the voyage the speed is reduced by defect in. . . machinery. . . the time so lost and the cost of any extra fuel consumed in consequence thereof . . . to be deducted from hire." In July and September 1977 the charterers made deductions from hire payments under each of the charters. They also gave notice that under Clause 11(C) they intended to deduct $47,122 from the hire due for the *Nanfri* on 1 October 1977, in respect of an alleged reduction in her speed following an engine breakdown on a voyage in 1975. The owners protested and gave notice of arbitration in respect of some of the deductions that had been made and on the question whether the charterers had the right unilaterally to deduct from hire sums not previously agreed as valid.

The case developed and reached the House of Lords on different issues, which are considered at paragraph 21.58, below. The House of Lords did not find it necessary to comment on the following points, but in the Court of Appeal:

(a) the members of the court were unanimous in their view that valid claims under Clause 11(A) and (C) could be deducted from subsequent hire payments;
(b) Lord Denning, M.R., and Goff, L.J., (with Cumming-Bruce, L.J., dissenting) said that the charterers could also deduct from hire their claim for damages when the owners had in breach of charter deprived them for a period of the use of the ship either in whole or in part (see below);
(c) as to the amounts that the charterers might deduct in respect of (a) and (b) above, Lord Denning, M.R., held these to be sums quantified by a reasonable assessment made in good faith, but Goff, L.J.'s judgment proceeded on a different basis, namely that in deciding to make a deduction the charterers act at their peril.

The Nanfri [1978] 1 Lloyd's Rep. 581, [1978] 2 Lloyd's Rep. 132 (C.A.) and [1979] 1 Lloyd's Rep. 201 (H.L.).

16.52 In *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, Mocatta, J., was faced with a deduction that had been assessed reasonably and made in good faith, but subsequently found to be excessive. Obliged to choose between the conflicting views expressed in *The Nanfri*, he chose that of Lord Denning, M.R., "which seems to me to be in accord with what commercial considerations demand": see page 164. The same also appears to be implicit in Robert Goff, J.'s judgment in *The Kostas Melas* [1977] 1 Lloyd's Rep. 18, as to which see paragraph 16.59 below. See also the judgment of Christopher Clarke, J., in *The Qatar Star* [2011] 1 Lloyd's Rep 350, at [46] – [48].

So although the law on the subject cannot be seen as fully settled, the weight of authority supports the view that the charterers are not in breach if they deduct on the basis of a reasonable assessment made in good faith.

16.53 However, where the deduction is based on equitable set-off, the charterers cannot deduct more than the amount of the hire paid or payable in respect of the period during which they have been deprived of the use of the ship: see *The Aditya Vaibhav* [1991] 1 Lloyd's Rep. 573, in which Saville, J., held that time charterers under a Shelltime 3 charter could not deduct all their losses and expenses caused by the alleged failure of owners properly to perform their hold-cleaning obligations, which exceeded the hire payable for the 14 days during which this alleged failure caused the ship to be delayed and unavailable for the charterers' service.

Bona fide belief in right to deduct not sufficient

16.54 If there is no right of deduction, either under the terms of the charter or on the basis of equitable set off (see below), the fact that the charterers believe, *bona fide* and reasonably, that they have a right of deduction will not prevent the owners from exercising their right of withdrawal for non-payment or under-payment of hire: see *The Lutetian* [1982] 2 Lloyd's Rep. 140, *per* Bingham, J., at page 154.

Owners estopped by silence

16.55 If the owners so conduct themselves as to mislead the charterers into believing that there is no objection to the charterers' calculations, the owners may be estopped from relying upon the incorrectness of the deduction: see *The Lutetian*, above, *per* Bingham, J., at pages 157 and 158.

Deductions from hire expressly permitted by the terms of the charter

16.56 The charterers may deduct from payments of hire those amounts specifically permitted by the terms of the charter. Under Clause 13 of the Baltime form the charterers or their agents may advance necessary funds to the master for ship's disbursements and such advances may be deducted from the hire; similarly, Lines 65 and 66 of the New York Produce form provide that advances for ship's disbursements "shall be deducted from the hire": see the judgment of Donaldson, J., in *Seven Seas* v. *Atlantic* [1975] 2 Lloyd's Rep. 188. Likewise Lines 99 to 101 of the New York Produce form – part of Clause 15 – permit deduction for time lost, fuel consumed and expenses incurred as a result of a reduction in speed caused by a defect in or breakdown of the ship's hull, machinery or equipment. The cost of fuel used for domestic consumption under Lines 133 and 134 may also be deducted from hire: see *per* Donaldson, J., in *Seven Seas* v. *Atlantic*, above, at page 190.

Deduction of an adjustment of hire due to the charterers

16.57 It has long been recognised that, where the charterers are entitled to be paid an adjustment of hire as a result of the ship having been off hire, they are entitled to deduct the adjustment from any subsequent payment of hire: see the comments on Lord Goff in *The Trident Beauty* [1994] 1 Lloyd's Rep. 365 (H.L.), at page 367, quoted at paragraph 16.17, above. See also *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, *per* Scrutton, L.J., at page 564. However, as already noted in paragraph 16.7, above, no deduction is permitted in respect of an anticipated period of off-hire: see *The Li Hai* [2005] 2 Lloyd's Rep. 389, *per* Jonathan Hirst Q.C. at page 398.

Deductions from hire of claims for damages: equitable set-off

General

16.58 Although the general rule is that the charterers are not entitled to deduct from hire claims for damages arising under the charter (for example in respect of damage to cargo), they may set off against hire a claim for damages where the owners' breach of charter has deprived them of the use of the ship or prejudiced them in their use of the ship: see *The Nanfri* [1978] 2 Lloyd's Rep. 132, *per* Lord Denning, M.R., at page 140. This right is an application of the principle of equitable set-off.

16.59 The right to deduct by way of set-off is a self-help remedy; it is also a provisional remedy, in the sense that it is a right to withhold monies pending final adjudication of the charterers' claim; and it is a right which can only be exercised in good faith and on reasonable grounds. In *The Kostas Melas* [1981] 1 Lloyd's Rep. 18, Robert Goff, J., said, at page 26 rhc, "it is to be remembered that although a right of set-off is a defence, with all the legal consequences which follow from it, in practice the exercise of a right of deduction or set-off is essentially a provisional act. It decides nothing finally. . . For the exercise of the right does not prevent either party from subsequently proving his claim or cross-claim, and so does not affect the final resolution of the fundamental dispute. . . Furthermore, the exercise of a right of deduction or set-off is essentially an act of self-help; it requires no order of the Court or arbitrators for its enforcement. If a party exercises it, however, he must have justification for doing so; and in theory he should be able to prove, at the time of its exercise, that he has that justification. But, as I have already indicated, the full facts may not be known to him, or the full evidence may not be available to him at that time. Even so bearing in mind the characteristics of the right, it is in my judgment implicit in its very nature that it should only be exercised in good faith on reasonable grounds, and furthermore, if the other party considers that it is not being so exercised, he should be able to obtain a rapid adjudication upon that question."

The basis of equitable set-off

16.60 In *The Nanfri* [1978] 2 Lloyd's Rep. 132, at page 140, Lord Denning, M.R., said that, as a matter of general law, the right to equitable set-off arises where a party has claims which "arise out of the same transaction or are closely connected with it", and "which go directly to impeach the plaintiff's demands, that is, [are] so closely connected with his demands that it would be manifestly unjust to allow him to enforce them without taking into account the cross-claim". Lord Denning's requirement that there be such a close connection between the right (here, the right to hire) and the charterer's cross-claim that it would be manifestly unjust to enforce the right without setting off the cross-claim was endorsed, in *Geldof* v. *Carves* [2011] 1 Lloyd's Rep. 517 (C.A.), after an exhaustive review of the authorities, by Rix, L.J., who added that reference to impeachment ("an unhelpful metaphor in the modern world") should now be dropped. Commenting on Lord Denning's formulation, Saville, J., said in *The Aditya Vaibhav* [1991] 1 Lloyd's Rep. 573, that in the context of a time charter "in respect of. . . periods when the owners are providing that for which hire is payable, such manifest injustice does not appear. The reason for this is that a claim for hire in respect of such periods cannot be impeached by saying that owners are in any sense asking to be paid for a service which they have not provided."

16.61 The right to set-off is now well established. Hobhouse, J., in *The Leon* [1985] 2 Lloyd's Rep. 470, having reviewed the authorities, said, at pages 475 and 476: "In fields of commercial law certainty of contractual rights and remedies is of the greatest importance. The right to be paid

time charter hire and the right to withhold payment are particularly clear examples where such certainty of the law must exist. The Court of Appeal has formulated a simple rule which represents the relevant application of the underlying principle. If the formulation is to be redrawn a better case would have to be made out than has been made before me and it is not appropriate for a Court of first instance to undertake that task. . . In the present context there is a series of precedents and we must accept their guidance." See also the judgment of Rix, L.J., in the more recent Court of Appeal case of *Geldof* v. *Carves*, above.

16.62 In this context, it is relevant to have in mind that where the owners' breach of charter has deprived the charterers of the use of the ship, the charterers' claim is a claim for damages, and not for the restitution of money had and received: *The Charalambos N. Pateras* [1971] 2 Lloyd's Rep. 42, *per* Mocatta, J., at page 48.

Partial and total interruption of service

16.63 In some of the early cases it was suggested that a right of equitable set-off would arise only where the charterers were deprived of the ship's services altogether. However, that idea was rejected in *The Teno* [1977] 2 Lloyd's Rep. 289. At page 297, Parker, J., said, "The next question is whether the equitable set-off is limited to cases where there is a total withdrawal for a specified time. I can see no reason in principle why it should be so limited. . . If the defence is available at all there is no reason why it should be any the less applicable to a case where the master wrongfully refuses to load any save one of four holds than to a case where he refuses to load any holds at all."

16.64 When *The Nanfri* came before the Court of Appeal ([1978] 2 Lloyd's Rep. 132) Lord Denning, M.R., and Goff, L.J., agreed the charterers could deduct where the owners had wrongfully deprived them of the use of the ship in whole or in part. Lord Denning, M.R., said, at page 141, "I would hold that, when the shipowner is guilty of a breach of contract which deprives the time charterer of part of the consideration for which the hire has been paid in advance, the charterer can deduct an equivalent amount out of the hire falling due for the next month". Cumming-Bruce, L.J., delivered a dissenting judgment on this point. This case was decided in the House of Lords on other grounds and without any guidance on this topic.

Deprived of, or prejudiced in, the use of the ship

16.65 As discussed above, the Court of Appeal in *The Nanfri* identified essentially two circumstances in which the charterers would be entitled to set off against hire: first, where the charterers have been deprived of the use of the ship and, second, where the charterers have been prejudiced in their use of the ship. See paragraph 16.58, above. It is not yet clear exactly which types of claim fall within these concepts.

16.66 In *Naxos Shipping* v. *Thegra Shipping* (*The Corfu Island*) (1973), an unreported case, Ackner, J., held that charterers were entitled to deduct from hire a claim in respect of an alleged breach of a speed warranty. Likewise in *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, Mocatta, J., allowed a deduction from hire for a failure to comply with a speed warranty on the basis of the right of equitable set-off. See also the judgment of Robert Goff, J., in *The Kostas Melas* [1981] 1 Lloyd's Rep. 18.

16.67 Parker, J., held in *The Teno* [1977] 2 Lloyd's Rep. 289 that there was a right to set-off against hire under a charter on the Baltime form in respect of a failure by the owners to load a full cargo. In *The Sargasso* [1994] 1 Lloyd's Rep. 412, Clarke, J., held that time charterers had the right to set-off against hire their claim for time lost by the ship having to leave her contractual discharge

port to dispose elsewhere of cargo that had been contaminated as a result of a breach of contract by the owners.

16.68 In *The Aditya Vaibhav* [1991] 1 Lloyd's Rep. 573 it was conceded by owners that they could not obtain summary judgment for that part of their claim for unpaid hire under a charter on the Shelltime 3 form which related to a period of 14 days during which the ship was not available to the charterers because of the owners' alleged failure properly to perform their hold-cleaning obligations.

Claims that do not give rise to a right of set-off

16.69 In his judgment in *The Nanfri* [1978] 2 Lloyd's Rep. 132 (C.A.) Lord Denning, M.R., said, at page 141, that the right to set-off was confined "to cases when the shipowner has wrongly deprived the charterer of the use of the ship or has prejudiced him in the use of it". He continued: "I would not extend it to other breaches or default of the shipowner, such as damage to cargo arising from the negligence of the crew." Goff, L.J., agreed with the exclusion of claims for damage to cargo; see page 144.

16.70 In an unreported judgment from 1979, *The Lok Manya*, Mustill, J., followed this authority in denying the right to set off a cargo damage claim. In so doing, he treated not only the cost of dumping the damaged cargo at sea but also hire for the three days used in that operation as an integral part of the cargo damage claim that could not be set off. As regards the lost time, that conclusion seems doubtful and Lord Denning, M.R., *obiter*, cast doubt on it when the case reached the Court of Appeal in 1980. Compare *The Sargasso*, paragraph 16.67, above.

16.71 In *The Aliakmon Progress* [1978] 2 Lloyd's Rep. 499 (see paragraph 34.20, below) the ship had been damaged by contact with a quay allegedly caused by negligence of her crew; the necessary repairs caused her to lose an anticipated cargo and she had to wait 39 days for another. Lord Denning, M.R., said at page 501: "I doubt whether [a claim in respect of the 39 days] would be admissible as equitable set-off. Equitable set-off, as we indicated in those cases [*The Nanfri*, above], is only available where the charterers have been deprived of the use of the ship by the fault of the owner. Here the charterers had the use of the ship, but could not get a cargo." (In any event, the charterers' claim was held invalid by the Court of Appeal because the owners could rely on a defence under the U.S. Carriage of Goods by Sea Act: see paragraph 34.20, below.)

16.72 Hobhouse, J., in *The Leon* [1985] 2 Lloyd's Rep. 470, rejected a claim that a right to equitable set-off arose from breaches in respect of: (*a*) a failure to keep accurate logs; (*b*) the master being a party to the creation of false documentation by bunker suppliers; and (*c*) a breach of duty by the owners as bailee of the charterers' bunkers. He said of these breaches, at page 474: "They do not relate to the use of the vessel. There is no suggestion that in the present case the charterers ever directly or indirectly lost even a minute of the ship's time as a result of any of these breaches nor is there any suggestion that at any time by reason of any of the breaches the whole reach of the vessel's holds, etc., were not at charterers' disposal or that the master did not prosecute the voyages with despatch or comply with the order of the charterers as regards the vessel's employment."

16.73 In *The Li Hai* [2005] 2 Lloyd's Rep. 389, the charterers claimed $500, which was a cancellation fee charged by a bunker supplier when the owners wrongfully (so the charterers said) refused to take on board bunkers. Jonathan Hirst Q.C. held that this claim was not akin to a claim arising from a refusal to load cargo. At page 399, he held that the charterers never suffered any loss of or prejudice in their use of the ship: "There was no failure to comply with an order with regard to the vessel's employment. The vessel's trading was in no way impeded. . . Moreover, here the

loss consisted of a $500 cancellation fee, not some loss of earnings. In my judgment, the fee did not impeach the owner's right to hire. It was altogether too remote."

Failure to pay punctually and the right to withdraw

16.74 If the charterers fail to make punctual payment of an instalment of hire, that is to say payment on or before the due date, the owners are entitled by the withdrawal clause (subject to the impact of any 'anti-technicality' clause) to withdraw the ship from their service and thus bring the charter to an end. Withdrawal in this context means the termination of the charter: see the discussion in *The Agios Giorgis* [1976] 2 Lloyd's Rep. 192, at page 202.

16.75 It is contentious whether late payment of hire instalments without more amounts to a repudiatory breach of the charter: see *The Brimnes* [1972] 2 Lloyd's Rep. 465 and [1974] 2 Lloyd's Rep. 241 (C.A.) and, to the contrary, *The Astra* [2013] 2 Lloyd's Rep. 69. For further comments see paragraphs 16.127 *et seq*.

Payment of less than amount due

16.76 The right of the owners to withdraw arises not only when no hire is paid or when hire is paid late. It also arises when a timely payment has been made, but of less than the amount due, and the outstanding balance is not paid by or on the due date: see *The Agios Giorgis* [1976] 2 Lloyd's Rep. 192 and *The Mihalios Xilas*, below. In both cases it was conceded by counsel for the charterers that a timely but insufficient payment gave rise to the right to withdraw.

The *Mihalios Xilas* was chartered on the Baltime form. Additional Clause 39 provided for the payment of hire monthly and for "the last month's hire to be estimated and paid in advance, less bunker cost and Owners' disbursements and other items of Owners' liability up to such time as vessel is expected to be re-delivered. . .". Hire for the ninth month was due on 22 March. On 21 March the charterers paid considerably less than a full month's hire and their agents explained to the owners that the shortfall was because the charterers were deducting in respect of certain advances and estimated bunkers and disbursements on redelivery, showing that they regarded this hire payment as the last under the charter. In arbitration the umpire found that the charterers' estimate that the ship would be redelivered at the end of the ninth month was not reasonable, also that the amount deducted was in any event unreasonable and excessive.

It was accepted before Kerr, J., that in these circumstances the owners were entitled to withdraw. The judge said, at page 700: "In the result there was accordingly an underpayment by the charterers of the ninth months' hire, and it was not disputed that on the facts found this constituted a 'default of payment' for the purposes of the second paragraph of cl.6 containing the right to withdraw the vessel."

(The question for decision by the courts, which eventually reached the House of Lords, was whether the owners had subsequently waived their right to withdraw; as to which see paragraph 16.110.)

The Mihalios Xilas [1976] 2 Lloyd's Rep. 697, [1978] 2 Lloyd's Rep. 397 (C.A.) and [1979] 2 Lloyd's Rep. 303 (H.L.).

(See also *The Lutetian* [1982] 2 Lloyd's Rep. 140, *per* Bingham, J., at page 154.)

Late payment by charterers: effect on the right to withdraw

16.77 The right to withdraw is not lost merely because the charterers tender the overdue hire before the owners have given notice of withdrawal. If the charterers fail to pay in time they are in default and their tender of hire thereafter cannot alter that position. The decision of the Court of Appeal to the contrary in *The Georgios C*. [1971] 1 Lloyd's Rep. 7 was expressly overruled by the House of Lords in *The Laconia* [1977] 1 Lloyd's Rep. 315.

16.78 The Baltime form provides for the right of withdrawal "In default of payment" and in

The Georgios C., above, the Court of Appeal held that these words meant "in default of payment and so long as default continues" (see *per* Lord Denning, M.R., at page 14), so that a late payment or tender of hire by the charterers would extinguish the right of withdrawal if this right had not been exercised by the owners prior to that payment or tender. This construction, and the decision it led to, were overruled by the decision of the House of Lords in *The Laconia*, above, in which the charter was on the New York Produce form, with its right to withdraw "failing the punctual and regular payment of the hire". On that wording, the House of Lords decided – as had Brandon, J., and the Court of Appeal in *The Brimnes* [1972] 2 Lloyd's Rep. 465, [1974] 2 Lloyd's Rep. 241 – that a late payment or tender of hire could not (without more) disentitle the owners from withdrawing. There has still been a failure of punctual and regular payment.

16.79 For the Baltime form, Lord Wilberforce emphasised that the words "in default of payment" had to be related to the obligation in the form (now in its Lines 85 and 86) to pay hire instalments "in advance", saying at page 318: "The Court of Appeal [in *The Georgios C.*] have in effect construed the words 'in default of payment' not as meaning 'in default of payment in advance', but as meaning 'in default of payment whether in advance or later, so long as the vessel has not been withdrawn'. This is a reconstruction not a construction of the clause." The decision of the House of Lords was thus that under both the Baltime form and the New York Produce form, the right to withdraw is not defeated by a late payment or tender of the missing hire instalment.

Effect of subsequently accruing rights of deduction on right to withdraw

16.80 Where the charterers underpay a hire instalment on the due date, but the ship is subsequently off-hire for a period, the value of the charterers' right to payment of an adjustment of hire may exceed the amount of the underpayment, leaving the charterers net creditors of the owners. Suppose, for example, that the charterers underpay by $100, but the ship is then off-hire for the whole of the day following the due date. In such circumstances, the owners' right to withdraw is unaffected: the whole amount of the hire instalment was due on the due date and the charterers failed to pay the whole amount due. See *The Li Hai* [2005] 2 Lloyd's Rep. 389, *per* Jonathan Hirst Q.C. at page 400.

Where the owners represent that they will not exercise the right to withdraw

16.81 In some cases, where the owners agree to use, or acquiesce in the use of, some mode of payment under which the charterers' payment is habitually made later than is required by the terms of the charter, the charterers may be entitled to say that the owners are estopped from insisting on payment in accordance with the terms of the charter: see paragraph 16.47, above.

16.82 However, the mere fact that the owners have repeatedly accepted late payments in the past is unlikely to estop them from exercising their right to withdraw. Giving the judgment of the Court of Appeal in *The Scaptrade* [1983] 1 Lloyd's Rep. 146, Robert Goff, L.J., said that in order to rely upon the principle of equitable estoppel, the charterers had first to establish that the owners had represented unequivocally that they would not enforce their strict legal right to withdraw. The required representation may be inferred from the charterers' conduct if it is shown that a reasonable man in the shoes of the charterers would have made that inference. Second, the charterers must show that it would be inequitable to allow the owners to enforce their right, having regard to the dealings which had taken place between the parties. To satisfy this requirement, it must be shown, or at least inferred, that the charterers had actually been influenced by the owners' representation. In the case in question, it was held that it was not possible to infer from the owners' acceptance of a number of late payments, or from a claim for interest on one late payment, a sufficient

representation to give rise to an equitable estoppel. Further, the charterers had not relied upon the owners' conduct. (The case went to the House of Lords on the separate issue of whether the charterers were entitled to equitable relief against forfeiture, see paragraphs 16.87 to 16.89, below.)

16.83 In *The Li Hai* [2005] 2 Lloyd's Rep. 389, it was found as a matter of fact that there was a settled practice for dealing with small deductions from hire, based on a process of negotiation. However, the judge held that he could not spell out of this an unequivocal representation by the owners that they would not seek to withdraw the ship for small deductions improperly made: see *per* Jonathan Hirst, Q.C. at page 402.

Exercise of the right to withdraw

Notice of withdrawal

16.84 Notice of withdrawal must be given to the charterers. Notice given to the master is not effective as against the charterers. In *The Georgios C*. [1971] 1 Lloyd's Rep. 7 at page 14, Lord Denning, M.R., said of the owners: "They only gave notice to their own master. That was, I think, insufficient. In order to exercise a right to withdraw a ship, the shipowners must give notice to the charterers. The withdrawal only operates from the time notice is received by the charterers."

16.85 The owners must indicate clearly that they are exercising their right of withdrawal. An equivocal statement which may or may not mean that they treat the contract as at an end is not sufficient. Donaldson, J., said in *The Aegnoussiotis* [1977] 1 Lloyd's Rep. 268, at page 275: "No particular form of words or notice is required, but the charterers must be informed that the owner is treating the non-payment of hire as having terminated the charterparty." The effectiveness of such a clear indication to the charterers of the owners' decision to withdraw will not be prejudiced merely because thereafter the ship continues, for example, to load cargo or carry cargo to destination: see the judgment of Robert Goff, J., in *The Tropwind* [1981] 1 Lloyd's Rep. 45, at page 52, which is considered correct on this point despite *obiter* comments of Lord Denning, M.R., to the contrary, [1982] 1 Lloyd's Rep. 232. As to notices under anti-technicality clauses, see paragraphs 16.92 *et seq*.

Withdrawal must be final

16.86 To withdraw is to terminate the charter. The owners do not have the right under clause 5 to withhold temporarily the services of their ship. In a case on the Baltime form, *International Bulk Carriers* v. *Evlogia Shipping* (*The Mihalios Xilas*) [1978] 2 Lloyd's Rep. 186, Donaldson, J., said at page 191: "Temporary withdrawal of a vessel for non-payment of hire is a right which could only exist if specially conferred upon the owners by the terms of the time charter. No such right is conferred by this charter-party." (A right of temporary withdrawal is sometimes conferred in terms by an additional clause, and the lien clause – clause 18 – might also be said to give such a right: see the decision below.)

The *Agios Giorgis* was time chartered on the New York Produce form for the period of a trip from Korea to Charleston and Norfolk. At about the time she reached Charleston a monthly payment of hire became due and from this the charterers made a deduction, subsequently found to be excessive, in respect of a breach of the speed warranty. The owners objected to any such deduction and therefore instructed the master to prevent discharge of the cargo for Norfolk (none of which belonged to the charterers) when he arrived there. This he did until the owners had persuaded the charterers to pay the monies deducted and discharge was prevented for nearly two days. The charterers claimed successfully that the owners were in breach of the obligation in Clause 8 to prosecute the voyage with the utmost despatch and render customary assistance.

Mocatta, J., held as follows:

(1) the charterers had failed to make "punctual and regular payment of the hire", as they were not entitled to make any deduction from hire in respect of their claim and in any event they had deducted too much (see paragraphs 16.50 *et seq*., above);

(2) this gave the owners the right to withdraw their ship finally from the charterers under Clause 5, but the owners had no right to make a temporary withdrawal or suspension of their ship's services either under that clause or otherwise, unless Clause 18 (the lien clause) applied;

(3) Clause 18 did not apply because the cargo over which it was said a lien had been exercised did not belong to the charterers.

The Agios Giorgis [1976] 2 Lloyd's Rep. 192.

(But as to point (3), see *The Aegnoussiotis* [1977] 1 Lloyd's Rep. 268, *International Bulk Carriers* v. *Evlogia Shipping* (*The Mihalios Xilas*) [1978] 2 Lloyd's Rep. 186, and *The Cebu* [1983] 1 Lloyd's Rep. 302; and also paragraphs 30.6 *et seq*., below, on the effect of the lien clause.)

Equitable relief from forfeiture

16.87 The owners' right to withdraw may operate very harshly against the charterers, who may lose a valuable charter and suffer heavy losses in consequence of a small error on their part or that of their bankers. This led some judges, following certain observations by Lord Simon in *The Laconia* [1977] 1 Lloyd's Rep. 315, to consider invoking the equitable power to give relief against forfeiture, a power developed to mitigate the harsh effect of forfeiture clauses in leases of land. However, it was held by the House of Lords in *The Scaptrade* [1983] 2 Lloyd's Rep. 253, affirming the decision of the Court of Appeal, that there was no jurisdiction to grant equitable relief in cases of withdrawal under time charters.

16.88 Lord Diplock, with whom the other Law Lords agreed, pointed out that a time charter, not being a charter by demise, transferred to the charterers no interest in or right to possession of the ship. It was a contract for services to be rendered to the charterers by the shipowners through the use of their ship and crew. The courts had always declined to grant a decree for specific performance of a contract for services. To grant an injunction restraining shipowners from exercising their right of withdrawal, as would be necessary to give the "relief from forfeiture" requested, was effectively the same as ordering specific performance of the charter contract. Consequently, it would amount to the grant of a decree for specific performance of a contract for services. This was sufficient reason in itself to reject the suggestion that the equitable principle of relief from forfeiture could be extended to prevent owners from exercising their strict contractual rights under the withdrawal clause in a time charter. (The position is different where the charter is by demise. Equitable relief from forfeiture may be given under at least some demise or bareboat charters, although the courts will do so only sparingly. See *Bareboat Charters* paragraphs 29.6 to 29.9, *The Jotunheim* [2005] 1 Lloyd's Rep. 181 and *Celestial Aviation Trading* v. *Paramount Airways* [2011] 1 Lloyd's Rep. 9).

16.89 In the same case, Robert Goff, L.J., in the Court of Appeal ([1983] 1 Lloyd's Rep. 146, page 153) dealt with the question of hardship in these terms: "The possibility that shipowners may snatch at the opportunity to withdraw ships from the service of time charterers for non-payment of hire must be very well known in the world of shipping; it must also be very well known that anti-technicality clauses are available which are effective to prevent any such occurrence. If a prospective time charterer wishes to have any such clause included in the charter, he can bargain for it: if he finds it necessary or desirable to agree to a charter which contains no such clause, he can warn the relevant section of his office, and his bank, of the importance of securing timeous payment."

Anti-technicality clauses

16.90 An anti-technicality clause is a clause designed to mitigate the rigour of the withdrawal clause. In dry cargo time charters, it usually provides for a 48-hour or 72-hour notice to be given by the owners to the charterers, after default has occurred, before the ship may be withdrawn. There is no printed provision of this kind in the New York Produce form or in the Baltime form, but the parties frequently add an anti-technicality clause in typescript.

NYPE 93

16.91 An anti-technicality clause, 11(b), is included in the 1993 revision of the New York Produce form, NYPE 93, headed "Grace Period": Lines 160 to 164. This operates where the failure to make punctual and regular payment is "due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers". In *The Qatar Star* [2011] 1 Lloyd's Rep. 350, Christopher Clarke, J., dealt with a similar clause which required an anti-technicality notice where there were "errors or omission [or] absence of intention to fail to make payment", holding that "absence of intention to fail to make payment" connoted absence of wilful or deliberate failure to pay. Where notice is required, the owners must give notice to pay within an agreed number of "clear banking days" and may not withdraw before that period of grace has expired. Thereafter (but only thereafter, by contrast to the position under the Supplytime 1989 form, as to which see *The Greatship Dhriti* [2013] 2 Lloyd's Rep. 359) the owners, in addition to having the right to withdraw, are given the right to withhold performance of their obligations while hire remains unpaid – yet hire continues to accrue: see Lines 153 to 158. The tanker charter forms usually include a printed provision like that in Clause 3(f) of the S.T.B. form: "In default of punctual and regular payment as herein specified, the Owner will notify. . . at. . . whereupon the Charterer shall make payment of the amount due within ten (10) days of receipt of notification from the Owner, failing which the Owner will have the right to withdraw the Vessel. . . "

The time at which notice is served

16.92 A valid notice under such an anti-technicality clause cannot be given until after midnight on the due day, which is when the charterers become in default. This was decided by the House of Lords in *The Afovos*, below. See also *The Lutetian* [1982] 2 Lloyd's Rep. 140, at page 155, where Bingham, J., commented that the decision in *The Afovos* (he was referring to the Court of Appeal's decision but the House of Lords took the same view) "makes evidence of banking hours and practice irrelevant to the question when notice may lawfully be given".

16.93 In *The Pamela* [1995] 2 Lloyd's Rep. 249, Gatehouse, J., held that where hire was due on a Friday, a notice telexed by the owners shortly before midnight on that day was not premature; it would be "effective" only when read by the charterers and the arbitrators had found that this was not to be expected before the Monday following. But it is suggested that this decision be treated with caution pending affirmation by a higher court that it is indeed consistent with *The Afovos*. (See also *The Western Triumph* [2002] 2 Lloyd's Rep. 1 (C.A.), touching on, but not deciding, the question of when notice given by email is effective.)

The contents of the notice

16.94 The wording of the notice to the charterers under such an anti-technicality clause must be clear and unambiguous. It must also be absolute in terms. It must make it clear that hire has not been paid punctually and that the owners are giving an ultimatum that unless it is paid within

48 hours (or other period specified in the particular clause) they will, or may, withdraw their ship: see the judgment of Lord Denning, M.R., in *The Rio Sun* [1981] 2 Lloyd's Rep. 489; *The Afovos*, below; and *The Pamela* [1995] 2 Lloyd's Rep. 249, at page 253.

The charter for the *Afovos* was on the New York Produce form with an added anti-technicality clause (Clause 31) which provided: "When hire is due and not received the Owners, before exercising the option of withdrawing the vessel from the Charter-Party, will give Charterers forty-eight hours notice, Saturdays, Sundays and Holidays excluded and will not withdraw the vessel if the hire is paid within these forty-eight hours." Hire was due on 14 June. The charterers' bank in Italy intended to remit the funds in good time by telex transfer to the owners' bank in London. Due to an unnotified change of telex number by the owners' bank and a failure by the charterers' bank to check the answerback, the telex transfer did not reach the owners' bank. At 16.40 hours on 14 June the owners' agents telexed the charterers: "Owners have instructed us that in case we do not receive the hire which is due today, to give charterers notice as per cl. 31 of the charterparty for withdrawal of the vessel from their service." It was held by the Court of Appeal that:

(1) there was no default in payment of hire by the charterers until after midnight on the due date;
(2) on a true construction of Clause 31, the 48-hour notice could not be given until after the last moment for payment;
(3) in any event, the notice was not a good notice because it was conditional in terms.

The decision of the Court of Appeal was affirmed by the House of Lords.
The Afovos [1982] 1 Lloyd's Rep. 562 (C.A.) and [1983] 1 Lloyd's Rep. 335 (H.L.).

16.95 In *The Li Hai* [2005] 2 Lloyd's Rep. 389, at page 405, Jonathan Hirst Q.C. held ineffective a notice stating simply that the ship would be withdrawn at the end of the relevant period, rather than giving an ultimatum that, unless payment was made within that period, she would be withdrawn.

16.96 However, the owners are not required to identify the ground of their complaint or specify what has not been paid: see *The Lutetian* [1982] 2 Lloyd's Rep. 140, *per* Bingham, J., at page 156. Nor, therefore, need the owners calculate what the charterers must pay: *The Li Hai*, above, *per* Jonathan Hirst Q.C. at page 404.

16.97 For a case in which it was argued by the owners (eventually without success) that the charterers had waived the need for such notice from the owners before withdrawal, see *The Rio Sun* [1981] 2 Lloyd's Rep. 489 (C.A. on leave to appeal) and [1982] 1 Lloyd's Rep. 404.

Waiver of the right to withdraw

16.98 Having become entitled to withdraw their ship, the owners may lose that right if, by their conduct, they waive the failure of the charterers to pay the hire on time – or, in other words, if they elect to treat the contract as subsisting. In this particular context, the owners must elect whether to exercise their right to withdraw or whether, alternatively, to refrain from doing so and allow the charter to continue. If the owners act in such a way as to indicate to the charterers a choice that the charter shall continue then they will be held to have elected accordingly and thus to have waived their right to withdraw. In the words of Lord Scarman in *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303, at page 314: "When a man, faced with two alternative and mutually exclusive courses of action, chooses one and has communicated his choice to the person concerned in such a way as to lead him to believe that he has made his choice, he has completed his election." And, "The consequence of the election, if established, is the abandonment, i.e., the waiver, of a right" – in this context, the right to withdraw. Examples of cases in which it has been argued that the right to withdraw has been waived are set out below. See also, for a case in which demise charterers argued unsuccessfully that owners' demands for payment of subsequent instalments of hire amounted to a waiver of their right to terminate for non-payment, *The Mahakam* [2012] 1 Lloyd's 87; and see *Stocznia Gdanska* v. *Latvian Shipping* [2002] 2 Lloyd's Rep. 436 (C.A.) for a discussion of the general principles applying where a party elects to affirm a contract.

Acceptance of a late payment

16.99 If the owners accept a late tender of the hire without protest and without reservation, they may be taken to have chosen to treat the payment as if it had been made punctually. In those circumstances, they will be held to have waived their right to withdraw. In *The Brimnes* [1974] 2 Lloyd's Rep. 241, Cairns, L.J., said: "I consider. . . that if a month's hire in advance is tendered late, but before withdrawal, and is accepted without qualification, it must be taken to be accepted as hire for the month, which must amount to an election not to enforce the right of withdrawal, so constituting a waiver of that right."

16.100 Whether the owners have accepted a late tender in this way is a matter of fact, and the court will examine all the relevant circumstances to see whether they have done so.

16.101 Acceptance, and thus a waiver of the right to withdraw, may also be found from the owners or their bank retaining tendered funds for an unreasonable time without giving a notice of withdrawal. But acceptance will not be found merely from the fact that the owners' bank receives funds from the charterers and commences internal processing of them.

The *Laconia* was chartered on the New York Produce form, hire being payable semi-monthly in advance into the owners' account with the London branch of First National City Bank. A periodic payment fell due on a Sunday, but it was only at about 1500 hours on the Monday following that the charterers' bank delivered to the owners' bank a "payment order" for the appropriate amount. Shortly thereafter, the bank began processing this document, which between banks is the equivalent of cash but which does not usually produce a credit in the customer's account for about 24 hours. Meanwhile, the owners' bank telephoned the owners' London agents, as they had previously been requested to do when the hire was received, and were told to refuse and return it, which they did by a parallel payment order next morning. The owners gave the charterers notice at 1855 hours on Monday evening that they were withdrawing the ship.

The House of Lords held that the owners were entitled to withdraw and had done so effectively. The late tender of hire could only be relevant if the owners were held to have accepted it and thus waived their right to withdraw, and the receipt of the payment order by their bank and the processing work that was begun upon it did not amount to any such waiver.

Lord Salmon said: "I doubt whether even if the processing of the payment order had been completed and the owners' account had been credited with the full amount of the payment order before that amount was returned to the Midland Bank on the following day, a finding of waiver could have been justified. . . Certainly it was not within the banker's express or implied authority to make commercial decisions on behalf of their customers by accepting or rejecting late payments of hire without taking instructions. They did take instructions and were told to reject the payment. They did so and returned it to the charterers on the following day which on any view must have been within a reasonable time. If the bank had kept the payment for an unreasonable time, the charterers might well have been led to believe that the owners had accepted payment. This would have amounted to a waiver of their right to withdraw the vessel. But nothing of the kind happened in the present case."

The Laconia [1977] 1 Lloyd's Rep. 315 (H.L.).

16.102 However, once the owners have given a valid notice of withdrawal, their subsequent retention of the hire will not of itself be taken as an affirmation of the contract, revoking the withdrawal. In *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303, below, Lord Scarman said, at page 316: "Owners were bound within a reasonable time after default to give notice of withdrawal. If they did not do so, they would be held to have waived the default. They gave notice on the afternoon of Mar. 26. Unless the retention of the hire at that time is to be treated as an election to continue the charter, the notice was valid, being given (as the umpire found) within a reasonable time. In my judgment, the retention of advance hire, unaccompanied by any other indications of an election, is not the unequivocal act required by law, and does not, of itself, amount to an election against withdrawal." For the requirement that the act must be unequivocal, see the speech of Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (H.L.), at pages 397 and 398.

16.103 In appropriate circumstances the retention of hire after a valid withdrawal could give

rise to a fresh contract on the same terms as the original charter. Brandon, J., considered this possibility in *The Brimnes* [1972] 2 Lloyd's Rep. 465, although he found that, as the owners' agents and solicitors had made it clear that the hire was being retained not as hire but as security for cross-claims, no common intention to enter into a new contract could be inferred.

Acceptance of a timely but insufficient payment

16.104 If the charterers make a timely but insufficient payment of hire, the mere acceptance of that payment is unlikely to amount to a waiver by the owners of their right to withdraw if the deficiency has not been made good on or before the due date. The owners will normally be entitled to hold the insufficient payment and to wait and see whether the charterers pay the balance in time. In *The Mihalios Xilas*, below, the House of Lords rejected an argument that the owners had waived their right because, although receiving notice two days before the due date that an insufficient payment was to be made, they did not instruct their bankers to reject the underpayment, which was actually received the next day. Lord Scarman said: "Since there was no default until Mar. 22 [the due date], this is a submission of 'advance waiver'. It is, I suppose, a theoretical possibility, but cases will be rare. I agree with Mr Justice Kerr that, where there is insufficient payment made prior to the last date for payment, it is not possible. . . for an owner to know whether he is entitled to withdraw the ship until the expiry of the last date for payment." The position might, of course, be different if by their words or positive conduct the owners led the charterers to believe that they had accepted, or would accept, the insufficient payment as payment in full or had chosen to forgo or not to exercise their right to withdraw.

16.105 Where the charterers have made a timely but insufficient payment the owners are entitled to a reasonable time in which to investigate the correctness of the charterers' deductions before deciding to withdraw: see paragraph 16.110.

Delay in exercising the right to withdraw

16.106 The owners have a reasonable time in which to give notice that they are exercising their right to withdraw: unreasonable delay may amount to waiver of that right. They will usually be expected to react quickly. Lord Wilberforce said in *The Laconia* [1977] 1 Lloyd's Rep. 315, at page 321: "The owners must within a reasonable time after the default give notice of withdrawal to the charterers. What is a reasonable time – essentially a matter for arbitrators to find – depends on the circumstances. In some, indeed many cases, it will be a short time – viz. the shortest time reasonably necessary to enable the shipowner to hear of the default and issue instructions." See *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303, *per* Lord Salmon at page 312 and Lord Scarman at page 316, and *The Antaios* (*No. 2*) [1983] 2 Lloyd's Rep. 473 (Q.B. and C.A.) and [1984] 2 Lloyd's Rep. 235 (H.L.). See also *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212 and paragraph 24.20, below, in which the Court of Appeal confirmed that a right to withdraw under a war cancellation clause had likewise to be exercised within a reasonable time (and noted that in the cases on withdrawal for non-payment of hire, this principle had been supported on a variety of bases, including election, waiver and estoppel).

16.107 The owners will not be held to have delayed unreasonably if, believing there to have been a default, they take time to make enquiries of their bank to ensure that the money has definitely not been received.

Hire for the *Balder London* was payable to a New York bank to the account of a London bank for the owners' account. The tenth monthly payment was due on Thursday, 17 April. Because of a change in personnel in the charterers' office no steps were taken to arrange for this payment. The owners, who were in Oslo, telephoned

the London bank after midday on Friday, 18 April and were told that no payment had been made from New York. They asked that a check should be made with the New York bank and that they should be telephoned back. On the morning of Monday, 21 April, the owners again telephoned the London bank, from whom they had heard nothing, discovered that payment had still not been received there and asked again for a check with New York. On that afternoon the owners heard from London that the New York bank had confirmed that the money had not been received by them; they gave notice of withdrawal shortly thereafter. Mocatta, J., held that, although the owners might have pressed their bankers harder on Friday, 18 April, their conduct could not be regarded as unreasonable and thus their withdrawal was effective: the owners had satisfied the first sentence of the extract from Lord Wilberforce's judgment quoted above, and the third sentence thereof "is stated too rigidly, though it may well be applicable in many cases".

The Balder London [1980] 2 Lloyd's Rep. 489.

16.108 Moreover, it may be reasonable in the circumstances of a particular case for the owners to take time to consider their position or to take legal advice before deciding to withdraw. Commenting on the above observation of Lord Wilberforce, Lloyd, J., said in *The Scaptrade* [1981] 2 Lloyd's Rep. 425, at page 429: "But what is the shortest time reasonably necessary will still depend on all the circumstances of the case. In some cases it will be reasonable for owners to take time to consider their position, as withdrawal under a time charter is a serious step not lightly to be undertaken. In other cases it may be reasonable for owners to seek legal advice. It seems to me inconceivable that Lord Wilberforce was intending to exclude such matters from consideration when he referred to 'the shortest time reasonably necessary to hear of the default and give instructions'."

The *Scaptrade* was chartered on the Shelltime 3 form, hire being payable in New York. A hire payment was due on Sunday, 8 July, but was not made. The employee of the owners concerned with hire payments waited for confirmation from the bank that the payment had been made, but made no enquiries until Thursday, 12 July, when a telex enquiry was sent to the sole brokers. The employee then referred to her superior and after a further telex enquiry and consultation with lawyers, the ship was withdrawn the same day (12 July). Lloyd, J., relying upon the decision of the Court of Appeal in *Tyrer* v. *Hessler* (1902) 7 Com. Cas. 166, held that the withdrawal had been made within a reasonable time.

The Scaptrade [1981] 2 Lloyd's Rep. 425 (appealed on other grounds: [1983] 1 Lloyd's Rep. 146 (C.A.) and [1983] 2 Lloyd's Rep. 253 (H.L.)).

16.109 Even though the period of delay before notice of withdrawal is given may not be unreasonable, the withdrawal will be invalid if the owners have affirmed the charter in the meantime. If the owners, between the date the hire is due and the date of withdrawal, and with knowledge of the default, communicate to the charterers, by word or conduct, that they have chosen to continue with the charter, the owners will be bound by that election and so the subsequent withdrawal will be wrongful – a repudiation of the continuing charter by the owners. Contrast the decision of the Court of Appeal in *Tyrer* v. *Hessler* (1902) 7 Com. Cas. 166, in which a delay of seven days, during which the master telegraphed for cargo to be ready at the next port, was held not to be an unreasonable time within which to withdraw, with *Nova Scotia* v. *Sutherland* (1899) 5 Com. Cas. 106, in which the act of the master in loading cargo after the due date and before notice of withdrawal two days later was held to amount to waiver of the right to withdraw. The *Nova Scotia* case was overruled on another point by *Tankexpress* v. *Financière Belge*, paragraph 16.44, above, but the finding of waiver was not criticised. It seems doubtful nonetheless. See also the observations on *Tyrer* v. *Hessler* in *The Scaptrade*, above, and by Staughton, J., in *The Antaios* (*No. 2*) [1983] 2 Lloyd's Rep. 473, at page 475. If the owners are found to have affirmed the charter despite the charterers' repeated failure to pay hire, that will only waive the right to withdraw as it stood at the time of the affirmation. A subsequent withdrawal may therefore be justified (and will not be a repudiation) if the charterers persist in, or add to, their repudiatory conduct, and the prior history will of course be relevant in considering whether the subsequent conduct is repudiatory: see *The Fortune Plum* [2013] 1 Lloyd's Rep. Plus 59, especially at [53].

16.110 When hire is paid in time but in an insufficient amount, the owners are entitled to a reasonable time in which to investigate the correctness of the charterers' deductions before deciding to withdraw.

The *Mihalios Xilas* was chartered on the Baltime form. Additional Clause 39 provided for the payment of hire monthly and for "the last month's hire to be estimated and paid in advance, less bunker cost and Owners' disbursements and other items of Owners' liability up to such time as vessel is expected to be re-delivered. . ." Hire for the ninth month was due on 22 March. On 21 March the charterers paid considerably less than a full month's hire and their agents explained to the owners that the shortfall was because the charterers were deducting in respect of certain advances and estimated bunkers and disbursements on redelivery, showing that they regarded this hire payment as the last under the charter. The owners, on the afternoon of 22 March, a Friday, asked the charterers for vouchers supporting the deduction for advances and disputed the charterers' estimate of the redelivery date and the amount of the deduction for bunkers and disbursements on redelivery. They followed this with another request on Monday, 25 March, but no further details were supplied and the owners withdrew their ship shortly after noon on Tuesday, 26 March.

In arbitration the umpire found: (*a*) that the charterers' estimate that the ship would be redelivered at the end of the ninth month was not reasonable; (*b*) that the amount deducted was in any event unreasonable and (*c*) that the owners' decision to withdraw had been made within a reasonable time.

The House of Lords held that the owners had made a valid withdrawal. They rejected an argument that the owners had, by their delay, waived their right to withdraw. Lord Diplock said: "Waiver requires knowledge and I agree with the umpire that the owners were entitled to a reasonable time to make enquiries of the charterers and of the master of the vessel (as they did) with a view to ascertaining whether [the charterers' estimates were based on reasonable grounds] before electing whether to withdraw or not. That being so, his finding that from Mar. 21 to noon on Mar. 26 was a reasonable time to do so is one of fact which cannot be disturbed".

The Mihalios Xilas [1979] 2 Lloyd's Rep. 303 (H.L.).

Effects of withdrawal

16.111 Upon a valid withdrawal by the owners the charter comes to an end. Where, after such a withdrawal, the owners perform further services at the request of the charterers, they may become entitled to remuneration for those services under a new contract. Robert Goff, J., in *The Tropwind* [1981] 1 Lloyd's Rep. 45, discussed the nature of an owner's right to such remuneration. He said, at page 53: "the first question to be asked is whether the services so rendered by the shipowners were rendered at the request (express or implied) of the charterers, in which event the charterers will ordinarily be liable to pay a reasonable remuneration for the services rendered, a liability which can probably be categorised as contractual. If, however, there was no such request, then there can be no contractual liability on the charterers; and their liability (if any) to pay remuneration for the services so rendered can only derive from the principles of the law of restitution." In that case the charterers were found by the judge to have made a request that the ship continue to load and then carry the cargo to destination; having complied with this request, the owners were entitled to be remunerated at the current market rate.

16.112 The Court of Appeal, [1982] 1 Lloyd's Rep. 232, unanimously reversed the judge's decision that the ship had been validly withdrawn and therefore the question of remuneration after withdrawal did not arise for them to decide. But Lord Denning, M.R., expressed the view that if there was cargo on board at the time of the notice of withdrawal and the shipowner carried it to destination, he did so by way of fulfilling the original charter or bill of lading and not in response to any new request by the charterer. So he could not recover the market rate either on a *quantum meruit* or otherwise. Dunn, L.J., expressed no view on this point other than to say that he would not necessarily agree with the views of Lord Denning if the point arose for decision. Given the development of the law of restitution since *The Tropwind* (*No. 2*), it is suggested that Robert Goff, J.'s view would now prevail: so, where a new engagement by the (former) charterers, silent as to rate, can be found in or inferred from the parties' communications and conduct, it will entitle the

owners to the prevailing market rate. By contrast, in *The Kos*, summarised in paragraph 16.117 below, the parties argued over the validity of the withdrawal and rejected each other's proposed terms for completing the ordered employment, after which the owners called on the charterers (who happened to own the cargo) to take it back and the charterers did so. That was a failure to agree new terms and a succumbing to the inevitable in those circumstances. No new engagement, express or implied, could be found on those facts.

16.113 A sub-time charterer who continues to make use of the ship after it has been withdrawn from the time charterer's service may likewise be obliged to pay reasonable remuneration to the owner: see the judgment of Carruthers, J., in *The Lakatoi Express* (1990) 19 N.S.W.L.R. 285, at page 304. See also *The Bulk Chile* [2013] 2 Lloyd's Rep. 38 (C.A.), where sub-time charterers (for a trip), knowing the ship had been withdrawn by her owners from the head charter, gave five days' notice of redelivery and asked the master to complete the voyage and deliver the cargo. They were held liable to pay reasonable remuneration to the owners, even though the owners had made it clear before they withdrew the ship that they would carry the cargo to destination and there discharge it and were under an existing contractual obligation to the shippers to do so. Tomlinson, L.J., said, at [33], "there is no reason why a request, giving rise to a right to remuneration, cannot be made for performance of services some, or even all of which, the recipient of the request is obliged to perform under a contract with a third party, and. . . that is the rational commercial interpretation of the parties' communications in this case."

16.114 The charterers are entitled to repayment of hire they have paid in respect of the period after the withdrawal of the ship: see *Wehner* v. *Dene Steam Shipping* [1905] 2 K.B. 92, and *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303. The owners are entitled to recover or retain hire only up to the date of withdrawal. This is so whether the owners withdraw for non-payment of hire due in advance or by way of acceptance of repudiation by the charterers: see *The Riza and The Sun* [1997] 2 Lloyd's Rep. 314. (For the right of the owners to recover in damages, see paragraphs 16.127 *et seq*., below.)

16.115 It does not, however, follow that the charterers will have the right to repayment from assignees where the hire has been paid not to the owners but to their assignees in order to support a line of credit.

The *Trident Beauty* was chartered on the New York Produce form. Hire was payable every 15 days in advance and Clause 57 provided that if the ship was off hire for a consecutive period of 12 days the charterers could cancel the charter. The owners had previously entered into a credit facility to finance the operation of this and other ships in their fleet. To secure this facility they undertook to assign income, including hire under this charter, to the lenders. The assigned income was to be free of any set-off, deduction or charge and was not to be "contingent or disputed". By the time a notice of assignment was given to the charterers, two instalments of hire had already been paid by them to the owners and the ship had been off hire for some days, awaiting repairs in Singapore. Obedient to the notice of assignment, the charterers paid the third instalment of hire in full to the lenders. The ship remained for another month off hire at Singapore and eventually the charterers treated the owners' conduct as having repudiated the charter and, the owners being insolvent, sought return of the third instalment of hire from the lenders, as money paid for a consideration that had wholly failed.

Judge Diamond's decision in favour of the charterers was reversed by the Court of Appeal. Whatever the position would have been between the charterers and the owners had the claim been brought against the latter, the charterers were not entitled to recover the instalment from the lenders; the repayment of advance hire may be recoverable from the owners in certain circumstances but it is not merely a "conditional" payment, nor could it be said that the lenders took the instalment subject to the burden of repayment should the ship remain off-hire.

Beldam, L.J., said, at page 453: "It seems to me that if those who supply such facilities could not count on their security, owners and charterers alike would find it more difficult to pursue their commercial activities."

This decision was upheld by the House of Lords. Lord Goff and Lord Woolf emphasised that it was the owners and not their assignees, the lenders, who remained liable to repay unearned hire to the charterers.

The Trident Beauty [1993] 1 Lloyd's Rep. 443 (C.A.) and [1994] 1 Lloyd's Rep. 365 (H.L.).

16.116 If bills of lading binding the owners have been issued (as to which see chapter 21, below), the owners will continue to be liable to the owners of cargo under those bills, even if the ship is validly withdrawn from the charter. Following withdrawal, performance of the owners' commitments under the bills of lading will not, without more, entitle the owners to remuneration from the (former) charterers and the question as to what remuneration the owners are entitled to from the bill of lading holders will depend on the terms of the bills: see the discussion of the owners' right to claim bill of lading freight at paragraph 30.67 *et seq*.

16.117 Where the owners are not bound by bills of lading they will still have minimum obligations as bailees to make the cargo available to their bailors to take back from the ship and to take reasonable care of the cargo in the meantime: see *Hayn* v. *Culliford* (1878) 3 C.P.D. 410 and (1879) 4 C.P.D. 182 (C.A.), *The AES Express*, paragraph 16.118 below, and *The Kos*, below. If discharging those minimum obligations delays the ship or involves the owners in expense, they will be entitled to remuneration for that time and reimbursement of that expense from their bailors. The Supreme Court so held in *The Kos*, where the bailors happened to be the (former) time charterers, in a development of the law of bailment building on *Cargo ex Argos* (1873) LR 5 PC 134 and *China Pacific* v. *Food Corporation of India* (*The Winson*) [1982] AC 939.

The *Kos* was chartered on the Shelltime 3 form, with no anti-technicality provision, so that the owners were entitled to withdraw, as they did in early June 2008, when at the height of a very strong market the charterers missed the due date for advance payment of a monthly hire instalment. At the time of the withdrawal, the *Kos*, a VLCC, was part-laden at Angra dos Reis, the loadport to which the charterers' employment orders had taken her. The charterers were also the shippers and owners of the cargo. Following the withdrawal, the ship was kept for 2.64 days at Angra dos Reis during which time the parties first argued over the legitimacy of the owners' actions and then discharged the cargo. This time at prevailing (very high) spot market rates was worth about US$410,000 to the owners. During the same period, the ship consumed bunkers in general ship's consumption and in operating her cargo machinery to enable the (former) charterers, as bailors, to take the cargo back from the ship worth (in all) about US$40,000. The owners claimed the total, about US$450,000, by way of remuneration, indemnity or damages.

Andrew Smith, J., upheld the owners' claim, awarding them remuneration for the ship's time and bunker costs as an entitlement 'correlative to their duties as bailees'. He rejected the other justifications for the claim advanced by the owners. Thus:

(a) there was no claim under the employment indemnity (Clause 13 of Shelltime 3) – any lack of remuneration or bunker cost for the owners' account resulted from the owners' decision to withdraw the ship, not from the order to load the cargo;
(b) there was no claim for damages for failure to pay hire on time – any loss was caused by the owners' decision to withdraw the ship, not the failure to pay hire that gave them the opportunity to do so;
(c) there was no relevant implied term of the charter obliging the charterers to pay;
(d) there was no new, post-withdrawal, contract to pay for the use of the ship or the redelivery of the cargo.

In the Court of Appeal, the owners challenged (a), (b) and (d) above, but the Court of Appeal agreed with Andrew Smith, J., on all of them. They also agreed with the charterers that the bailment claim generally failed, although they upheld it limited to the cost of bunkers consumed in operating cargo machinery to return the cargo.

In the Supreme Court, the owners challenged (a) and (d) above, and sought to restore Andrew Smith, J.'s conclusion that the bailment claim succeeded generally. Their Lordships were unanimous that the bailment claim had rightly succeeded in full at first instance. The post-withdrawal bailment was, thus, a bailment for reward by operation of law. The charterers argued that whilst the bailment had come into existence consensually, pursuant to the charter, and thus not officiously, yet since it was the owners' free choice, motivated by their own commercial interests, to terminate the contractual basis of the bailment, the 2.64-day bailment should be treated in the same way as a purely officious intervention. That argument was rejected by the Supreme Court, albeit with laconic reasoning: ". . . the owners had in no sense officiously put themselves in this position . . .", *per* Lord Sumption at [20]. Their Lordships agreed with Andrew Smith, J., and the Court of Appeal, as to (d) (see paragraph 16.112, above); the majority (Lord Mance dissenting) disagreed with them as to (a) (see paragraph 19.34, below).

The Kos [2010] 1 Lloyd's Rep. 87, [2010] 2 Lloyd's Rep. 409 (C.A.) and [2012] 2 Lloyd's Rep. 292 (S.C.).

16.118 It has been said by the Admiralty Court of New South Wales that "as a necessary incident of" withdrawing his ship the owner assumes, further, the charterer's obligations to cargo being carried under bills of lading issued and signed by the charterer: see *The AES Express*, below. An English court would not, we suggest, accept that proposition, but would accept the actual decision in that case that if the owner decides of his own volition to carry such cargo to destination he cannot require payment of freight by the receiver when freight had previously been paid to the charterer by the shipper.

The disponent owners of the *AES Express* withdrew her from a Baltime charter upon the charterers giving notice that they were going out of business. She was then on a voyage from Norfolk to Auckland, Sydney and Melbourne with cargo, including a consignment of eight containers of paperboard for Melbourne under freight pre-paid bills of lading issued and signed by the charterers. Prior to the ship's arrival at Auckland the owners withdrew her for non-payment of hire, but it was only after the call at Auckland that the owners gave notice to the receiver of these containers that the ship had been withdrawn and that they were seeking freight from them in exchange for carriage to and delivery at Melbourne. At no time did the receivers request such carriage or delivery and they challenged the owners' claim for freight on delivery, which was duly made at Melbourne.

In the Admiralty Court of New South Wales, Carruthers, J., held as follows:

(a) after withdrawal the owners remained under a duty as bailees to take reasonable care of the cargo;
(b) although the bills of lading were charterers' bills, the owners, as a necessary incident of the withdrawal, assumed the obligations of the charterers under the bills, including the obligation to carry the eight containers to Melbourne;
(c) the owners were not entitled to be paid freight on delivery there, as freight under these bills had been paid before withdrawal by the shippers to the charterers; and
(d) if (b) were wrong and the owners were entitled to put the eight containers out at Auckland, the owners were not entitled to remuneration for carrying them on to Melbourne under the principle of restitution or unjust enrichment, because in undertaking the on-carriage, the owners, who were assumed by the judge to have intended to call at Melbourne in any event, had acted as volunteers.

The AES Express (1990) 20 N.S.W.L.R. 57.

16.119 The owners may, however, be entitled to retain any voyage freight paid to them on delivery of cargo: see the judgment of Lord Reading, C.J., in *Wulfsberg* v. *Weardale* (1916) 115 L.T. 146 (C.A.).

Or on any breach of this Charter Party

16.120 If these words in the withdrawal clause of the New York Produce form are given their literal meaning – allowing withdrawal for any breach of any term of the charter however slight – the potential effect would be draconian. For this reason, the courts have been obliged to consider carefully whether any adequate justification can be found for some more restrictive interpretation. As Purchas, L.J., said in *The Athos* [1983] 1 Lloyd's Rep. 127, at page 143, the courts are presented with a stark choice: "Should the clause be allowed to stand unmitigated in its effect or should the Court rewrite the clause so that its effect would be reasonably acceptable in the Court's view to commercial men?"

16.121 While there are conflicting decisions and *dicta* at first instance and in the Court of Appeal, the view has been firmly expressed in the House of Lords in *The Antaios* (*No. 2*) [1984] 2 Lloyd's Rep. 235, *per* Lord Diplock at page 241 and Lord Roskill, at page 243, that the words are not to be read literally but are to be restricted, by commercial common sense, to a repudiatory breach – that is to say, a breach of such seriousness as to entitle the owners to treat the charter as discharged by the charterers' conduct.

16.122 In *The Tropwind* (*No. 1*), below, Kerr, J., held that the words might cover an unjustified refusal to make a payment which had become due and would cover orders to an unsafe port or orders to load a dangerous or excluded cargo, but would not cover a breach which consisted merely in failing to make a timely payment of items other than the charter hire itself.

The *Tropwind* was chartered on the New York Produce form for 9 to 12 months for worldwide trading within Institute Warranty limits. The charterers could breach these limits subject to paying the appropriate additional insurance premium. The limits were breached and additional premium became payable. The owners withdrew the ship, alleging that the charterers had failed to remit the additional premium "in due time". They argued that, although the charter did not provide a time within which the additional premium should be paid, it became payable within a reasonable time and that in the circumstances such time was 14 days, and that as no such payment had been made they could withdraw the ship.

Kerr, J., held that the phrase "or on any breach of this Charter Party" did not cover late payments other than of the hire, saying: "It might be applicable to an unjustified *refusal* to make some other payment, as opposed to cases of mere delay, and it would certainly be applicable to other kinds of breaches, such as ordering the vessel to an unsafe port, loading dangerous cargoes or cargoes expressly excluded from the charter as provided by another clause in the present case. But in my view any businessmen reading this clause, while of course realising that any delay in paying the hire gives rise to the right of withdrawal, would be astonished to be told that any delay in making some other payment which might become due is also covered by these general words. If this had been the intention, then the requirement of punctual payment could easily have been widened so as to include all sums which might become due, as well as the payment of hire." He also rejected the owners' contention as to the time for payment of the additional premium and held that while the owners were correct in contending that the payment had to be made within a reasonable time, 14 days was in the circumstances of the case too short a period.

The Tropwind (*No. 1*) [1977] 1 Lloyd's Rep. 397.

16.123 Neill, J., at first instance in *The Athos*, below, found himself unable to follow the decision of Kerr, J., despite the fact that it had been referred to with apparent approval by Lord Simon in *The Laconia* [1977] 1 Lloyd's Rep. 315. However, the Court of Appeal, while affirming Neill, J.'s decision, disagreed by a majority with his interpretation of "any breach" and endorsed the interpretation adopted by Kerr, J.

The New York Produce form charter for the *Athos* included an additional clause reading as follows: "35. War Risk Insurance is always to be maintained and the orders of Owners' War Risk Underwriters are always to be followed. Charterers to reimburse Owners for. . . extra War Risk Insurance following receipt of invoices and supporting vouchers on payment of next hire." Hire, payable monthly in advance, was due on the 25th of each month.

In February 1980 the charterers ordered the ship to Iran, which at that time was a dangerous area. The owners were consequently obliged to pay additional premium to their War Risks Association. This premium was calculated on the ship's insured value which had been maintained at the same level for several years despite a large drop in her market value. Moreover, the percentage applied to this insured value to produce the premium payable was considerably increased by the owners' decision to include optional cover from the Association in respect of the risk of the ship being "trapped" in Iran. Upon hearing of the additional premium payable, the charterers objected both to the insured value and to the percentage applied to it. At the end of March, after some exchanges on these issues, the owners sent the charterers the Association's debit note for the premium and requested payment not later than the date of the next hire payment. On 18 April the charterers paid the monthly hire due on 25 April but did not pay the requested premium. When the owners protested, the charterers suggested arbitration. By a letter which reached the charterers on 22 May, the owners set out in full their case for recovery of the premium and enclosed credit notes from the Association allowing them certain percentage discounts against that premium. Meanwhile, the charterers had on 20 May paid the monthly hire due on Sunday, 25 May. The owners, having made enquiries of their bank after 26 May, a holiday, and established that no payment in respect of the premium had been received, withdrew their ship on 29 May.

Neill, J., held as follows:

1. The extent of the insurance cover was a matter for the owners' discretion, to be exercised according to the standard of the prudent owner; in this case the owners had been entitled to maintain the insured value of their ship despite the fall in her market value and to elect for the inclusion of the "trapping" cover.

2. The charterers were obliged to pay under Clause 35 only the net premium after deduction of the percentage discounts allowed to the owners by the Association. Therefore, the obligation to pay under that clause did not arise until the letter of 22 May reached the charterers, for until the credit notes enclosed therewith were received there had not been full "receipt of invoices and supporting vouchers". There was no waiver by the charterers of the benefit of the discounts, nor of their right to receive invoices and supporting vouchers.

3. A failure to make timely payment of an amount due under Clause 35 was a "breach of this Charter Party" under Clause 5 entitling the owners to withdraw their ship.

4. But, as the charterers had already paid that month's hire before 22 May, their payment of premium under Clause 35 "on payment of next hire" could be made with their payment of the hire due on 25 June. Thus the owners had not been entitled to withdraw their ship on 29 May.

5. Had the owners, contrary to his decision above, been entitled to withdraw their ship under Clause 5, they would not have waived this right by delaying withdrawal until 29 May while enquiries were made of the bank.

The Court of Appeal affirmed Neill, J.'s decision on points 2 and 4 above, but a majority (Kerr, L.J., and Stephenson, L.J., with Purchas, L.J., dissenting) expressed the opinion, *obiter*, that Neill, J.'s literal interpretation of Clause 5 under point 3 above was incorrect and that the more restrictive interpretation adopted by Kerr, J., in *The Tropwind* (*No. 1*), above, was to be preferred.

The Athos [1981] 2 Lloyd's Rep. 74 and [1983] 1 Lloyd's Rep. 127 (C.A.).

16.124 According to the *obiter* view of the majority of the Court of Appeal in *The Athos*, the intention of Clause 5 was "to single out the payment of hire by the due date as a crucial obligation in relation to payments, and to draw a distinction between payments – other than hire – on the one hand, and breaches of a different nature on the other hand"; *per* Kerr, L.J, at page 137. But that view left open the possibility that in regard to breaches other than those involving payment, even trivial breaches might entitle an owner to withdraw under Clause 5. As already stated, that possibility can probably now be discounted, following *The Antaios* (*No. 2*), below, in which the House of Lords expressed the firm view that the words referred only to repudiatory breaches.

16.125 In *The Antaios* (*No. 2*) [1984] 2 Lloyd's Rep. 235 (which was concerned with the grounds upon which leave might be given to appeal against an arbitrator's award), Lord Diplock in the House of Lords summarised, at page 238, the arbitrators' reasons for their award as being that "breach" in the phrase "or any breach of this Charter Party" means "a repudiatory breach – that is to say: a fundamental breach of an innominate term or breach of a term expressly stated to be a condition, such as would entitle the shipowners to elect to treat the contract as wrongfully repudiated by the charterers". The arbitrators rejected the owners' construction – that the words should be given their literal meaning – on the ground that it was "wholly unreasonable, totally uncommercial and in total contradiction to the whole purpose of the NYPE time charter form". Lord Diplock and Lord Roskill, with whom the other members of the House of Lords agreed, both stated that the arbitrators were obviously right in this decision.

NYPE 93

16.126 In the 1993 revision of the New York Produce form the relevant part of Line 61 has been amended to read "or on any fundamental breach whatsoever of this Charter Party"; see Line 150. This echoes the interpretation of the phrase from the 1946 form that was approved by the House of Lords in *The Antaios* (*No. 2*) above.

Withdrawal and the right to damages

16.127 If at the time of a valid withdrawal there is hire both payable and earned, the owners clearly have the right to claim it, together with any other amounts due from the charterers at the time of withdrawal. However, the question may arise whether the owners are also entitled to claim

damages for loss of bargain – typically, loss caused by the market rate of hire at the time of the withdrawal being lower than the charter rate.

Is the obligation to pay punctually a condition?

16.128 The question whether the owners are also entitled to claim damages for loss of bargain will depend in the first place on whether the obligation to pay hire punctually is a condition of the contract rather than an intermediate term (on which see G.2–G.7 and G.18, below). If it is, then *any* failure to pay promptly – even being just one day late or a tiny amount short on just one occasion – is a repudiatory breach, entitling the owners to damages for loss of bargain if they terminate. On the other hand, that would not be the case if Clause 5 were an intermediate term, albeit one that is reinforced with a contractual option to terminate – a possibility discussed in paragraph 16.129, below. If that were the position, then the owners would not be entitled to recover damages for loss of bargain if their loss could fairly be said to have resulted from their own decision to exercise their option to terminate. The owners would only, normally, be entitled to damages resulting from the termination of the charter if the charterers' failure to pay had amounted to a repudiation of the charter (as in that case it is not said that the owners' decision to terminate breaks the chain of causation). Mere failure to pay on time is very rarely a repudiatory breach of an intermediate term. Realistically the owners would probably have to show that the charterers' communications and conduct overall, including their failure(s) to pay, amounted to a renunciation of the charter: that is, an unambiguous representation that the charterers would not or could not perform their obligations under the charter.

16.129 In *The Brimnes* [1972] 2 Lloyd's Rep. 465, having already decided the case on another ground (namely that the owners had lawfully withdrawn before the missing hire had been paid, see paragraphs 16.77 to 16.79, above) Brandon, J., expressed the view, *obiter*, that the obligation to pay hire on time was not a condition but an intermediate term reinforced by a contractual option to withdraw. He said this, at page 482: ". . . I have reached the conclusion that there is nothing in Clause 5 which shows clearly that the parties intended the obligation to pay hire punctually to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw was given." Thereafter, and in the absence of binding authority to the contrary, Brandon, J.'s opinion was generally accepted as correct. However in 2013, Flaux, J., having also decided the case before him on other grounds, undertook, *obiter*, an extensive examination of the judicial *dicta* and arrived at the opposite view: see *The Astra* [2013] 2 Lloyd's Rep. 69.

16.130 In reaching his *obiter* conclusion that Clause 5 is a condition, Flaux, J., was influenced by the increased use of anti-technicality clauses (as to which see paragraphs 16.90 *et seq*., above; there was no such clause in *The Brimnes*), and by what he took to be a general rule in mercantile contracts that provisions as to time for payment are 'of the essence'. It might be questioned why the presence or absence, or the prevalence, of anti-technicality clauses should be regarded as significant. Such clauses were introduced to alert the charterer to the danger that the ship is about to be withdrawn and to give him a chance to avert that danger. If the charterer fails to pay by the new deadline, it might be thought that the situation of the parties should be as it would have been, absent the anti-technicality clause, following the original failure to pay. It might also be questioned whether any presumption as to time being of the essence in mercantile contracts was ever, or should now be, regarded as applicable to something like time charter hire payments, that is to say periodic payments in advance for the provision of services over time. Is it really the case that the inclusion of the right to withdraw is the articulation of an agreement (for example) that the owners are deprived of substantially the whole of their bargain if under a time charter of (perhaps) many

years duration, they are on one occasion paid a month's hire on rather than before the first day of that month?

16.131 In *The Astra*, the arbitrators, in deciding that there had been a repudiatory breach, applied what was the correct legal test if Clause 5 had been an intermediate term only, which they considered it was (see paragraph 16.135, below). The failure of the charterers' appeal was therefore inevitable and the case did not go further. However Flaux, J.'s *obiter* comments have given rise to uncertainty as to whether Clause 5 is a condition which will remain, we suggest, until the point is decided by the Court of Appeal.

Repudiatory failure to pay

16.132 If the obligation to pay hire punctually is not a condition of the charter, in what circumstances will failure to pay it on time amount to a repudiation of the charter?

16.133 Conduct may amount to repudiation where it shows an intention no longer to be bound by the contract or an inability to perform such that the threatened non-performance would have the effect of depriving the owners of substantially the whole benefit of the charter: see *per* Lord Diplock in *The Afovos* [1983] 1 Lloyd's Rep. 335, at page 341.

16.134 Failure to pay an instalment of hire on the due date would not satisfy this test: see the comments of Lord Denning, M.R., in *The Georgios C*. [1971] 1 Lloyd's Rep. 7, at page 14 and in *The Tropwind* (*No. 2*) [1982] 1 Lloyd's Rep. 232, at page 237; see also those of Lord Diplock in *The Afovos*, above, at page 341. Even repeated lateness of payment may not do so: see *The Brimnes* [1972] 2 Lloyd's Rep. 465 and [1974] 2 Lloyd's Rep. 241 (C.A.).

16.135 Where, however, the conduct of the charterers is such that it is reasonable to infer unwillingness or inability on their part to pay, there may be repudiation. That may be the right inference, even if there is no history of defaults nor any express intimation as to the charterers' intentions or ability for the future. In *Leslie Shipping* v. *Welstead* [1921] 3 K.B. 420, for example, the charterers had dishonoured a bill they had given for one month's hire and the next had not been paid at all. It was held by Greer, J., that the owners were entitled to treat the charter as at an end and to claim damages as well. In *The Astra* [2013] 2 Lloyd's Rep. 69, Flaux, J., reviewed the authorities as to the legal test to be applied in deciding whether the charterers' communications and conduct amount to a repudiation of the charter. He concluded, in particular, at [24], that formulations of the test in *Ross T. Smyth* v. *T. D. Bailey* [1940] 3 All E.R. 60, *Decro-Wall International* v. *Practitioners in Marketing* [1971] 1 W.L.R. 361 and *The Nanfri* [1979] A.C. 757, are but three ways of saying the same thing. The facts found by the arbitrators amply justified the conclusion "that the charterers were determined to perform the charterparty in a manner which deprived the owners of the substantial benefit they should have obtained from further performance" which (see [27]) would seem to be Flaux, J.'s encapsulation of the legal test. Viewed objectively, the charterers seemed set upon paying US$7,000 per day below the charter rate for the remainder of the charter (a period of more than three years) and the arbitrators were "entitled to conclude that that amounted to a breach which went to the root of the contract" (at [28]).

Measure of damages for wrongful withdrawal by the owners

16.136 See paragraphs 4.87 *et seq*., above.

Injunction to prevent a wrongful withdrawal by the owners

16.137 See paragraphs 4.95 *et seq*., above.

U.S. Law

Cash

16A.1 Strictly speaking, "cash" in the United States is either actual currency or Federal Reserve funds. There is a widespread commercial practice, however, of accepting ordinary checks, payment orders or wire transfers as the equivalent of "cash." This is so even though the owner's bank may require a day or more for the check or transfer to clear before giving the owner unrestricted use of the funds.

16A.2 Such practice was called into question in *The Penta*, SMA 1603 (Arb. at N.Y. 1981), where the panel unanimously ruled that the charterer's tender of charter hire by ordinary check which cleared after the due date was a breach of its obligation to make payment in "cash." According to the panel:

> The words "in cash" must mean the one making the payment has the obligation to see to it the recipient has the use of the funds without a qualification attached thereto. [Charterer] should have accomplished this by a wire transfer, or if they chose to pay by check, a check could have been tendered either in federal funds or sufficiently in advance as to allow time for the check to clear.

While this case did not involve a withdrawal of a ship, it is no doubt correct in defining "cash" and indicates that certain commercial arbitrators in New York agree with the strict English rule of what is required to make a timely hire payment.

16A.3 In *Transportes Ferreos de Venezuela*, *C.A.* v. *C.V. G. Ferrominera Orinoco*, *C.A.*, SMA 3954 (Arb. at N.Y. 2007), the parties had entered into an agreement for the transportation of iron ore on shuttle ships, and the agreement required payment in U.S. dollars. The Government of Venezuela thereafter instituted new currency regulations that the charterer claimed prevented it from making payment in dollars. Instead, the charterer paid in Venezuelan bolivars, which were converted from dollars at an artificially low government conversion rate. The panel concluded that performance had not become impossible simply because it could not be made in the exact manner called for by the contract. Furthermore, the panel ruled that the owner was entitled to recover the difference between the artificial government conversion rate and the commercial conversion rate. In other words, the owner was entitled to the full U.S. dollars value of the payments due.

Payment of less than full hire/deductions

16A.4 The problem of what deductions are permitted from hire payments is a vexatious one. Under the New York Produce form, the charterer has no right to withhold hire except as expressly provided in the charter for off-hire or advances. Thus, in *The Uranus*, 1977 AMC 586 (Arb. at N.Y. 1977), the panel was unanimous in its decision that the charterer was in breach of the charter by withholding hire against its claim for alleged cargo damage. According to the panel:

> The Panel agrees the Charterer was in breach of the hire payment provisions of the charter party by withholding hire due against his pending cargo claim. Under the N.Y. Produce Exchange form hire is payable in full without deduction excepting those deductions permitted by Clauses 5 and 15 and other express provisions as are described in the charter. Charterer's remedy for pursuing a cargo claim not recognized by Owner is to proceed to arbitration. [1977 AMC at 590.]

16A.5 A similar result was obtained in *The Katina*, SMA 1310 (Arb. at N.Y. 1979), where a panel upheld a withdrawal when the charterer made unauthorized and excessive deductions from hire. Similarly, in *The Myriam*, 1952 AMC 1625 (Arb. at N.Y. 1952), it was held that deductions for off-hire and related claims were excessive and that the owner was entitled to withdraw the

ship for non-payment of hire. In *The Brookhurst*, SMA 87 (Arb. at N.Y. 1960), it was held that the charterer was not entitled to deduct amounts from the last charter hire payment for an alleged speed deficiency and disbursements, and that under Clause 5 of the New York Produce form, the owner was justified in withdrawing the ship as a result of the charterer's failure to pay hire when and as due under the charter.

16A.6 In *The Commuter*, SMA 3890 (Arb. at N.Y. 2005), the charterer withheld hire based on its allegation that the ship's inert gas system had malfunctioned. The panel concluded that the withholding was improper because the inert gas system had not malfunctioned, and the off-hire clause did not apply. The panel issued an interim order requiring hire to be paid. See also cases discussed below at paragraphs 25A.39–25A.46.

16A.7 In *The Aetolia*, SMA 1993 (Arb. at N.Y. 1984), the panel held that there is no cessation of hire clause in the New York Produce form which permits the charterer to deduct hire for time used to secure cargo in slack holds. According to the panel, this operation formed part of the charterer's obligations to load, stow, and trim the cargo. In addition, the panel held that claims for cargo damage or loss did not give the charterer a right to withhold hire.

16A.8 It has been argued that a charterer may not withhold hire for disputed off-hire claims. On the other hand, the off-hire clause (Clause 15) itself appears to contemplate that hire simply has not been earned and is not payable to the extent of any actual breakdown or speed deficiency. Hence, a charterer can argue persuasively that if off-hire has accrued, he is entitled to deduct it, whether or not the owner consents. Of course, the caveat is that the charterer must be sure of his ground. Thus, if he withholds more hire than is later established as correct, he has to that extent failed to pay hire and a withdrawal would be proper. At the same time, an owner who withdraws by reason of disputed off-hire deductions should similarly be sure of his ground, since if the deductions are later found to be correct the withdrawal may be held wrongful. The severe risks attaching to a mistake in this area suggest that where there is a good faith dispute the parties should consider an escrow arrangement followed by a prompt submission of the dispute to arbitration.

16A.9 Equally vexing is the question whether a charterer can deduct anticipated off-hire. For example, if a ship is scheduled to go into dry dock in the succeeding month, must the charterer pay a full month's hire? The case of *The Noto*, 1979 AMC 116 (Arb. at N.Y. 1976), suggests not, but the authorities are divided and a charterer risks a withdrawal if full hire is not paid "in advance."

16A.10 The posting of security for hire can itself lead to difficulties. In *The Mare Felice*, 1974 AMC 2150 (Arb. at N.Y. 1971), the charterer had paid the owner U.S.$50,000 as security together with the second hire payment, which was to be applied against the last hire payment. The charterer failed to make the third hire payment on the due date, and the owner withdrew the ship. The charterer's primary defense was that the owner was not justified in terminating the charter since the overdue hire payment could be taken from the security deposit. The panel held that the withdrawal was proper, since the charter specifically gave the owner the right to withdraw the ship if hire payments were late. As to the security deposit, the majority stated:

> The majority considers the security deposit to be only drawn upon so that the funds therefrom may exhaust themselves simultaneously with the redelivery of the vessel and thus the number of days' hire which the security deposit represented was to be applied to the last number of days of hire accordingly. [1974 AMC at 2152.]

16A.11 The near sanctity of the owner's right to hire is demonstrated by the arbitration award in *The Dagny Skou*, SMA 2416 (Arb. at N.Y. 1987). The ship was operating under a five-year time charter. During the course of the charter, the charterer, an Argentine company, was served with an order of attachment issued by the Argentine court on the application of creditors of the owner. Pursuant to the court order, the charterer paid funds into the registry of the court and, thereafter,

deducted the amount deposited with the court from hire. The panel held that the deduction from hire was improper.

16A.12 In *The Isla Montague*, SMA 3882 (Arb. at N.Y. 2005), the panel similarly concluded that the charterer's deductions from hire were not justified. The charterer relied on the owner's representations to declare the value of the ship to Venezuelan customs officials. When the ship arrived at port, Venezuelan officials determined that the value of the ship was actually much higher. The ship was detained and fines were imposed. The panel ruled that the charterer was obliged to pay hire without interruption during the detention period because no provision of the charter provided for such a deduction.

16A.13 In *The Thekos*, SMA 2253 (Arb. at N.Y. 1986), the panel held that post-redelivery speed or performance claims, and claims for attorneys' fees, were not permitted deductions under Clause 5 or 15.

16A.14 In *The Treana*, SMA 2929 (Arb. at N.Y. 1992), the arbitrators found that the charterer's deductions from hire under speed and consumption warranties for gear failure and other minor differences were not justified. See also *The Karin M*, SMA 2869 (Arb. at N.Y. 1992), where the charterer was held to have wrongfully deducted hire for a variety of claims it asserted against the owner.

16A.15 In *The Hamlet*, SMA 2780 (Arb. at N.Y. 1991), the arbitrators found that the New York Produce form does not contain any provision which allowed the charterer to offset its claims against the ship from earned hire.

16A.16 In *The Solar*, SMA 2666 (Arb. at N.Y. 1990), the arbitrators held that the charterer's assignment of sub-freights to the owner did not discharge its obligation to pay full hire.

16A.17 In *The World Aegeus*, SMA 2488 (Arb. at N.Y. 1988), the charterer was required to pay hire for the entire charter period, even though a subsequent charter, which did not interfere with the charterer's employment of the ship, provided for payment of hire and bunkers retroactively to a time prior to the expiration of the initial charter.

16A.18 In *The Ocean Advance*, SMA 1677 (Arb. at N.Y. 1982), the panel stated that though the charterer had the right, under the New York Produce form, to sublet the ship, there was no provision permitting the charterer to withhold hire from the owner based upon the non-payment of sub-freights by a sub-charterer to charterer.

Events listed in general exceptions clause

16A.19 If the failure to pay hire is caused by an event listed in the general exceptions clause, the owner has no right to withdraw the ship from the charterer's service. *Clyde Commercial S.S. Co*. v. *West India S.S. Co*., 169 F. 275 (2d Cir.), *cert. denied,* 214 U.S. 523 (1909).

"In advance"

16A.20 There are numerous cases holding that the owner is entitled to withdraw the ship from the charterer's service if hire is not paid when it is due under Clause 5 of the New York Produce form. See, e.g., *The Admiralty Flyer*, SMA 349 (Arb. at N.Y. 1967), holding that the owner was entitled to withdraw the ship from the service of the charterer when it defaulted in the payment of hire as provided in Clause 5. In *The Egle*, SMA 815 (Arb. at N.Y. 1973), the panel upheld the owner's withdrawal of the ship about five months before the redelivery date on the basis of Clause 5. The owner withdrew the ship nine days after 38th hire payment was due and after giving notice of its intention of doing so if the payment was not made immediately.

16A.21 The first question to be determined is when each installment falls due. For example, if

hire commences at 5 a.m. on Monday, March 1, the next installment would of course be due on March 15. It seems widely accepted in New York that hire due on March 15 could be paid at any time during business hours that day, even though the semi-monthly period had commenced at 5 a.m. See *The Penta*, SMA 1603 (Arb. at N.Y. 1981). There is, however, *dictum* to the contrary. See *The VermontI*, SMA 747 (Arb. at N.Y. 1970).

16A.22 Even more troublesome are hire payments falling due on a Saturday, Sunday, or holiday. Under the English rule, payment must be made on the preceding business day. However, in a New York arbitration, *The Maria G. Culucundis*, 1954 AMC 325 (Arb. at N.Y. 1952), a contrary rule was adopted. There an installment of hire fell due on 23 December, a Saturday. The charterer did not tender a check for the hire until 2 p.m. Tuesday, 26 December. The owner withdrew the ship, but in a subsequent arbitration of the charterer's claim for damages, the withdrawal was held wrongful. This result is consistent with the New York General Construction Law, § 25, which provides that any payment falling due on a Saturday, Sunday or holiday may be made on the following business day.

Modification by course of conduct

16A.23 Both the time-of-payment and the method-of-payment provisions can be modified by the owner's course of conduct. Thus, in *The Spyros Lemos*, 1967 AMC 2357 (Arb. at N.Y. 1967), the charterer's method of making cable remittances resulted in the crediting of the owner's account one or two days after the due date. The owner failed to object to this practice, however, until he served a notice of withdrawal following a late receipt of payment. The withdrawal was held wrongful. A similar result was reached in *The Pandora*, 1973 AMC 1561 (Arb. at N.Y. 1972), where the failure to protest late payments was held to deprive the owner of the right to withdraw the ship without a prior warning. So, in *The Essi Gina*, SMA 534 (Arb. at N.Y. 1970), the prior record of payments showed that, over a period of seven years under the charter, the owner had on 18 different occasions accepted payments made from one to five days late without protest. On this record, the panel held that the owner was not justified in withdrawing the ship for a late payment. According to the panel:

> The Arbitrators gave careful consideration to the language of Clause 5 of the Charter, which states ". . . otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers. . . ." That language is clear and without ambiguity. It refers to "punctual and regular payment." It says nothing about punctual and regular receipt, and the Arbitrators are satisfied that the history of seven years of payment of charter hire by the Charterers without question or protest by the Owners established a pattern of punctuality and regularity on the part of Charterers that could not be so suddenly set aside by the Owners in one single instance that was not even an exceptional instance.

16A.24 In *The Proton*, SMA 160 (Arb. at N.Y. 1966), it was held that the owner was not entitled to withdraw the ship because by "word and correspondence [it had] established a modus operandi" which allowed late payment. This principle was upheld in *Cochin Refineries* v. *Triton Shipping*, 1978 AMC 444 (Arb. at N.Y. 1978), where the panel ruled that since evidence established that the shipowner had long acquiesced in delayed payments, it was not justified in withdrawing the ships from an affreightment contract for failure to pay freight. See also *The Robertina*, SMA 1151 (Arb. at N.Y. 1977).

16A.25 These cases do suggest, however (as does the strong dissent in *Cochin Refineries*, above) that even if late payments are not at first protested, an owner may restore his right to punctual payment by giving express notice of his intent to strictly enforce the withdrawal clause in the future. Moreover, there are cases in which withdrawal was permitted on grounds of late

payment, even though the owner did not protest previous late payments. See *The Vermont I*, SMA 747 (Arb. at N.Y. 1970); *The Orient Lakes*, SMA 181 (Arb. at N.Y. 1964). Hence, a charterer who habitually makes late payments which are accepted without protest may be lulled into a false sense of security.

16A.26 In *The Pergamos*, SMA 3090 (Arb. at N.Y. 1994), the charterer was repeatedly late in making hire payments. The owner objected to the late payments, but never exercised its right to withdraw. For the seventh payment, the owner granted a final extension date to the charterer. Despite the fact that the charterer met this deadline, the owner claimed it had a right to withdraw the ship because the charterer did not remit payment of other disputed expenses which the parties were attempting to resolve separately. Finding that by extending the deadline the owner had fixed new terms of payment for the hire which did not require the payment of disputed expenses, the arbitrators held that the owner no longer had a right of withdrawal.

Whether a warning is required

16A.27 It is often put to a legal advisor by an owner whether a warning is required before an actual notice of withdrawal is sent. In England, no such principle appears to apply. New York arbitrators, however, have traditionally followed a more liberal approach in deciding withdrawal cases. Hence, a warning is prudent, even if it prompts the charterer into making payment and curing the default. In *The Noto*, above, a distinguished panel of arbitrators suggested that, because withdrawal was such a drastic remedy, a warning must first be given.

16A.28 The relative liberality of New York arbitrators, however, should not be understood to mean an otherwise valid withdrawal will not be upheld. In *The Athenian Horizon*, SMA 1197 (Arb. at N.Y. 1977), a withdrawal was upheld for a delay in payment of a few days, even though the charterer had remitted the hire and only the close of banking hours precluded owner's receipt of it by the deadline given. In the words of the panel:

> Charterers had an absolute obligation to pay hire in advance, failing which gave rise to the contractual right of the owners to withdraw.

16A.29 See also *The Admiralty Flyer*, SMA 349 (Arb. at N.Y. 1967). In *The Egle*, SMA 815 (Arb. at N.Y. 1973), the panel upheld the owner's withdrawal of the ship about five months before the redelivery date on the basis of the withdrawal clause in the New York Produce form. The owner withdrew the ship nine days after the 38th hire payment was due, and after giving notice of its intention of doing so if the payment was not made immediately.

16A.30 In *The Transport*, SMA 3788 (Arb. at N.Y. 2003), the panel upheld the owner's withdrawal of the ship following the charterer's "frequent" late payments. The panel noted that the charterer had not heeded the owner's previous warnings, but it also described withdrawal as the owner's "unfettered right." The panel rejected the charterer's claim of wrongful termination and ruled that the charterer's arrest of the ship was wrongful.

Grace periods

16A.31 Because the consequences of a withdrawal are so serious, most time charters allow for a grace period during which the charterer can pay any hire due and owing and thereby prevent a withdrawal. It is typical for the charters to require the owner to give the charterer notice of default and this will trigger the commence of the grace period. If payment is made during the grace period, the owner is not be entitled to withdraw the ship from the charterer's service.

16A.32 In *The Tradewind Sun*, SMA No. 4133 (Arb. at N.Y. 2011) (Siciliano), the owner

withdrew the ship after giving two written notices. The charter required seven days' notice of breach before withdrawal was permitted and further provided that "Timely payment of hire is of the essence." A sole arbitrator found Owner's notice sufficient and timely and its withdrawal justified, and it further found that Owner had made reasonable efforts to mitigate its damages.

16A.33 In *The Cape Palmas*, SMA 3865 (Arb. at N.Y. 2004), the panel considered the three-day grace period provided by Clause 11(b) of the NYPE 93 form, which applies where payment is not made "due to oversight, negligence, errors or omissions on the part of the charterers or their bankers." The panel concluded that the grace period did not apply where the reason for the charterer's non-payment was a dispute with the owner about the amount due.

Notice of withdrawal

16A.34 As under English law, an owner who wishes to treat a charterer's default in payment as grounds for termination of the charter must promptly communicate this to the charterer. No special wording is required; the customary message is to the effect that "as a result of your failure to pay hire when due owners are hereby withdrawing the vessel from your further service without prejudice to their claims for damages."

Acceptance of late payment of hire

16A.35 The American cases have not wrestled with the distinctions cited in the English decisions. In *The U.S.* 219 (*No. 11*), 21 F. Supp. 466 (E.D. Pa. 1937), the court held that the acceptance of late hire extinguished the right of withdrawal. This appears correct in principle, since acceptance of a payment for the future use of the ship is inconsistent with a withdrawal. Moreover, in *The San Juan Venturer*, 1974 AMC 1053 (Arb. at N.Y. 1974), a majority of the arbitrators held that a right of cancellation was waived where a late payment of freight was remitted and accepted prior to the withdrawal notice, even though the freight was in payment of the past services of the ship.

16A.36 In *The Shimone*, SMA 3092 (Arb. at N.Y. 1994), the arbitrators unanimously held that the owner waived its right to withdraw the ship when it accepted late payment of hire. Although the owner's withdrawal was held to be wrongful, the charterer was not awarded damages because it would have suffered a loss in performing the balance of the charter.

16A.37 In *The Allison*, SMA 3410 (Arb. at N.Y. 1998) the owner did not notify the charterer that it was withdrawing the ship due to non-payment of hire and subsequently accepted a late payment of hire by the charterer. The panel found that since there had not been clear notice of withdrawal, once the charterer made the late payment of hire and the owner accepted it, the charterer's breach had been cured and the charter continued.

Late tender of payment

16A.38 In the leading court case, *Luckenbach* v. *Pierson*, 229 F. 130 (2d Cir. 1915), the Court of Appeals for the Second Circuit upheld a withdrawal made after a tender of a late payment hire had been rejected. A panel of arbitrators in New York subsequently held that an unaccepted tender will preclude a valid withdrawal if the charterer is not given a notice of withdrawal prior to the tender. *The Noto*, 1979 AMC 116 (Arb. at N.Y. 1976). As long as the owner has not otherwise waived its right of withdrawal for a late payment, however, the charterer should not be permitted to override the owner's rights by making a late tender of payment. In such circumstances the right to accept or reject the late payment remains with the owner as the court held in *Luckenbach*.

Withdrawal with cargo on board

16A.39 If the ship is performing a voyage at the time of the default, the notice of withdrawal cannot in a true sense be effective until the voyage is completed and all of the cargo is discharged. *Luckenbach* v. *Pierson*, above; *Diana Compania Maritima S.A*. v. *Sub-freights of the Admiralty Flyer*, 280 F. Supp. 607, 1968 AMC 2093 (S.D.N.Y. 1968). See also *Antria* v. *Triton*, 1980 AMC 681 (E.D. Pa. 1978), where the court ruled that an owner who withdrew a loaded ship and carried the cargo to its destination had an "equitable" claim to the bill of lading freights only if the ship was withdrawn before the freights became due. The presence of cargo on board, however, should not preclude a valid withdrawal, whether one takes the view that a withdrawal is not effective until completion of the cargo voyage, or is effective immediately with the owner assuming the time charterer's obligations to the cargo interests. *The Noto*, above.

16A.40 See *Finora Co*. v. *Amitie Shipping Ltd*., 852 F. Supp. 1298, 1995 AMC 607 (D.S.C. 1994), *aff'd,* 54 F.3d 209 (4th Cir. 1995), where the court held that the owner's attempted withdrawal of the ship from the charterer after the voyage commenced did not become effective as to the sub-charterer until after its cargo was discharged. *The Athenian Horizon*, SMA 1197 (Arb. at N.Y. 1977), discussed at paragraph 16A.28.

Bank error

16A.41 The rule in New York insofar as bank errors are concerned is not as strict as the English law. In *The Pandora* (*No. 2*), SMA 755-A (Arb. at N.Y. 1973), a payment of hire was remitted by the charterer's bank through an intermediary bank to the bank designated by the owner. Because of an error by the intermediary bank, the payment was not received by the owner's bank. When the owner notified the charterer of the non-receipt of the hire and the withdrawal of the ship, the charterer made inquiries of its bank. A further five- or six-day delay ensued, however, before the source of the error was discovered and the late payment transmitted. In upholding the withdrawal, the panel noted that the charterer had an opportunity to correct the default in payment after having been advised thereof by the owner. Accordingly, it was the charterer's failure to correct the default promptly which led the panel, somewhat reluctantly, to sustain the right of withdrawal.

16A.42 A fascinating footnote to *The Pandora* case is the ensuing litigation against the banks. The charterer sued both its local bank, Continental Illinois, and its correspondent through whom payment to the owner was to have been effected, Swiss Bank Corp. In *Evra Corp*. v. *Swiss Bank Corp*., 522 F. Supp. 820 (N.D. Ill. 1981), *rev'd,* 673 F.2d 951 (7th Cir. 1982), the court found that the failure to consummate the crucial hire payment came about when telex payment instructions sent by Continental Illinois to Swiss Bank Corp. in Geneva were ignored by the latter, either because the telex was lost or the Swiss Bank Corp's machine had run out of paper (Continental Illinois' telex machine had received an "answerback" confirming the electronic receipt of the message). It was held: (*a*) that under applicable Illinois law Swiss Bank Corp. owed a duty of care to the charterer; (*b*) that Swiss Bank Corp. was negligent in failing to log incoming telexes and ensuring that its machine had paper; and (*c*) the charterer's damages exceeding $2,000,000 in lost profits on the cancelled charter were foreseeable and recoverable from Swiss Bank Corp. On appeal, however, the decision was reversed, the appellate court relying on the principle established in *Hadley* v. *Baxendale* in holding the damages were too remote and consequential to be recoverable.

16A.43 Another New York case on this point is *The Essi Gina*, SMA 534 (Arb. at N.Y. 1970). There, a check was mailed to the bank designated by the owner, but two days after the due date the bank advised that the check had not been received. The next day the ship was withdrawn and tender

of a substitute check for the hire was rejected. A few days later the bank discovered the missing check, although there was no mention in the award as to when the check had arrived at the bank. The arbitrators held that the error was solely the bank's, that the charterer was blameless, and that the withdrawal was wrongful.

16A.44 Similarly, in *The Meltemi*, SMA 491 (Arb. at N.Y. 1970), the charter specified "punctual" payment of hire. The owner withdrew the ship because at the close of business on the anniversary date, payment had not been received by its bank in New York. Payment had been authorized by a Canadian bank on the morning of the due date, however, but was delayed because of a breakdown of the telex machine and arrived the next morning. On these facts, the majority of the panel held that the owner was not entitled to withdraw the ship, and that payment of hire was made in accordance with both accepted practice and the express terms of the charter.

16A.45 It is submitted that these decisions can be read as permitting the charterer to correct any delay in payment occasioned by a bank error as long as: (*a*) the charterer itself is not contributorily responsible for the delay; and (*b*) the charterer promptly corrects the default in payment as soon as it learns of it. It is also submitted that these decisions are in keeping with the traditional concepts of equity in New York arbitrations which tend to avoid a harsh result for a party who has acted diligently and in good faith.

16A.46 No case in New York seems to have dealt expressly with the issue of delays due to bank errors on the basis of the principles of agency. It would seem that if a bank is designated by the owner for the payment of hire, the bank is the owner's agent and any error by the bank in crediting the owner's account must be imputed to the owner. In *The Erie*, SMA 497 (Arb. at N.Y. 1970), it was held that the owner had no right to withdraw where a check for payment due on May 19 was mailed on that date and received by the owner's bank the next morning. Payment was not credited to the owner until May 21, but it was held that this was the result of the owner's failure to properly advise its bank of an assignment.

16A.47 By the same token, the bank through which the charterer remits the hire is the charterer's agent or sub-agent. Accordingly, errors by the charterer's bank or an intermediate bank should be imputed to the charterer. Although *The Pandora* (*No. 2*) and *The Essi Gina* decisions indicate that an innocent and diligent charterer may receive favorable treatment in New York, the severe risks involved warrant the establishment of a kind of "fail-safe" mechanism to ensure the timely receipt of the hire by the owner's bank.

"Or on any breach of this Charter Party"

16A.48 Clause 5, read literally, would permit withdrawal for any breach by the charterer. However, the principle of *ejusdem generis* should apply, and this would permit withdrawal only in cases of breaches of like seriousness to the failure to pay hire. In *The Arietta Venizelos*, 1973 AMC 1012 (Arb. at N.Y. 1972), a withdrawal was held valid where the charterer nominated a port which was known to be unsafe because of threats of guerrilla attacks on tankers. The decision was under the Texacotime form, but provides a helpful analogy here.

Effect of withdrawal

16A.49 English law relating to the consequences of a withdrawal remains somewhat uncertain on the question of whether an owner may recover damages for repudiation upon withdrawal for non-payment of him. See paragraphs 16.128–16.131.

16A.50 The American view, however, is that mere late payment of hire entitles the owner to treat the charter as repudiated. The "withdrawal" clause is thus construed as the equivalent of a

"time is of the essence" provision, any breach of which is sufficient to be treated as grounds for termination. Hence, in New York the charterer would risk being held liable for damages if the owner were to withdraw in a falling market after a late payment. See *The Opal Sun*, SMA 3697 (Arb. at N.Y. 2001), which involved a Shelltime 4 charter, where the panel ruled:

> Charterer's failure to make full hire payment when due is a fundamental breach of the contract and such a breach gives rise to a claim for damages. That time is of the essence regarding charter hire payments is a sacrosanct principle in American maritime commercial practice. Given the specific terminology in this agreement, there can be no breach more fundamental than Charterer's failure to make hire payments in full and on time.

16A.51 A valid withdrawal may affect the rights of sub-charterers. See, e.g., *Cardinal Shipping Corp*. v. *The Seisho Maru*, 744 F.2d 461 (5th Cir. 1984), holding that a sub-charterer could not exercise a maritime lien on the ship because the lien would have conflicted with the right of withdrawal of the owner under a head charter because of the charterer's failure to pay hire.

16A.52 In *The Shena and The Ave*, SMA 2893 (Arb. at N.Y. 1992), the arbitrators denied the charterer's claim that it was entitled to reimbursement from the owner for bunkers that the sub-charterer had supplied after the owner withdrew the ship for late hire payment by the charterer. The owner's direct purchase from the sub-charterer of the bunkers in order to mitigate its damages was approved by the arbitrators.

Damages in the event of wrongful withdrawal or cancellation

16A.53 The purpose of contract damages is to put the injured party in as good a financial position as he would have been in had the contract been performed. In this way, an injured party's "expectation interests" are protected. See *Restatement, Second Contracts*, § 347: see, e.g., *Sofia Shipping Co*. v. *Amoco Transp*. *Co*., 628 F. Supp. 116, 1986 AMC 2163 (S.D.N.Y. 1986). Damages are limited, however, to those that were foreseeable at the time the contract was entered into. Contract law recognizes a distinction between direct damages, which arise naturally from the breach itself, and consequential damages, which are losses that are above and beyond direct damages. Recovery of consequential damages will not be allowed unless it is found that at the time of the making of the contract, the parties contemplated that the loss or damage would be a probable result of a breach of the contract. *Hadley* v. *Baxendale* (1854) 9 Ex. 341, 156 E.R. 145.

16A.54 The proper measure of direct damages for a wrongful withdrawal or cancellation of the charter is the difference between the original charter rate and the prevailing market rate for equivalent business at the time of the breach. *Orion Shipping & Trading* v. *Eastern States Petroleum Corp*., 312 F.2d 299 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963). The purpose of this approach is to put the non-breaching party in the same position he would be in had the breaching party performed its obligations under the charter. The market rate is usually determined by reference to other charters for comparable ships in the same or comparable trade fixed on or about the date of the breach. See *United Transp*. *Co*. v. *Berwind-White Coal Mining Co*., 13 F.2d 282 (2d Cir. 1926); *Liberty Navigation and T*. *Co*. v. *Kinoshita & Co*. *Ltd*., 285 F.2d 343 (2d Cir. 1960), *cert. denied,* 366 U.S. 949 (1961); *McNear* v. *Leblond*, 123 F. 384 (9th Cir. 1903).

16A.55 See *The Opal Sun*, SMA 3697 (Arb. at N.Y. 2001), holding "that the market at the time of breach is the controlling factor in quantifying damages" in a withdrawal case.

16A.56 In *The Chia May*, SMA 3546 (Arb. at N.Y. 1999), the main issue was whether the owner properly mitigated its damages following the premature redelivery of the ship. The arbitrators considered the meaning of the term "equivalent business" in applying the damages rule stated above. The owner had relet the ship and claimed damages based on the difference between the charter rate and the substitute charter rate for the remaining period of the charter. The panel agreed

with the owner and found that "equivalent business" meant a charter for the remaining minimum period of the charter.

16A.57 In *The Moshill*, SMA 2069 (Arb. at N.Y. 1985), to determine the owner's damages for the charterer's non-performance of a time charter, the panel adopted the approach of comparing the amount of hire which would have been earned or was payable over the remaining term of the charter, with actual earnings from or the cost of substitute voyages performed from the time of the default to the expiration of the minimum term of the contract.

16A.58 There will be occasions when there is no prevailing market for equivalent business at the time of the breach. This may be attributable to the nature of the trade the ship is engaged in or simply fluctuations in market conditions. In this situation, the court or arbitrators should nonetheless determine a market rate based on the available information.

16A.59 A "quintessential example" of consequential damages is loss of profits. See *Nyquist* v. *Randall*, 819 F.2d 1014 (11th Cir. 1987). A sampling of maritime cases involving this issue would include *Vitol Trading S.A.* v. *SCS Control Services*, 874 F.2d 76, 80–82 (2d Cir. 1989); *Evra Corp.* v. *Swiss Bank Corp.*, 673 F.2d 951, 955, 956 (7th Cir. 1982), *cert. denied,* 459 U.S. 1017 (1982); *Gardner* v. *The Calvert*, 253 F.2d 395, 399–400 (3d Cir.), *cert. denied,* 356 U.S. 960 (1958); *Polar Steamship Corp.* v. *Overseas S. Corp.*, 136 F.2d 835, 840–842 (4th Cir.), *cert. denied,* 320 U.S. 774 (1943); *Czarnikow-Rionda Co.* v. *Federal Sugar Refining Co.*, 255 N.Y. 33, 41–42, 173 N.E. 913, 915–916 (1930); *The Elbe Ore*, SMA 2561 (Arb. at N.Y. 1989), *confirmed,* 1989 AMC 2874 (S.D.N.Y. 1989); and *McAllister Brothers Inc.* v. *A & S Transportation Co.*, SMA 1989 (Arb. at N.Y. 1984).

16A.60 In *The Independence*, SMA 3049 (Arb. at N.Y. 1994), the disponent owner sought to recover its lost profits as a result of the charterer's repudiation of a five-year charter. The panel found that the charterer had knowledge of the terms and conditions of the head charter when the sub-charter was entered into. The charterer was on notice of the profits the disponent owner would have earned as a result of the rate differential between the two charterparties. Therefore, the panel awarded the disponent owner the difference between the cost of performing the head charter and the revenue it would have earned had the charterer performed.

16A.61 In *The Boni*, SMA 3053 (Arb. at N.Y. 1994), the ship could not proceed on the chartered voyage due to heavy damage she sustained from a fire. The panel denied the sub-charterer/cargo owner's request that its damages include crude oil yield losses, finding that they were special damages which were not reasonably foreseeable by the carrier at the time of contracting. The panel also denied the cargo owner's claim for hedging losses. In doing so, however, it rejected the defendant's argument that these losses were special damages. Instead, the panel denied this claim because of the cargo owner's failure to place the hedging transactions in accordance with its own stated procedure or in accordance with accepted industry standards.

16A.62 In *The Montecristo*, SMA 2941 (Arb. at N.Y. 1993), the panel awarded consequential damages for failure to provide a cargo, finding that the losses which resulted therefrom were foreseeable at the time the voyage charter was made.

16A.63 In cases arising under time or voyage charters, the injured party will have an obligation to take reasonable steps to mitigate damages. *Aaby* v. *States Marine Corp.*, 107 F. Supp. 484 (S.D.N.Y. 1951). The duty to mitigate, however, may not arise where there has been a breach of a long-term contract of affreightment. Compare *Orion Shipping & Trading* v. *Eastern States Petroleum Corp.*, SMA 573 (Arb. at N.Y. 1962), with *McAllister Bros. Inc.* v. *A & S Transp. Co.*, SMA 1989 (Arb. at N.Y. 1984) and *Alumina Transp. Corp.* v. *Occidental Chemical Co.*, SMA 2136 (Arb. at N.Y. 1985).

16A.64 See generally *Arbitration between Guinomar and Martin Marietta Aluminium Inc.*, SMA 2534 (Arb. at N.Y. 1988).

16A.65 As a general rule, the burden is on the party in breach to prove that the innocent party failed to act reasonably to avoid damages. *Federal Insurance Co*. v. *Sabine Towing & Transp*. *Co*., 783 F.2d 347, 350 (2d Cir. 1986). See generally *The Oak Pearl*, SMA 2427 (Arb. at N.Y. 1986); *The Mermaid I*, SMA 1836 (Arb. at N.Y. 1983); *The Captain Demosthenes*, SMA 1569 (Arb. at N.Y. 1981); and *Eddie S.S. Co. Ltd*. v. *Eastern Development Inc*., SMA 1051 (Arb. at N.Y. 1970).

16A.66 In meeting its obligation to reasonably mitigate damages, a shipowner is "required only to use good faith and reasonable diligence in so doing. He is not required to use the best judgment possible or adopt the wisest course which hindsight might have dictated." *Ellerman Lines Ltd*. v. *The President Harding*, 187 F. Supp. 948, 951 (S.D.N.Y. 1960), *aff'd,* 288 F.2d 288 (2d Cir. 1961).

16A.67 *Aaby* v. *States Marine Corp*., 107 F. Supp. 484 (S.D.N.Y. 1951), is an example of a case where the owner failed to take reasonable steps to avoid damages. Following the charterer's breach, the owner refused a mitigation offer made by the charterer which the court found represented prevailing market rates. As stated by the court, "when the libelants decided to await a possible rise in the market, they were gambling at their own risk." 107 F. Supp. at 485.

16A.68 In *The Independence*, above, the panel ruled that when market conditions improved, the disponent owner should have sought long-term employment for the ship in order to mitigate damages caused by the charterer's repudiation of a five-year time charter rather than merely continuing to trade the ship in the spot market.

Right to deny charterer use of ship

16A.69 In *The Dominique*, SMA 2535 (Arb. at N.Y. 1989), because the charterer was late in making a payment of hire, the owner withheld the use of the ship until the payment was received. The arbitrators ruled that while the owner had the right to withdraw the ship by reason of the late payment, it had no right to temporarily deny the ship's use to the charterer. The panel observed that in so holding, the decision was in accord with *The Agios Giorgis* [1976] 2 Lloyd's Rep. 192 (discussed at paragraph 16.86) and *The Helindas*, SMA 1589 (Arb. at N.Y. 1981).

16A.70 In *The Koycegiz*, SMA 2700 (Arb. at N.Y. 1990), the panel found that the owner was entitled to hold the ship at anchorage for two reasons: first, the owner placed the charterer on notice of late hire payments and technically would have been within its rights to withdraw the ship had it so desired, and second, the delay was actually caused by the crew's removal of the charterer's cargo of asbestos at the charterer's request.

16A.71 In *The Karin M*, SMA 2869 (Arb. at N.Y. 1992), the arbitrators found that the owner was not justified in delaying the discharge of cargo for late payment of hire. The charterer was awarded off-hire for the period of delay.

16A.72 In *The Cape Palmas*, SMA 3865 (Arb. at N.Y. 2004), however, the panel concluded that the owner was justified in preventing the ship from berthing and unloading due to the charterer's failure to pay hire. Clause 11(a) of the NYPE 93 form at issue allowed the owner to "withhold the performance of any and all of [its] obligations" in the event of non-payment. The panel found that the inclusion of this language distinguished the NYPE 93 form from prior versions of the NYPE form and provided a basis for the owner to temporarily withhold use of the ship.

CHAPTER 17

From When Time is to Count; Advances; Docks and Wharves; Spaces Available; Passengers

[Clause 5 continued]

"62. . . . Time to count from 7 a.m. on the working day
63. following that on which written notice of readiness has been given to Charterers or their Agents before 4
p.m., but if required by Charterers, they
64. to have the privilege of using vessel at once, such time used to count as hire.
65. Cash for vessel's ordinary disbursements at any port may be advanced as required by the Captain, by the
Charterers or their Agents, subject
66. to 2½% commission and such advances shall be deducted from the hire. The Charterers, however, shall in
no way be responsible for the application
67. of such advances.
68. 6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that
Charterers or their Agents may
69. direct, provided the vessel can safely lie always afloat at any time of tide, except at such places where it is
customary for similar size vessels to safely
70. lie aground.
71. 7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can
reasonably stow and carry), also
72. accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and
sufficient space for Ship's officers, crew,
73. tackle, apparel, furniture, provisions, stores and fuel. Charterers have the privilege of passengers as far as
accommodations allow, Charterers
74. paying Owners ..... per day per passenger for accommodations and meals. However,
it is agreed that in case any fines or extra expenses are
75. incurred in the consequence of the carriage of passengers, Charterers are to bear such risk and
expense."

Commencement of hire

17.1 This subject is discussed in chapter 7, paragraphs 7.40 *et seq*.

Advances

17.2 Line 66 allows the charterers to deduct the advances mentioned in Line 65 from hire. For comments on permitted deductions from hire, see paragraphs 16.48 to 16.72.

Safely lie always afloat

17.3 For comments on the safety of berths selected by the charterers, see paragraphs 10.85 to 10.90.

Spaces available to the charterers

"the whole reach of the Vessel's Hold, Decks, and usual places of loading"

17.4 These words entitle the charterers to use all space which is cargo space, in the accepted sense of that term; space properly required for ballast is not included: see *Weir* v. *Union S.S.* [1900] A.C. 525 (H.L.). The words refer to the structural capacity of the ship at the time the charter is entered into, not at the time the ship was built: *Japy Frères* v. *Sutherland* (1921) 6 Ll.L.Rep. 381. See also *Noemijulia Steamship* v. *Minister of Food* (1950) 83 Ll.L.Rep. 500 and 84 Ll.L.Rep. 354 (C.A.) for a case about the owners' right to reserve proper space for the ship's fuel (in that case, coal).

"not more than she can reasonably stow and carry"

17.5 In *The Roman Karmen* [1994] 1 Lloyd's Rep. 644, Mance, J., held that these words in Clause 7 of the New York Produce form were not restricted "to considerations of physical safety and seaworthiness" but extended "at least to enable owners to comply with the rational rules laid down by her classification society regarding the stowage and disposition of cargo in the general interests of the vessel's physical safety during her operation".

Deck cargo

17.6 For comments on deck cargo see paragraphs 20.34 to 20.36.

U.S. Law

From when time is to count

17A.1 Under Clause 5 of the New York Produce form, hire commences at 7 a.m. on the working day after notice of readiness has been given to the charterer, provided notice is given before 4 p.m. See, e.g., *The Hopeville*, 1968 AMC 2650 (Arb. at N.Y. 1968). Under Line 21, hire commences as provided in Clause 5, even if the berth is not available. If the dock or wharf is immediately available when notice of readiness is given, however, hire will nevertheless not commence until the next working day. See *The Alexandros Koryzis*, SMA 271 (Arb. at N.Y. 1968). The charterer may choose to use the ship sooner than the next working day after notice has been given. If he does so, the charterer is, of course, obliged to pay hire for the time used. Contrary to the English view that hire runs continuously once the charterer begins loading cargo or otherwise using the ship, the U.S. rule is that the charterer must pay hire only for the hours of actual use. See *The Antonis*, SMA 273 (Arb. at N.Y. 1959).

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CHAPTER 18

Utmost Despatch

"76. 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and
77. boats. . . "

18.1 Under a time charter, the owners promise to provide the charterers with the services of the chartered ship. To that end, under Clause 8 of the New York Produce form, the owners promise that (1) the master will follow the charterers' orders as to how the ship is to be employed (an undertaking considered in the next chapter); (2) the voyages that the ship undertakes will be performed with "the utmost despatch"; and (3) the master will ensure that his crew provide "all customary assistance" with the ship's trading.

Prosecution of voyage

18.2 There may be a failure to prosecute the voyage with the utmost despatch where, without good reason, the master sails at reduced speed (*The Pearl C* [2012] 2 Lloyd's Rep. 533); or takes a route other than the shortest and quickest (*The Hill Harmony*, below); or puts into, or delays at, a port of refuge unnecessarily (*Istros* (*Owners*) v. *Dahlstrom* (1930) 38 Ll.L.Rep. 84 and paragraph 18.8, below); or refuses to put into a port to which he has been ordered by the charterers (*The Charalambos N. Pateras* [1972] 1 Lloyd's Rep. 1); or prevents the loading or discharge of cargo (*The Agios Giorgis* [1976] 2 Lloyd's Rep. 192 and paragraph 16.86, above).

The *Hill Harmony*, a bulk carrier of 15,622 gross tons, was sub-chartered on an amended New York Produce form incorporating the Hague-Visby Rules. In January and again in April 1994, the master ignored orders from the sub-charterers (based on the advice of a weather routing service) to use the great circle route for a voyage from Vancouver to Japan and sailed instead by the more southerly and longer rhumb line route, considerably extending the time taken for each voyage. The sub-charterers deducted from hire in respect of the extra time used and bunkers consumed, claiming that the disponent owners were in breach of Clause 8, in that the master had failed to prosecute the voyages with the utmost despatch and had not obeyed their orders as regards employment.

From written evidence in the arbitration it appeared that the master had followed the more southerly route because in October 1993, under a previous charter, the ship had been damaged in heavy weather on the great circle route. However, there was evidence that many other ships had followed the great circle route in early 1994 without any particular difficulty, and the majority arbitrators concluded that this master had shown no good reason for not doing likewise.

Clarke, J., and the Court of Appeal concentrated on whether there had been a breach of the second of the master's obligations under Clause 8, namely, to follow the sub-charterers' orders as regards employment. They held that there had been no such breach, as these routing orders related to navigation as opposed to employment and therefore fell outside the clause.

The House of Lords reversed their decisions and restored that of the majority arbitrators. They held that the first obligation of the master under Clause 8, namely, to prosecute his voyages with the utmost despatch, required him to perform voyages ordered by the sub-charterers by the shortest and quickest route, even in the absence of express orders as to such route, unless either there was some navigational reason for not doing so or he used another "usual" route. In this case no sufficient navigational objection had been raised to the

great circle route, nor was there either evidence or a finding by the arbitrators that the rhumb line route was a "usual" route for these voyages.

Although this was sufficient to decide the case, they went on to hold that the disponent owners were also in breach of the obligation to obey the sub-charterers' orders as regards employment. Contrary to the view taken by the courts below, the orders to use the great circle route were orders regarding "employment" rather than 'navigation'. In the words of Lord Hobhouse: "'Employment' embraces the economic aspect – the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship."

The disponent owners could not use as a defence to these breaches Article IV, rule 2(a), of the Hague-Visby Rules, "act, neglect or default of the master. . . in the navigation or management of the ship". The master had not erred in his navigation, but had simply chosen to disregard his two contractual obligations under Clause 8.

Lord Bingham said, at page 150: "In the absence of evidence that the rhumb line route was the usual route or a usual route, and in the absence of any satisfactory navigational or other reason for taking a longer and slower route, the master's obligation of utmost despatch required him to take the shortest and quickest route. This conclusion is in my view inescapable irrespective of any express orders given by the charterers."

Lord Hobhouse said at page 156: "Suppose that the charterer does no more than order the vessel to load at Vancouver and proceed to a port on the east coast of Japan, that order would give rise to an obligation under the clause to proceed from one port to the other with the utmost despatch and is inconsistent with a liberty to delay the vessel by going by a longer than necessary route. To proceed by an unnecessarily long route delays the vessel just as surely as if the vessel had sailed at something less than full speed. There may of course be countervailing factors such as adverse currents or headwinds which may make an apparently longer route in fact the more expeditious route but, on the arbitrators' findings, none of these factors justified taking the longer route in the present case."

The Hill Harmony [1998] 2 Lloyd's Rep. 367, [1999] 2 Lloyd's Rep. 209 (C.A.) and [2001] 1 Lloyd's Rep. 147 (H.L.).

It is suggested that some references in the House of Lords speeches in the case above to the or a 'usual' route should be treated with care. The concept of the or a "usual" route comes from cases on deviation under voyage charters and bills of lading (see paragraph 18.10, below, and *Voyage Charters* paragraph 12.2). Where a time charter contains an express obligation of utmost despatch, it is difficult to see how the master can rely on the usualness of a route that is not the shortest save where it is usual because, as a result of one of the "countervailing factors" mentioned by Lord Hobhouse in the quotation above, it is quicker. In Lord Hobhouse's words, at page 157: "Under the time charter the obligation is not simply to proceed by a usual route but to proceed with the utmost despatch." Usually, the shortest route will also be the quickest, but where the two diverge, the framing of the obligation in terms of time ("despatch") requires that the quickest route be selected.

NYPE 93

18.3 The 1993 revision of the New York Produce form uses the phrase "due despatch" in place of "utmost despatch": see Clause 8, Line 100. It is not thought that the change is likely to be material.

Engineers or other members of the crew

18.4 Although the words refer specifically to the captain, they cover also any failure by the engineers to prosecute the voyage with the utmost despatch: see *The Apollonius* [1978] 1 Lloyd's Rep. 53. See also *The Pearl C* [2012] 2 Lloyd's Rep. 533, where the failure was attributed by the arbitrators simply to "crew".

Subject to the master's responsibility for safety

18.5 The master's obligation to accomplish his voyages at full speed and by the most direct route is subject to his responsibility for the safety of ship, crew and cargo. Faced with dangerous weather conditions or other hazards of navigation he may, therefore, be entitled or even obliged to

reduce speed or to depart from the most direct route – or disobey a routing order from the charterer, as Lord Hobhouse explained in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 160. But, as he also pointed out at page 157, a master's preference for calm waters does not justify departure from the most direct route; ships are designed and should be maintained to sail through (normal) heavy weather.

Subject to exceptions clauses

18.6 The obligation may also be qualified by the exceptions in the charter.

The *Keifuku Maru* was time chartered for six months. Clause 9 of the charter provided: "The Captain shall prosecute his voyages with the utmost dispatch. . .", and Clause 14: "Throughout this charter losses or damages, whether in respect of goods carried or to be carried, or in other respects arising or occasioned by the following causes, shall be absolutely excepted, viz. . . . negligence, default, or error in judgment of the pilot, master or crew in the management or navigation of the steamer."

The umpire's findings of fact indicated that there had been delays due to insufficient consumption of coal on passage although there was no lack of coal. Bailhache, J., considered this amounted to a finding of negligence on the part of the master. He held that there was a breach of Clause 9 and that the owners were not protected by Clause 14 because that clause could not be construed so as to "wipe out" the obligation in Clause 9.

The Court of Appeal asked the umpire for further findings, which, when given, were that the loss of speed was due to "general slackness" but not to negligence. A majority of the Court of Appeal held that these findings made it unnecessary to consider Clause 14; but Scrutton, L.J., took the view that Clause 14 overrode Clause 9, because there were still matters to which Clause 9 might apply even if Clause 14 was given full effect.

A majority of the House of Lords agreed with the Court of Appeal that the umpire's findings determined the matter in favour of the charterers. On the relationship between Clauses 9 and 14 three members of the court expressed opinions agreeing with Scrutton, L.J., that Clause 14 would override Clause 9 in the event of negligence. Viscount Cave, L.C., on the other hand, considered that Bailhache, J., was right in taking the opposite view.

Suzuki v. *Beynon* (1924) 18 Ll.L.Rep. 415, 20 Ll.L.Rep. 179 (C.A.) and (1925) 24 Ll.L.Rep. 49 (H.L.).

(See also the cases in paragraph 18.2 above, in all of which (other than *The Pearl C* and *The Hill Harmony*) the owner was shielded by what was then Clause 13 (now Clause 12) of the Baltime form in respect of the failure to prosecute with despatch (see paragraph 18.8 *et seq*., below).)

18.7 It seems therefore that against a claim for breach of the obligation to prosecute a voyage with the utmost despatch under Line 76 of the New York Produce form the owners may be able to rely on defences available under the United States Carriage of Goods by Sea Act, incorporated by Clause 24. In particular, the defence of "neglect or default. . . in the navigation or in the management of the ship" is available in principle under Section 4(2)(*a*) of that Act (even if it was inapplicable on the facts in *The Pearl C* and in *The Hill Harmony*, see paragraph 18.10, below). The relevant provisions of the Act are, by Section 2, applicable only "in relation to the loading, handling, stowage, carriage, custody, care, and discharge" of cargo. But it was held in *Adamastos* v. *Anglo-Saxon Petroleum* [1958] 1 Lloyd's Rep. 73 that the losses of charterers under a consecutive voyage charter as a result of the ship failing to perform as many voyages as she should were within the words of Section 2 as it applied, by incorporation, to the charter. Presumably, the same would be true of similar losses caused by the master's failure to prosecute a voyage under a time charter with the utmost despatch, so that the defences given by the Act would be available even where the charterers' losses arose otherwise than from physical loss of or damage to the cargo. This was assumed to be the case by all concerned in *The Hill Harmony*, above, where the damages claimed were for loss of time and additional bunkers consumed (see the comments of Lord Hobhouse at [2001] 1 Lloyd's Rep. 147, at page 154) and by Popplewell, J., in *The Pearl C* [2012] 2 Lloyd's Rep. 533 (which concerned a deduction from hire in respect of slow steaming). It is consistent with

the wide effect afforded to Section 4(2)(a) of the Act under a charter on the New York Produce form by the Court of Appeal in *The Satya Kailash* [1984] 1 Lloyd's Rep. 588: see paragraphs 34.5 to 34.10 and 34.23 to 34.25, below.

18.8 Under the Baltime form, if delay on the voyage is due to neglect or default of the master, the owners will generally be protected by the exceptions in Clause 12.

The *Istros* was chartered under the 1920 form of the Baltime charter and was ordered on a voyage from the Tyne. Although the weather on the voyage was bad there was nothing to justify the master's putting into three ports of refuge en route. It was held that he was negligent in so doing and had failed to prosecute the voyage with utmost despatch. But since there was no evidence of any personal want of due diligence or default on the part of the owners, it was held that they were protected by the exceptions clause. Wright, J., said (the present Clause 9 then being numbered 8):

"There has been in this case no want of due diligence on the part of the owners or their manager in making the ship seaworthy and fitted for the voyage, and there has been no other personal act or omission or default on their part. Any neglect or default that there has been has been that of the owners' servants. The arbitrator has found that there has been such neglect or default by the master and that has caused the delay. That seems to me to come within the precise words of Clause 12. It is not necessary here to consider whether every possible case that may arise under Clause 8 of a failure on the part of the captain to prosecute all voyages with utmost despatch is covered by Clause 12. I have not in my mind at this moment any specific type of case of a breach of Clause 8 by the act of the captain for which, notwithstanding Clause 12, the owner would be responsible. But there may be such cases. In any view, it seems to me that Clause 12 must receive effect where the case comes within its clear terms. If the effect of that is to render the owners free from any liability for loss or delay where there is a failure on the part of the captain to prosecute the voyage with the utmost despatch, then I think the owner is entitled to the full benefit of that clause."

Istros v. *Dahlstrom* (1930) 38 Ll.L.Rep. 84.

(This decision was approved by the House of Lords in *The TFL Prosperity* [1984] 1 Lloyd's Rep. 123)

18.9 The owners will, it seems, also be protected by Clause 12 of the Baltime form if delay is attributable to the failure of the ship's engineers to run the engines properly.

The *Apollonius* was chartered on the Baltime form and was delayed on a voyage from Japan to the River Plate by the failure of the engineers to operate the main engines at full output at certain times. It was held by Mocatta, J., that this constituted a breach of the obligation under Clause 9 to prosecute the voyage with the utmost despatch, but that the owners were protected by Clause 13 (now Clause 12).

The Apollonius [1978] 1 Lloyd's Rep. 53.

(Views expressed by Mocatta, J., on other aspects of this case were criticised by the House of Lords in *The TFL Prosperity*, above.)

18.10 In *Suzuki* v. *Beynon*, above, the view was expressed that if an exceptions clause 'wiped out' the obligation to prosecute the voyage with the utmost despatch, the exceptions clause should not be given effect. But the weight of opinion in that case was that if there were matters to which the obligation to proceed with utmost despatch might apply, in the absence of neglect or default of the master, exceptions excluding liability for the master's negligence should be given full effect. *Suzuki* v. *Beynon* was considered by the House of Lords in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, above. In the light of the analysis there, it is suggested that if the master chooses, without good reason, to steam at reduced speed or not to adopt the shortest and quickest route (*a fortiori* if that is the route ordered by the charterers), the owners will not be protected by the exceptions clause. If, on the other hand, the master maintains speed and adopts the shortest and quickest route, but thereafter his negligence in attempting to follow that route lengthens the voyage, the owners should be protected. Popplewell, J., in *The Pearl C* [2012] 2 Lloyd's Rep. 533 at [56], accepted a dichotomy between "a deliberate decision not to proceed with utmost dispatch, and a negligent error in the navigation or management of the vessel concerning a matter of seamanship", and said that "The exception in article 4 rule 2(a) applies to the latter but not the former". Where delay is the result of orders by the owners, they will obtain no protection from

the exceptions clause: *International Bulk Carriers* v. *Evlogia Shipping* (*The Mihalios Xilas*) [1979] 2 Lloyd's Rep. 303 (H.L.).

18.11 The obligation of utmost despatch may also be modified by the general exceptions in Lines 103 to 106 of New York Produce form. For comments on these exceptions, see chapter 27. For the incorporation of the United States Act, see chapter 34.

Deviation

18.12 It was suggested in argument during the first instance hearing of *The Hill Harmony* [1998] 2 Lloyd's Rep. 367 that the owners' right to rely on the defence in Article IV, rule 2(a), of the Hague-Visby Rules in response to a claim based on failure to prosecute voyages with the utmost despatch, might be lost if it were found that there had been an "unreasonable deviation" (that is, a deviation not excused by Article IV, rule 4). As the arbitrators had not made the findings of fact that Clarke, J., regarded as necessary to allow this argument to be developed, its legal merits were left undecided both by the judge and by the courts above. However, it is unlikely that the courts would wish to import into the construction of a true time charter the concept of deviation that has been developed in relation to bills of lading and voyage charters (see *Voyage Charters*, paragraphs 12.1 *et seq*.). As Lord Hobhouse said in the House of Lords [2001] 1 Lloyd's Rep. 147, at page 157: "This was not directly material to a time charter where the contract is not a contract of carriage but a contract for the provision of the services of a crewed vessel." The focus is more likely, as suggested by Potter, L.J., in the Court of Appeal [1999] 2 Lloyd's Rep. 209, at page 217, to be upon the obligations expressed in the charter, as by Clause 8 in the New York Produce form, and the natural interpretation of these terms. The likely outcome is somewhat harder to predict in the case of a time charter for a trip (as to which see paragraphs I.17, 4.1 and 4.99 *et seq*., above); see the aside of Clarke, J., in the same case, [1998] 2 Lloyd's Rep. 367, at page 378.

Customary assistance

18.13 The owners undertake that the master will provide the "customary assistance" of his crew. Exactly what services are to be provided may depend on the facts of the case. The relevant factors may include the flag of the ship, the articles signed by the crew and the trade in which the ship is engaged. However, the services provided will typically include cleaning the cargo spaces between voyages (as to which see paragraph 11.18 above), berthing and shifting, preparation of gangways, preparation of holds, opening and closing hatches and assisting with bunkering. In many cases, the services to be provided are spelled out in an additional clause.

18.14 As with any contract for services, it is an implied term of the charter that the services be provided using reasonable care and skill: see the Supply of Goods and Services Act 1982, section 13 ("In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill"). An implied duty of due diligence was recognised by Rix, J., in *The Liepaya* [1999] 1 Lloyd's Rep 649, at page 668 lhc (in that case in relation to tank cleaning).

18.15 An indication of the extent, and limits, of customary assistance is given by the findings made in *The Bela Krajina* [1975] 1 Lloyd's Rep. 139, a case concerning the cleaning of rust from the holds on a ballast passage before the loading of grain and after the carriage of muriate of potash, phosphate rock and manganese ore: see paragraph 11.19, above.

U.S. Law

Utmost despatch

18A.1 The purpose of Clause 8 is to impose a duty on the master to carry out voyages ordered by the charterer without interruption and as quickly as circumstances and safety will permit.

18A.2 In *Lowber* v. *Bang*s, 69 U.S. 728 (1865), the charter provided "ship to proceed from Melbourne to Calcutta with all possible despatch." The court held that: "We cannot give any other construction to [this] language. . . than that she was to proceed direct from one place to the other, and that to this extent, *at least*, time was intended to be made of the essence of the contract." Moreover, the court found that this provision went to the "entire root of the contract," and that the charterer was released from the contract because the vessel diverted to Manila en route to Calcutta, and consequently arrived at the latter port more than three months later than she would have had she not made the diversion.

18A.3 The master's duty to prosecute the voyage with the utmost despatch, however, must be balanced against his paramount duty to provide for the safety of the vessel, her crew and cargo. If the master acts in good faith and with a reasonable exercise of judgment in the particular circumstances in concluding that the voyage must be delayed for the safety of the vessel, crew or cargo, such delays would not constitute a violation of the charter. There are circumstances, moreover, which will justify a deviation from or temporary discontinuance of the voyage.

18A.4 In *The Styria*, 101 F. 728 (2d Cir. 1900), *modified on other grounds,* 186 U.S. 1 (1902), the ship loaded a cargo of sulphur at Sicily for shipment to New York. Before departing from Sicily, the master learned that the war between Spain and the United States had broken out. Because sulphur was a contraband article, the master had the cargo unloaded and put in a warehouse in Sicily. He gave the consignees written notice of his actions, and advised that "on finding risky my passage to New York, with the actual sulphur cargo, for facts of war" he was discharging the cargo (186 U.S. at 10). The court held that the master's actions were fully justified in the circumstances, in that "his conduct. . . had due regard to the interest of all concerned in the ship and in the cargo. . ." 186 U.S. at 20.

18A.5 In *The Manisamut Naree*, SMA 4088 (Arb. at N.Y. 2010) (Arnold, Fox, Hood), the panel found that it was a reasonable deviation for owner to divert the ship to embark security experts before transiting the Gulf of Aden and consequently disallowed charterer's deduction from hire. The panel found, however, that the parties should equally share the cost of the security experts.

18A.6 In *The Robertina*, SMA 1151 (Arb. at N.Y. 1977), the owner ordered the master to detain the ship at Cristobal because the charterer was delinquent in paying a hire installment. The owner could not exercise a lien on the cargo, as it was being shipped under prepaid bills of lading. Moreover, the owner could not effect a withdrawal for late payment of hire because it had tolerated numerous late payments in the past. The detention of the ship was found by the arbitrators to be merely a pressure tactic designed to force the charterer to pay hire at a time and place when the owner could not enforce a lien on the cargo. In these circumstances, the arbitrators found that the owner was in violation of its duty under Clause 8 to prosecute the voyage with the utmost despatch.

18A.7 In *The Medita*, SMA 1150 (Arb. at N.Y. 1977), the arbitrators held that the master did not violate his duty to prosecute the voyage with the utmost despatch when he deviated from his course to avoid heavy weather.

18A.8 See also *The Andros Mentor*, SMA 2125 (Art. at N.Y. 1985), and *The White Manta*, SMA 3257 (Arb. at N.Y. 1996), discussed at paragraphs 19A.2 and 19A.4.

18A.9 The master's decision to delay departure from one of the discharge ports to wait for gale

force weather to pass was approved by the arbitrators in *The Karin M*, SMA 2869 (Arb. at N.Y. 1992).

18A.10 The master may delay the voyage when he reasonably believes the ship is in jeopardy, if, for example, a dangerous cargo is on board and he wishes to seek expert assistance in assuring the safe stowage of the cargo. In *The Fernglen*, 1971 AMC 213 (Arb. at N.Y. 1970), the panel held that the master was justified in keeping the ship at anchor for eight days while he brought in experts to counsel him on the proper stowage of a cargo of scrap which included steel turnings.

18A.11 In *The Continental Trader*, SMA 1503 (Arb. at N.Y. 1980), the ship encountered delays at Bandar Shapour following completion of discharge due to political unrest and strikes in the port which affected the port authorities, tugs and pilots. The master refused to sail without official clearance from the port authorities or a pilot. Eventually, when the ship had nearly exhausted her supply of fresh water and fuel, the ship did leave without the assistance of a pilot, but only after port clearance was granted and tugs came alongside. The panel unanimously denied the charterer's claim that the master failed to prosecute the voyage with the utmost despatch. As stated by the panel:

> . . . The Panel falls back on the ancient rule of the Sea that the master of a ship is the final judge in matters affecting the safety of his ship. . . The master acted within his rights, indeed his unavoidable duty, to act with prudent restraint and caution when there was no pilot, no tug and no official clearance, until he was forced to compromise such forbearance to prevent disablement or greater harm to the vessel by proceeding under less than ideal conditions without pilot.

18A.12 In *The Lelaps*, SMA 2840 (Arb. at N.Y. 1992), the panel rejected the owner's argument that the term "customary quick despatch" as modified by the phrase "fast as vessel can load/discharge" meant that the charterer was required to furnish a loading berth upon arrival because the addition of the word "customary" relieved the charterer of this responsibility.

18A.13 In *The General Piar*, SMA 4140 (Arb. at N.Y. 2011) (Bulow), the master refused to sign shipping documents as presented on the ground that they contained certain discrepancies. The agent suggested he sign them under protest with remarks at the bottom of the page; instead, he struck through contested figures and inserted what he considered to be correct figures. As a result, port clearance could not be obtained. New documents were delivered to the master the following day, which he signed in the manner originally suggested by the agent. Charterer claimed for the time lost, and the arbitrator allowed the claim finding that, by initially failing to follow the customary procedure for noting discrepancies in the documents, owner breached Clause 9, which provided that the master should prosecute all voyages "with the utmost dispatch and render customary assistance to the Charterer or his agent." The arbitrator noted the master should have known that Clause 9 also protected Owner by providing that "Charterer shall indemnify the Owners against all consequences or liability arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with their orders."

Customary assistance

18A.14 In *The Andros City*, SMA 1156 (Arb. at N.Y. 1977), the owner claimed reimbursement of a sum paid to the crew for sweeping and washing cargo holds at the request of the charterer. The charter contained a typewritten addition to the New York Produce form which provided for the payment by the charterer to the crew of a lump sum for overtime. The issue raised in the case was whether the customary assistance provision of Clause 8 entitled the charterer to require that the crew perform ordinary cleaning and hold washing and, if so, whether the monthly lump sum overtime payment the charterer was required to make was the measure of remuneration for this work.

18A.15 The panel held that the cleaning and washing of cargo holds is not a part of the usual and customary work of the ship's crew. In so holding, the arbitrators noted that the collective bargaining agreement for the ship treated hold cleaning as an activity for which the crew members involved were entitled to special remuneration. The panel stated that the overtime provision related to the crew's performance of its usual duties in docking and undocking and keeping the ship available for the charterer's use. The panel noted, however:

> The interpretation of Clause 8 lies at the core of this dispute and it, therefore, must be examined carefully. To do so it is necessary to isolate the first and second parts of the clause. The first part, requiring "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats" is in essence an acknowledgement of the vessel's obligation to exercise all possible effort to perform as efficiently and expeditiously as possible. It cannot and should not be read out of context or interpreted in a vacuum so as to shift responsibilities which are specifically provided for in other portions of this clause and others. The latter part of Clause 8 allocates the expense of loading, stowing, trimming and discharging cargo to the Charterer, and in this respect the Panel considers the hold cleaning function, subsequent to delivery and where it is not related to hold maintenance or the vessel's seaworthiness, is for Charterer's account.
>
> The "customary assistance" of Clause 8 may, under appropriate circumstances, be read as to require the master and crew to sweep and wash holds of cargo residue during ballast voyages or to perform other work for Charterer which they would normally do for Owner, but the essential thrust of this obligation is to protect the Charterer from the possibility of an unreasonable refusal of Owner to cooperate rather than to allow Charterer the unlimited right to order the use of ship's labor for its own use at the expense of the Owner.

CHAPTER 19

Employment Clause

[Clause 8 continued]

"77. . . . The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and
78. agency; . . ."

Obedience to the charterers' orders

19.1 It is not up to the master to question unduly the orders of the charterers as to the employment of the ship. It was said by Roche, J., in *Portsmouth Steamship* v. *Liverpool & Glasgow Salvage Association* (1929) 34 Ll.L.Rep. 459, that "it was for the captain, within the limits of obviously grave danger, to follow [the charterers'] instructions without undue question". One situation in which the master is not only entitled but may also be obliged to refuse the orders of the charterers is where these endanger the safety of his ship or her cargo. As Lord Hobhouse said in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 160: "The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme cases the master is under an obligation not to obey the order." It should also be noted that not every order is an order "as regards employment" – see the comments below.

19.2 Although the master is obliged to employ his ship in accordance with the orders of the charterers, he is not always obliged to obey their orders immediately. The circumstances in which an order is received, or the nature of it, may make it unreasonable for the master to comply without further consideration or enquiry. The right of the owners or the master to delay for a reasonable time before complying with an order is not confined to specific categories of cases and the question to be determined in each case is how a person of reasonable prudence would have acted in the circumstances: see the judgments of the Court of Appeal in *The Houda* [1994] 2 Lloyd's Rep. 541, below. Delay may, for instance, be justified in the face of orders which could expose the ship or the cargo to potential peril. And in a war situation there may be circumstances where there is both a right and a duty to delay in order to seek further information about the source and validity of orders received, even though there may be no immediate physical threat to the cargo or to the ship: see *The Houda*, below.

The *Anastasia* was time chartered for a trip on the New York Produce form. She was ordered to load jute at Chalna and the master was told by the charterers' agents there that, although this cargo was for Europe, he should tell the local authority that he was carrying it to Singapore, to which port the bills of lading would be made out. Shortly after the ship sailed from Chalna, the charterers cabled the master with orders to return to Chalna to load more jute. The master exchanged cables with the charterers for some time and eventually obeyed their order only after establishing (a) that despite the fact that he had now entered in his log the true destination of the ship, the charterers still wished him to return to Chalna and (b) that there would be sufficient water over the bar. Donaldson, J., held that the master was justified in delaying his obedience to the charterers' orders. Having described the responsibility of the master's job, he said: "It seems to me that against that

background it must be the duty of the master to act reasonably upon receipt of orders. Some orders are of their nature such that they would, if the master were to act reasonably, require immediate compliance. Others would require a great deal of thought and consideration before a reasonable master would comply with them."

Midwest Shipping v. *Henry* [1971] 1 Lloyd's Rep. 375.

(See also the voyage charter cases of *Pole* v. *Cetcovitch* (1860) 9 C.B.(N.S.) 430 and *The Teutonia* (1872) L.R. 4 P.C. 171.)

The *Houda* was time chartered to Kuwaiti charterers on an amended Shelltime 4 form. The ship was given standing instructions that all voyage orders would be issued by the charterers in Kuwait. Following the invasion of Kuwait by Iraq the charterers' office was moved to London and it was from London that voyage instructions were issued to the ship. The owners delayed compliance with the orders, questioning whether they were lawful, and subsequently refused to comply with the charterers' further orders to discharge the cargo at Ain Sukhna without production of the bills of lading, which had disappeared following the invasion. It was held by the Court of Appeal, reversing Phillips, J., that:

(1) While charterers' orders ordinarily required immediate compliance, the circumstances in which an order was received, or the nature of it, might make it unreasonable for the master to comply without further consideration or enquiry. The question to be determined in each case was how a person of reasonable prudence would have acted in the circumstances and the circumstances of the case in question were capable of constituting reasonable grounds for some delay in compliance.

(2) In the absence of contractual provision – and the amended Shelltime 4 charter made no such provision – time charterers (like voyage charterers) were not entitled to require the owners or the master to discharge cargo without production of bills of lading, even though such discharge might not in fact infringe the rights of the parties entitled to possession of the cargo.

The Houda [1993] 1 Lloyd's Rep. 333 and [1994] 2 Lloyd's Rep. 541 (C.A.).

(See paragraph 37.78, below, for further details of this case and the amendments to the Shelltime 4 charter.)

19.3 The employment clause does not compel the master to obey orders for the employment of the ship outside the limits laid down by the charter, which the charterers are not entitled to give: see paragraphs 5.1 and 5.12, above. Nor does it oblige him to obey orders that trespass on his responsibility for matters of navigation and seamanship: but as to that see *The Hill Harmony* at paragraph 19.29, below.

19.4 The master is also not obliged to obey orders of the charterers to deliver cargo to a person not entitled to receive it: see *The Sagona* [1984] 1 Lloyd's Rep. 194, *per* Staughton, J., at page 205.

19.5 Even if delivery of the cargo in accordance with the charterers' orders would not in fact infringe the rights of the party properly entitled to receive it, the master is not bound to comply with the orders of the charterers to deliver the cargo without production of the bills of lading: see *The Houda*, above. In that case it was argued that since under a time charter the ship and the master were placed under the general orders and directions of the charterers, the latter were entitled to give a lawful order for delivery of cargo without production of bills of lading in circumstances where the charterers had the right to possession of the cargo or had the authority of the true owners of the cargo to deal with it. This argument was accepted by Phillips, J., at first instance, but was rejected by the Court of Appeal. In the Court of Appeal, Neill, L.J., said, at page 552: "I can see no good reason to depart from the general rule that the owners do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. . . As Lord Denning put it in *Sze Hai Tong Bank* v. *Rambler Cycle Co. Ltd*. [1959] A.C. 576, at page 586: '. . . a shipowner who delivers without production of a bill of lading does so at his peril'. This is a simple working rule. It is of course open to a shipowner to decide that he is adequately protected by a letter of indemnity and to deliver in the absence of the bill of lading, but in my judgment the rights of a time charterer to give orders do not entitle him to *insist* that cargo should be discharged without production of the bill of lading."

19.6 For the consequences of the charterers persisting in an invalid order after the owners have refused to comply with it, see paragraphs 4.68 and 5.18, above.

19.7 However, if the charterers' orders are complied with and the owners suffer loss as a result, they will often be entitled to recover their loss from the charterers by way of indemnity: see the discussion below.

19.8 Although the master is under the orders and directions of the charterers, the owners remain liable for negligence of the master, subject to any exceptions in the charter. In *Raynes* v. *Ballantyne* (1898) 14 T.L.R. 399, a ship which was under time charter caused damage to the charterers' own pier as a result of the master's negligence. It was held by the House of Lords that (apart from the exceptions clause in the charter) the owners were liable. Lord Herschell said: "The captain was appointed by the owners, but was to be under the directions of the charterers. The effect of that contract was to place the vessel at the complete disposal of the charterers within the limits specified in the charter, and subject to the same limits the master was bound to obey the orders of the charterer, although no doubt he was still the servant of the shipowner. Consequently, apart from the clause [the exceptions clause], the owner would be responsible for any negligence of the master, although the owner had no voice to control the master, who was carrying out the charterer's instructions."

The master of the *Aquacharm* was ordered by charterers under a New York Produce form charter to load to the draught permitted for a transit of the Panama Canal. He negligently loaded to a greater draught. Lloyd, J., held that the owners would have been liable for consequent losses had it not been for an effective defence incorporated into the charter by Clause 24 (as to which defence, see paragraph 34.20, below). His judgment was affirmed by the Court of Appeal.

The Aquacharm [1980] 2 Lloyd's Rep. 237 and [1982] 1 Lloyd's Rep. 7 (C.A.).

19.9 But the obligation on the master to obey the charterers' orders is not 'absolute', being only to exercise reasonable skill and care: see *The Aquacharm*, above.

Relationship with Baltime exceptions clause

19.10 The owners may have a defence under Clause 12 of the Baltime form to a claim by the charterers for damages caused by a failure of the master to comply with their employment orders if the claim can be categorised as a claim for delay during the currency of the charter, or if it is in respect of physical loss or damage to goods on board (see paragraph 18.8, above). The question whether such a claim could be regarded as a claim for delay was left open by the Court of Appeal in *The Charalambos N. Pateras* [1972] 1 Lloyd's Rep. 1. See also *The Hill Harmony* [2001] 1 Lloyd's Rep. 147 and generally chapter 18, above.

Express indemnity

19.11 Some time charters state that the owners are to be indemnified against adverse results of compliance with the charterers' orders: see, for examples, *Strathlorne Steamship* v. *Andrew Weir*, above, and *Portsmouth Steamship* v. *Liverpool & Glasgow Salvage Association*, below. In the case of the Baltime form, Lines 123 to 127 of Clause 9 provide such an express indemnity: "The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders. . . ."

Consequences or liabilities

19.12 It was held in *Royal Greek Government* v. *Minister of Transport* (*The Ann Stathatos*) (1949) 83 Ll.L.Rep. 228, summarised at paragraph 19.30, below, that "consequences or liabilities" in Clause 9 of the Baltime form were not limited to matters not covered by other provisions of the charter.

Devlin, J., said, at page 234: "I see nothing incongruous in the idea that the clause was intended to have, as it were, a life of its own and to be more than a bin for odds and ends left over from other clauses. Dangerous cargoes, trades, ports and places can all be prohibited by express provision; but many cases may arise which are outside the rigid framework of a prohibition clause, but where an owner, if he were free to choose, might prefer not to go to a particular place or take a particular cargo, not necessarily because he foresees any definite danger but because he feels it might lead to trouble. If he is to surrender his freedom of choice and put his master under the orders of the charterer, there is nothing unreasonable in his stipulating for a complete indemnity in return."

19.13 It was held in *Bosma* v. *Larsen* [1966] 1 Lloyd's Rep. 22 that this indemnity in Clause 9 of the Baltime form against "all consequences or liabilities" imposes the obligation to indemnify against the incurring of a liability and hence that the owners' cause of action in respect of a liability for damage to cargo under bills of lading arose when that liability to cargo was created and not when the cargo claim was paid. But the decision was not followed in *County & District Properties* v. *Jenner* [1976] 2 Lloyd's Rep. 728, where it was held that the cause of action in a claim under a building contract did not, on the wording of the indemnity clause in that contract, arise until the underlying liability was ascertained. The court in *Green & Silley Weir* v. *British Railways Board* (1980) 17 B.L.R. 94 also declined to follow *Bosma* v. *Larsen*. Neill, J., in *The Caroline P* [1984] 2 Lloyd's Rep. 466 (see paragraph 21.71, below), having analysed the authorities, did not state whether he agreed with the decision in *Bosma* v. *Larsen* or not, but he observed that McNair, J., had not dealt separately with the words "all consequences" in construing the indemnity provision in Clause 9. *Bosma* v. *Larsen* must now, therefore, be regarded as very doubtful authority.

Such orders

19.14 In *The Ann Stathatos* (1949) 83 Ll.L.Rep. 228 it was held that "such orders" in Clause 9 of the Baltime form did not relate only to the signing of bills of lading or other documents: see under "Consequences or liabilities", above.

Implied indemnity

19.15 In the New York Produce form (unlike the Baltime form) there is no express indemnity given to the owners. But an indemnity will normally be implied against loss or damage suffered, or liability incurred, by the owners as a consequence of complying with the charterers' orders or directions unless, by the charter, the owners consented to bear the loss, damage or liability in question. The owners have put their ship at the disposal of the charterers, who can choose (within the agreed limits) what cargoes to load and where to send the ship, and for that arrangement to work effectively the master must be entitled and bound to follow the charterers' orders without undue question. It is therefore said to be not only reasonable, but necessary to give business efficacy to the contract, that the charterers should bear the consequences of their choices. See *per* Mustill, J., in *The Georges Christos Lemos* (*third party proceedings*) [1991] 2 Lloyd's Rep. 107 and in *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277, at page 290, and *per* Cresswell, J., and Evans, L.J., in *The Island Archon* [1993] 2 Lloyd's Rep. 388, at pages 404 and 407, and [1994] 2 Lloyd's Rep. 227 (C.A.), at page 237.

The *Strathlorne* was time chartered, the charter providing that the captain (although appointed by the owners) should be under the orders and directions of the charterers as regards employment, agency or other arrangements. The charter also contained an express indemnity clause. The ship was sub-chartered for a voyage with rice from Rangoon to Swatow and bills of lading were tendered to and signed by the master. At Swatow the charterers' agents directed the master that they would be responsible for delivery of the cargo

and in fact they caused it to be delivered without production of the bills of lading. The bills of lading had not been taken up from the bank which held them and were never paid for. In the event, the owners were held liable to the bank for the value of the rice misdelivered. It was held by Roche, J., and the Court of Appeal that, irrespective of the express indemnity provision (the scope of which was doubtful), an indemnity in favour of the owners was to be implied at common law against the liability they incurred as a result of the master complying with the charterers' orders.

The Court of Appeal, in affirming the judgment of Roche, J., applied the principle laid down by Tindal, C.J., in *Toplis* v. *Grave* and quoted in *Dugdale* v. *Lovering* (1875) L.R. 10 C.P. 196: ". . . when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

Strathlorne Steamship v. *Andrew Weir* (1934) 49 Ll.L.Rep. 306 and (1934) 50 Ll.L.Rep. 185 (C.A.).

19.16 Even if the charterers' order is lawful, that is to say, one they are entitled to give and the owners obliged to obey under the charter, an indemnity will usually be implied unless the loss in respect of which the indemnity is sought arises from a risk which, on the true construction of the charter, the owners themselves have agreed to bear.

The *Island Archon* was chartered on the New York Produce form for 36 months. In the course of the charter she was ordered to carry cargo to ports in Iraq. Cargo claims were made and enforced against the local agents of the owners. The arbitrator found that the claims were based on unreliable short-landing and damage certificates which nevertheless were accepted as conclusive by the Iraqi courts. They were instances of what the arbitrator called an "Iraqi system", prevalent at the time the charterers gave their orders, of vessel detention and financial loss in respect of spurious cargo claims. The owners claimed an indemnity from the charterers against the cargo claims they had been forced to meet. It was argued on behalf of the charterers that no right of indemnity arose as their order to discharge in Iraq was valid and there was no breach of charter on their part.

It was held by Cresswell, J., and the Court of Appeal that an indemnity was to be implied since the risk of incurring liability for dubious cargo claims was one which, under the charter, the owners had not agreed to bear (it was noted that the risk had not been notorious at the date of the charter) and since, upon the arbitrator's findings, the liability flowed directly from the charterers' order to carry cargo to Iraq.

The Island Archon [1993] 2 Lloyd's Rep. 388 and [1994] 2 Lloyd's Rep. 227 (C.A.).

19.17 The precise scope of this principle is not entirely clear. As formulated above, the indemnity extends to lawful orders that expose the owners or the ship to risks the owners have not consented to bear. Yet Lord Hobhouse said in *The Hill Harmony*, at page 160: "If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it." It is suggested that Lord Hobhouse's equation is not universally true. But it does reflect a certain instinct that agreeing to run a risk and agreeing to bear the consequences ordinarily go hand in hand. That in turn makes the identification of risks that the owners have agreed to run, but not to bear, a little elusive. The facts of *The Island Archon* itself might be taken to be an example, although on the arbitrator's findings the order seems to have been an order to proceed to a (legally) unsafe port and therefore unlawful all along. A surer example, which the Court of Appeal drew upon to show that the implied indemnity is not limited to unlawful orders, is an order to sign a bill of lading committing the owners to more onerous cargo responsibilities than they have undertaken by the charter (paragraph 19.22 below). It is suggested that the basis and scope of the implied indemnity would benefit from definitive consideration by the Supreme Court, but the end result seems right, namely that where it is found that loss, damage, or liability has resulted from following the charterers' orders, the charterers must indemnify the owners unless they prove that the effective cause of the loss, damage or liability was a risk the owners had agreed by the charter to bear. That it is for the charterers to show why they are not liable is sufficient to explain why the claim in *The Island Archon* succeeded, although the owners did not set out to prove an unlawful order, and also to explain the successful indemnity claim by

the owners of the *Georges Chr. Lemos* in *The Athanasia Comninos* (see paragraph 9.13, above), which proceeded from Mustill, J.'s conclusion that "on the evidence given at the trial. . . the cause of the explosion is unknown".

19.18 Thus, the implied indemnity, as with the express indemnity in the Baltime form, will cover not only liabilities that the owners may incur, but also other loss or damage they may suffer, as for example damage suffered by their ship at an unsafe port to which she has sailed in compliance with the charterers' orders (see paragraphs 10.94 to 10.98, above), or the reasonable costs of defending legal proceedings (see *The Caroline P* [1984] 2 Lloyd's Rep. 466, *per* Neill, J., at page 476). But there will be no indemnity in respect of general navigational risks not peculiar to the charterers' orders (see *The Island Archon*, above) and in all cases there must be an unbroken chain of causation between the loss suffered and the charterers' order: see below at paragraph 19.32, under 'Causation'.

19.19 In the case of liabilities incurred to third parties, however, there is no right to indemnity where the act of the master in complying with the charterers' orders or directions is manifestly wrongful or "manifestly tortious". To disqualify a claim for indemnity, an act must always involve "an element of turpitude" and it is not enough that "the actor has carelessly failed to make enquiries which would have revealed the true nature of the act, or. . . has culpably but not recklessly drawn the wrong inference from such enquiries as he has made"; *per* Mustill, L.J., in *The Nogar Marin* [1988] 1 Lloyd's Rep. 412, at page 417.

The *Sagona* was time chartered on the Beepeetime 2 form, Clause 20 of which provided that the master was to be under the orders and directions of the charterers as regards employment, and incorporated an indemnity in favour of the owners against liabilities arising from signing bills of lading in accordance with the directions of the charterers or their agents. The charterers ordered the ship to deliver a cargo of gasoil at Nordenham to Mabanaft. Following the common (although not universal) practice in the carriage of oil cargoes at that time (1978), the master did not insist upon the production of a bill of lading or a letter of indemnity before delivering the cargo. Mabanaft were not in fact entitled to the cargo, the ship was arrested and the owners suffered losses in consequence which they sought to recover from the charterers by way of indemnity. It was held by Staughton, J., applying *Strathlorne* v. *Weir* above, that the owners' losses had been caused by compliance with the charterers' orders. In the light of the practice which was then common, the master's action in delivering the cargo without a bill of lading was not manifestly illegal nor was there anything which should have excited the master's suspicion; accordingly the owners were entitled to recover their losses under an implied indemnity.

The Sagona [1984] 1 Lloyd's Rep. 194.

(See also *The Nogar Marin* [1988] 1 Lloyd's Rep. 412.)

Relationship with other charter clauses

19.20 In *The Nogar Marin* [1988] 1 Lloyd's Rep. 412 at page 422, Mustill, L.J., said that: ". . . the implication of an obligation to indemnify is not automatic. It must always depend on the facts of the individual case, and on the terms of any underlying contractual relationship". Thus an indemnity will not be implied if it is inconsistent with the express terms of the charter: see the *obiter* comments of Staughton, L.J., in *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), at page 462, and compare *The Marie H*, below. But implied indemnities do not have to be limited to matters outside the scope of other charter clauses (see *Royal Greek Government* v. *Minister of Transport* (1949) 83 Ll.L.Rep. 228, *per* Devlin, J., at page 234) and an overlap of subject matter with such express clauses does not necessarily involve inconsistency. Thus hire lost to the owners by operation of an off-hire clause may be capable of being recovered under the implied indemnity.

The *Marie H* was fixed on the New York Produce form for a time charter trip from Germany to East Africa. An additional clause allowed explosives to be shipped subject to certain conditions "at Charterer's risk without any liability to owners for loss of or damage to cargo and/or ship howsoever caused". Another, numbered 52,

supplemented the printed off-hire clause as follows: "Should the vessel put back whilst on voyage by reason of an accident or breakdown, for which Charterers are not responsible, the hire shall be suspended from the time of her putting back until she is again in the same or equidistant position and the voyage resumed therefrom." General cargo was loaded at Hamburg and Antwerp, including seven containers and a crate of explosives. The ship then encountered a violent storm in the Bay of Biscay and had to put into Lisbon where she was repaired and her cargo was repacked. Precautions made necessary by the presence of explosives among the cargo prolonged the time taken by this work and also increased its cost.

The sole arbitrator, relying on Clause 8 and the additional explosive cargo clause, held that the owners were entitled to an implied indemnity arising from their obedience to the charterers' orders to load the explosives, covering a refund of deducted off-hire/damages for delay and expenses at Lisbon but only to the extent that the delay and expense had been exacerbated by the presence of the explosives. His approach was approved by Timothy Walker, J., in the Commercial Court. One of the charterers' objections to the award was that, as the ship went off-hire "by reason of an accident or breakdown, for which Charterers are not responsible", to allow recovery of off-hire would involve allowing the implied indemnity to override an express term of the charter. The judge, distinguishing *The Berge Sund*, above, as concerning "a different clause in a different contract", rejected this argument on the basis: (a) that an overlap between the implied indemnity and an express term did not necessarily involve inconsistency; and (b) that the off-hire to be refunded under the award was only that caused by a cause for which the charterers were responsible, namely, the loading of the explosives.

Deutsche Ost-Afrika-Linie v. *Legent Maritime* (*The Marie H*) [1998] 2 Lloyd's Rep. 71.

19.21 See also the comments on this issue by Steyn, J., at first instance in *The Berge Sund* [1992] 1 Lloyd's Rep. 460, at page 467 (reversed on other grounds [1993] 2 Lloyd's Rep. 453). As to the charterers' safe port obligations, see chapter 10. In *The Berge Sund*, the off-hire clause provided that hire was not payable where loss of time occurred within the clause and was "not caused by Charterer's fault". An obligation to indemnify the owners in respect of loss of time within the clause irrespective of fault by the charterers would have been inconsistent. Similarly, the Shelltime 4 form provides that the charterers are to have no liability in respect of the safety of ports to which the chartered ship is traded, in the absence of a want of due diligence to ensure their safety. So there can be no room for an indemnity claim in respect of damage resulting from unsafety (and the general indemnity wording in Clause 13(a)(i) of the form must presumably be limited accordingly). No indemnity claim was even put forward in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508 (paragraph 37.44, below).

Indemnity arising from the signing of bills of lading

19.22 If the master is required by the charterers to sign or permit to be signed bills of lading which impose on the owners greater liability than that which they have assumed under the charter, the owners will usually be entitled to be indemnified by the charterers in respect of their additional liability: see paragraphs 21.31 to 21.36. But the right to indemnity may be lost if the master signs bills in circumstances where it was his duty to refuse to sign: a number of possible such circumstances are considered in paragraphs 21.37 to 21.60, below.

Indemnity not dependent on charterers' fault

19.23 The indemnity in favour of the owners against the consequences of complying with the charterers' orders operates quite independently of any fault on the part of the charterers. In *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277, summarised in paragraph 19.30, below, Mustill, J., rejecting an argument by the charterers that Article IV, rule 3 of the Hague Rules protected them from liability under the implied indemnity in the New York Produce form, said: "they would need to use much clearer language than this to introduce the idea of fault into the shipowner's implied indemnity, where it has never been before".

Employment

19.24 The master is put under the charterers' direction "as regards employment". "Employment" in this context relates to the economic utilisation of the ship. In the words of Lord Bingham in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 150: "Clause 8 of the present charter-party, providing that the master (although appointed by the owners) shall be under the orders and directions of the charterers, gives the charterer his key right under the contract: to decide where the vessel shall go and what she shall carry, how (in short) she shall be used, always subject to the terms of the charter-party." But matters of "employment" have to be distinguished from matters of "navigation", which remain the responsibility of the master.

19.25 An order by the charterers that the ship is to proceed to or remain at a certain port is an order regarding employment. Thus in *Temple Steamship* v. *Sovfracht* (1945) 79 Ll.L.Rep. 1, summarised in paragraph 4.99, above, the obedience of the master to the wrongful orders of the charterers to delay at Murmansk and thereafter proceed to Garston did not amount to a waiver and did not prejudice the claim of his owners against the charterers under that charter (an amended Baltime form), since the master was under the orders of the charterers as to employment (see paragraph 5.15, above). See also *Larrinaga Steamship* v. *The Crown* (1944) 78 Ll.L.Rep. 167, below, and *The Eugenia* [1963] 2 Lloyd's Rep. 381 (C.A.). Hence the charterers may be obliged to indemnify the owners in respect of cargo claims for which they must almost inevitably have to pay simply by discharging cargo at a particular port as ordered by the charterers: see *The Island Archon* [1994] 2 Lloyd's Rep. 227 (C.A.) and paragraph 19.16, above.

19.26 But a distinction is drawn between such orders and how they are to be executed in terms of navigation.

The *Ramon de Larrinaga* was on requisition to the Crown on the terms of the T.99A time charter, including a clause virtually identical to the employment and indemnity clause of the Baltime form. In October 1939 she was ordered to proceed on a voyage from Newport to St. Nazaire and then to Cardiff for a joint survey prior to redelivery. After discharge at St. Nazaire she was ordered by the naval sea transport officer there to proceed at once to Quiberon Bay and join a convoy for Cardiff. The master protested that, with the weather deteriorating and darkness coming on, he should wait until morning before sailing. But he was overruled. The ship thereupon set out but subsequently grounded and was damaged.

One basis on which the owners claimed indemnity from the Crown was that the damage to the ship had been caused by the master's compliance with charterers' orders. This argument was rejected by the House of Lords because, although the orders to St. Nazaire and then to Cardiff were orders by the charterers as regards employment, the orders of the naval sea transport officer as to when the ship should sail for Cardiff were not, and, in any event, the damage was not caused by the charterers' orders, although it occurred while they were being carried out.

Lord Wright said, at page 173: "These sailing orders [of the naval sea transport officer] which the Judge found were given were, in my opinion, merely dealing with matters of navigation in regard to carrying out the orders [of the charterers] to proceed to Cardiff. It was the duty of the master to exercise his judgment in such matters of navigation." Lord Porter said, at page 176: ". . . an order to sail from port A to port B is in common parlance an order as to employment, but an order that the ship shall sail at a particular time is not. . .".

Larrinaga Steamship v. *The Crown* (1944) 78 Ll.L.Rep. 167 (H.L.).

(See also *Weir* v. *Union Steamship Company* [1900] A.C. 525 (H.L.) and *Stag Line* v. *Ellerman & Papayanni Lines* (1949) 82 Ll.L.Rep. 826.)

19.27 That matters of navigation and ship management remain always the responsibility of the owners and their servant, the master, is underlined by the words of Lines 170 and 171 in the New York Produce form. So while it was held by Staughton, J., in *The Erechthion* [1987] 2 Lloyd's Rep. 180, below, that the orders of a harbour master to proceed to an anchorage to lighten were orders as to employment, the advice of the pilot as to precisely where the ship should anchor was a matter of navigation.

The *Erechthion*, while under time charter on the New York Produce form, was ordered by the charterers to discharge at Port Harcourt. Since her draught was too deep, she was ordered by the harbour master to proceed to an anchorage in the river to lighten, where she grounded. It was common ground that there was to be implied in the charter an obligation to indemnify the owners against the consequences of complying with the charterers' order to go to Port Harcourt. It was held by Staughton, J., that the charterers' order was to be regarded as an order to go to such discharging place there as the harbour authority should designate. He held that the harbour master's order was an order as to employment and remitted to the arbitrators the question whether the grounding was proximately caused by this order, rather than by the advice of the pilot as to where within the anchorage the ship should anchor, which was a matter of navigation only.

The Erechthion [1987] 2 Lloyd's Rep. 180.

(See also *The Isabelle* [1982] 2 Lloyd's Rep. 81 and *The Mediolanum* [1984] 1 Lloyd's Rep. 136 (C.A.), and paragraphs 10.89 and 10.90, above, where these cases are discussed.)

19.28 Orders from the charterers as to the general route by which the ship is to carry out a voyage are orders regarding employment. Absent any specific charter term to the contrary, the master is obliged to obey such orders, subject only to considerations of seamanship and safety: *The Hill Harmony* [2001] 1 Lloyd's Rep. 147 (H.L.). For the facts and a summary of the decision see paragraph 18.2, above.

19.29 In the above case, Lord Hobhouse, at page 159 of the House of Lords report, defined the difference between "employment" and "navigation" as follows: "'Employment' embraces the economic aspect – the exploitation of the earning potential of the vessel. "Navigation" embraces matters of seamanship." But exactly where in practice the line between them is to be drawn in respect of routing orders given by (or on behalf of) charterers is capable of further clarification. For this purpose the facts of *The Hill Harmony* were too extreme. The charterers' orders were on a large scale and the master's reasons for disobeying them were unconvincing. A more precise distinction may emerge when there comes before the courts a case in which the charterers give more detailed orders and the master makes out a better case for departing from them for reasons of safety or seamanship. Lord Bingham expressed the balance to be struck as follows, at page 152: "The charterer's right to use the vessel must be given full and fair effect; but it cannot encroach on matters falling within the specialized professional maritime expertise of the master, particularly where the safety or security of the vessel, her crew and her cargo are involved. He is the person, on the vessel, immediately responsible." On the continuing importance of the master's role, see also Lord Hobhouse's remark, at page 160, quoted in paragraph 19.1, above.

19.30 Similarly, an order to load a particular cargo has been held to be an order regarding employment. If the order to load that cargo causes loss to the owners, then the right to indemnity from the charterers arises.

The *Ann Stathatos* was time chartered on a wartime version of the Baltime form which included, as in Clause 9 of the present form, the statement that the master was to be "under the orders of the charterer as regards employment" and an express indemnity against the consequences of his obeying such orders. The charterers ordered the ship to load a cargo of coal, which gave off methane gas. Repairs to water tanks in the 'tween decks were being undertaken, pending sailing of the ship's convoy, when a series of explosions damaged the ship. The arbitrators found that the direct cause of the explosions was a combination of the explosive atmosphere and a spark produced by the repairs. The owners claimed that the charterers should indemnify them for the damage to the ship.

Devlin, J., held that an order to load a particular cargo was an order as to the employment of the ship and so was within the scope of the indemnity provision, but, on the facts found by the arbitrators, the loading was not the direct cause of the loss and so no right to an indemnity arose.

Royal Greek Government v. *Minister of Transport* (1949) 83 Ll.L.Rep. 228.

The *Athanasia Comninos* and the *Georges Chr. Lemos* were chartered to the same charterers on the New York Produce form. Both were ordered by the charterers to load coal in Sydney, Nova Scotia for Birkenhead. Shortly after sailing each ship was damaged by an explosion caused by ignition of a mixture of air and methane gas, which had been emitted from the coal after loading. The owners sought to recover from the

charterers in respect of these damages. It was conceded by the charterers that their order to load the coal fell within the scope of the indemnity implied from Clause 8, even if the owners failed (as they did at the trial) to prove that the coal loaded had properties making it unusually dangerous as compared with other coal cargoes. But the charterers claimed that there had been faults by each of the owners and/or their crews which broke the chain of causation between their orders to load the coal and the explosions. Mustill, J., found no such fault with regard to the *Georges Chr. Lemos*, but that the ignition of the gas and air mixture on the *Athanasia Comninos* had been caused by a crew member lighting a match for a cigarette in the forecastle. Accordingly he held the charterers liable to the owners of the former ship, but not to the owners of the latter. (With regard to the former ship, the judge rejected a defence put forward by the charterers on the basis of Article IV, rule 3 of the Hague Rules: as to which see paragraph 9.25, above, and paragraph 34.40, below.)

Mustill, J., said: "It seems to me perfectly possible to have a loss which is caused by the shipment of a cargo having certain properties, even if the properties of the cargo in question are no different from those of other cargoes of the same description. In the present case, if one asks the question (eliminating the possibility of fault on the part of the shipowner) 'Why was there an explosion?', the answer is – 'Because there was methane in the hold'. And if one goes on to ask 'Why was there methane in the hold?', the answer is – 'Because the Time Charterers called on the vessel to load coal.' This answer is in my opinion sufficient to found an indemnity, without proof that the coal was in any way unusual."

The Athanasia Comninos [1990] 1 Lloyd's Rep. 277.

19.31 The charterers' entitlement to direct the ship's employment may entitle them to have the ship inspected by third parties, where that is a commercial requirement of the charterers' ordered employment, and not only where it is a requirement imposed by local law. Thus, in *The Silver Constellation* [2008] 2 Lloyd's Rep. 440, at pages 454 to 455, David Steel, J., held that although the charter, which was on the New York Produce form, did not oblige the owners to obtain or maintain a Right Ship approval rating for the ship, Clause 8 did oblige them to obey the charterers' orders to submit the ship to a Right Ship inspection and vetting procedure. Similarly (and an analogy drawn in *The Silver Constellation*), an order to allow shore inspectors on board to inspect the cleanliness of holds prior to loading would be an order as regards employment under Clause 8.

Causation

19.32 For the owners to succeed under the indemnity, there must be an unbroken chain of causation between the instructions of the charterers and the loss suffered: see *Royal Greek Government* v. *Minister of Transport*, and *The Athanasia Comninos*, above. Donaldson, J., said in *The White Rose*, below: "A loss may well arise in the course of compliance with the time charterers' orders, but this fact does not, without more, establish that it was caused by and is in law a consequence of such compliance and, in the absence of proof of such causation, there is no right to indemnity." See also *The Erechthion* [1987] 2 Lloyd's Rep. 180, *The Berge Sund* [1992] 1 Lloyd's Rep. 460, *per* Steyn, J., at page 467, [1993] 2 Lloyd's Rep. 453 (C.A.), *per* Staughton, L.J., at page 462, *The Island Archon* [1993] 2 Lloyd's Rep. 388 and [1994] 2 Lloyd's Rep. 227 (C.A.) and *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, summarised at paragraph 9.1, above. In *The Aquacharm* [1982] 1 Lloyd's Rep. 7 (the facts of which are set out at paragraph 34.20, below), Griffiths, L.J., said: "the owners have failed to show that the transhipment expenses were incurred as a direct consequence of complying with the charterers' orders. . . The burden is on the owners claiming the indemnity to establish that the charterers' orders caused the loss – this they have failed to do and they are not therefore entitled to be indemnified against the expenses of the transhipment." See also under "Ordinary expenses and navigational risks", below. As to the need to show a *direct* consequence, see the caveat of Staughton, L.J., in *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), at pages 462 rhc to 463 lhc. The issue as to causation may be whether the master should have refused to follow the order that led to loss or damage, so that by doing so he broke the chain of causation. Such a break in the chain is not lightly to be found: see paragraph 10.60, above.

The *White Rose*, on charter on the Baltime form, was ordered to load grain at Duluth. In accordance with their obligations under Clause 4, the charterers appointed as loading stevedores a firm of average competence by local standards. One of their men, having left his station for his own purposes, fell through an unfenced part of a 'tween deck hatch. He sued the owners for damages for his injuries in the Minnesota courts and the owners became obliged to spend money on legal fees and to contribute towards the settlement of his claim. The owners claimed to be indemnified by the charterers under Clause 9. Their claim was rejected by Donaldson, J., because the accident, and thus the owners' loss, had been caused by the lack of fencing (for which the charterers were not responsible) and the negligence of the injured man himself, and not by either their compliance with the charterers' orders to load grain at Duluth or the selection by the charterers of incompetent stevedores.

The White Rose [1969] 2 Lloyd's Rep. 52.

The *Hillcroft* was chartered to lighten the *West Hesseltine*, aground off the Cape Verde Islands. The charter obliged the captain to "follow the instructions of the charterers" who were to "indemnify the owners from any consequences, or liabilities that may arise" therefrom. The charterers ordered the transfer of barrels of palm oil which leaked, despite careful handling, and damaged the *Hillcroft*'s holds. The ship was also damaged by the transfer of large mahogany logs. Roche, J., held that the charterers were liable to indemnify the owners in both these cases, but not for further damage following the escape of oil from her forepeak tank, for although this had also been loaded on the charterers' instructions, the effective cause of its escape was the subsequent breaking of a pipe connected to that tank.

Portsmouth Steamship v. *Liverpool & Glasgow Salvage Association* (1929) 34 Ll.L.Rep. 459.

(See also the judgments of Lord Porter in *Larrinaga Steamship* v. *The Crown* (1944) 78 Ll.L.Rep. 167, at page 176 and of Lord Hobhouse in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 158.)

19.33 Damages for breach of contract are awarded only in respect of loss that is not too remote. In that context, a loss is too remote if it is of a type that would have been outside the reasonable contemplation of the parties, at the time when the charter was concluded, as liable to result from the breach in question. A right to an indemnity is often a right to recover "all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties" (*The Eurus*, below, at page 357 of the Court of Appeal report, *per* Staughton, L.J.), although there is no fixed rule. Furthermore, it may be that issues of foreseeability are not only relevant to 'remoteness' but also can play a part in considering whether a specified event (as opposed to some other factor, whether pre-existing or supervening) is properly to be regarded as having been an effective cause of a loss: *The Eurus* [1996] 2 Lloyd's Rep. 408 (Rix, J.), [1998] 1 Lloyd's Rep. 351 (C.A.); *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99 (Colman, J.). In any given case, therefore, proof of an unbroken chain of causation between the charterers' order and the loss in respect of which the owners seek an indemnity may require consideration of how foreseeable it was that such loss would or might result from such an order. The law here is not fully developed, however. In particular, it is suggested that the indemnity should generally cover losses that are foreseeable when the charterers' relevant order was given even if they would have been unforeseeable when the charter was entered into: see Foxton, in *Legal Issues Relating to Time Charterparties*, Informa (2008), paragraphs 6.33 to 6.35, criticising in this respect paragraph 305 of Colman, J.'s judgment in *The Greek Fighter*, and see also the passage from the judgment of Aikens, J., in *The Kitsa* that is quoted at the end of paragraph 19.40, below.

19.34 Whether there was effective causation for an employment indemnity claim provoked a sharp difference of view in *The Kos* [2012] 2 Lloyd's Rep. 292 (the facts of which are summarised at paragraph 16.117 above). The indemnity was the express indemnity under Clause 13 of the Shelltime 3 form, against "all consequences or liabilities that may arise from the master, charterers or their agents signing bills of lading or other documents, or from the master otherwise complying with charterers' or their agents' orders". The owners withdrew the ship part way through loading at Angra dos Reis, Brazil, when a monthly hire instalment fell due and was not paid on time. Dealing with the cargo that had been loaded kept the ship at Angra dos Reis for 2.64 days after the

withdrawal. The owners claimed indemnity under Clause 13 for a lack of earnings for that time. That claim strictly did not arise in the Supreme Court, because it was there held that the owners were entitled to remuneration for the 2.64 days. The owners' claim under Clause 13 was that any lack of earnings was caused by the order to load the cargo. On that issue of causation, Andrew Smith, J., the Court of Appeal, and Lord Mance in the Supreme Court, disagreed with the owners, concluding that the sole effective cause of any lack of earnings was the owners' choice to withdraw. Lords Phillips, Clarke and Sumption (with whom Lord Walker agreed), however, sided with the owners on causation. Their reasoning, we suggest, is unsatisfactory, and it has been criticised (see Simon Baughen [2012] LMCLQ 343, at 348–349; Paul Todd [2012] JBL 549, at 549–552; Liang Zhao (2012) 18 JIML 121, at 122–123). We respectfully think that Lord Mance's reasoning on this aspect is preferable and should be followed.

Severable losses

19.35 It may, however, be possible to segregate loss, damage or expense caused by obedience to the charterers' orders from loss, damage or expense caused by other factors and allow the owner to recover in respect of the former.

The *Marie H* was fixed on the New York Produce form for a time charter trip from Germany to East Africa. An additional clause allowed explosives to be shipped subject to certain conditions "at Charterer's risk without any liability to owners for loss of or damage to cargo and/or ship howsoever caused".

General cargo was loaded at Hamburg and Antwerp, including seven containers and a crate of explosives. The ship then encountered a violent storm in the Bay of Biscay and had to put into Lisbon where she was repaired and her cargo was repacked. Precautions made necessary by the presence of explosives among the cargo prolonged the time taken by this work and also increased its costs.

The sole arbitrator, relying on Clause 8 and the additional explosive cargo clause, held that the owners were entitled to an implied indemnity arising from their obedience to the charterers' orders to load the explosives, covering a refund of deducted off-hire/damages for delay and expenses at Lisbon but only to the extent that the delay and expense had been exacerbated by the presence of the explosives. His approach was approved by Timothy Walker, J., in the Commercial Court.

Deutsche Ost-Africa-Linie v. *Legent Maritime* (*The Marie H*) [1998] 2 Lloyd's Rep. 71.

Ordinary expenses and navigational risks

19.36 The owners are not entitled to recover from the charterers under their indemnity the ordinary expenses and losses of trading, despite the fact that in a broad sense these are incurred as a result of their obedience to the orders of the charterers. This was expressed by Lloyd, J., in *The Aquacharm* [1980] 2 Lloyd's Rep. 237, at page 244 lhc, in the following words: "It is of course well settled that owners can recover under an implied indemnity for the direct consequences of complying with the charterers' orders. But it is not every loss arising in the course of the voyage that can be recovered. For example, the owners cannot recover heavy weather damage merely because, had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered. The connection is too remote. Similarly, the owners cannot recover the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense the cost of ballasting is incurred as a consequence of complying with the charterers' orders: see *Weir and Others* v. *Union Steamship Co. Ltd*. [1900] A.C. 525. The same considerations apply in the present case. The costs of transhipment were an ordinary expense incurred in the course of navigation."

19.37 The above passage, including the extract from the judgment of Lloyd, J., in *The Aquacharm*, was quoted with approval by Evans, L.J., in the Court of Appeal in *The Island Archon* [1994] 2

Lloyd's Rep. 227, at page 235. The Lord Justice, having referred to other authorities, then continued, at page 236: "The authorities show, therefore, that time charterers may be held liable under an express indemnity for the consequences of ordering the chartered vessel to load a particular cargo or to proceed to a named port, even though the order is one which the charterer is entitled to give and the master is bound to obey. But the consequences for which the charterer is liable do not include two categories of loss. First, the loss may be regarded as caused in law by some subsequent or intervening event. An act of negligence may often, but not invariably, break the chain of causation in this sense: *Portsmouth Steamship Co. Ltd*. v. *Liverpool & Glasgow Salvage Association* (1929) 34 Ll.L.Rep. 459 (Mr Justice Roche) and *The White Rose*, at page 59. Second, the loss although a consequence 'in a broad sense' . . . may have arisen from a risk which the shipowner has agreed to run, hence the exclusion of navigation risks and also the distinction which has been held to exist between time and voyage charter-parties (*per* Mr Justice Devlin, in *The Ann Stathatos* and Mr Justice Mustill, in *The Georges Christos Lemos* (*third party proceedings*) [1991] 2 Lloyd's Rep. 107)."

19.38 Evans, L.J., emphasised, however, that a rigid distinction should not be drawn between voyage and time charters in this regard. An indemnity might less readily be implied in the case of a time charter for the period of a specified voyage or 'trip', whereas it might be more readily implied in a voyage charter giving the charterers a wide range of options. This is because, in the former type of charter, it is likely to be possible to impute to the owner an acceptance, as for his own account, of a greater range of the risks that might arise in the course of the charter service, than would be the case in the latter type of charter.

19.39 He then continued, still at page 236: "What risks the shipowner has agreed to bear must depend upon the true construction of the charter-party and therefore upon the situation when the charter-party was entered into. If there had been a finding in the present case that the 'Iraqi system' was notorious at the date of the charter-party in March, 1979 then there might be substance in the charterers' contention that the shipowners had consented to bear the consequences of ordering the vessel to discharge at an Iraqi port, which they could have excluded from the agreed limits if they had sought to do so."

19.40 Sir Donald Nicholls, V.-C., also emphasised, at page 238, that the implied indemnity covered some only of the consequences of the shipowner's compliance with the charterer's orders; the loss had not only to arise directly from those orders but "also be one which, on a fair reading of the charter-party, the shipowner cannot be taken to have accepted". In *The Darya Tara* [1997] 1 Lloyd's Rep. 42, the facts of which are summarised at paragraph 20.34, below, Mance, J., followed this reasoning in rejecting a claim by owners to be indemnified against the consequences of their obedience to the order of charterers to load cargo on deck. By obeying they had accepted the associated risks; the loss arose from heavy weather and not from the charterers' orders. See also *The Kitsa* [2005] 1 Lloyd's Rep. 432, in which arbitrators had found that the risk that the ship's bottom would be fouled by inactivity in a warm water port had been accepted by her owners so that consequent cleaning costs were not recoverable from the charterers under an implied indemnity. Aikens, J., found no error of law in their approach. He noted, at [24], that "just because a particular risk of loss or expense is foreseen or foreseeable at the time a charter-party is made, that is not conclusive to determine whether that loss or expense is within the scope of an implied indemnity. But it is clear from [the passages in *The Island Archon* quoted above] that if, at the time that the charter-party is concluded, the occurrence and type of loss or expense to the shipowner flowing from the order as to employment of the vessel were *unforeseen*, then that will be a potent factor in deciding that the loss or expense will fall within the scope of the implied indemnity: particularly when the order was lawful" (original emphasis).

19.41 In *The Dimitris L* (*No 2*) [2012] 2 Lloyd's Rep. 354, Christopher Clarke, J., held, at [55], that the time charterers' orders to proceed to the United States did not entitle the owners to be

indemnified against the cost of U.S. Gross Transportation Tax, which was "an ordinary expense of trading" to the United States "and not an unusual feature. In any event the risk of incurring or being liable for this very tax has been dealt with by [additional] clause 112 [which was the BIMCO US Tax clause] and, to the extent that the owners are not entitled to recover under that clause, the risk of having to bear the cost of the tax is one which they must be taken to have accepted."

19.42 It is of the essence of a time charter that lawful employment orders given by the charterers be complied with. Thus, in *The Product Star (No. 2)* [1983] 1 Lloyd's Rep. 397, a definitive refusal of the charterers' order to proceed to Ruwais, UAE, for loading, was a repudiation of the charter irrespective of the owners' claim that their reasons for refusing on that occasion might not recur, so that the problem would not necessarily persist throughout the charter period. "The Judge held tersely that the refusal went to the root of the contract and amounted to a repudiation of it. The owners were wrongfully declining to enter the Gulf and yet demanding hire. In my judgment, the telex message by which the owners refused to proceed exhibited an intention no longer to be bound by the charter-party and constituted a plain and deliberate abnegation of it. The point is unarguable.", *per* Leggatt, L.J., at 407 rhc.

19.43 In *The Bulk Uruguay* [2014] 2 Lloyd's Rep. 66, the issue was whether sub-time charterers had been entitled to terminate a sub-time charter under which disponent owners had granted a right to order Gulf of Aden voyages that they did not have from the head owners. Popplewell, J., upheld a majority decision of arbitrators that the sub-charterers were not so entitled, primarily because of a finding of fact that a repudiatory breach of the kind described by Leggatt, L.J., in *The Product Star (No. 2)*, above, would not inevitably occur. That was sufficient to justify the arbitrators' decision only if the sole question was whether there was an anticipatory breach by the disponent owners of the obligation to comply in due course with lawful employment orders actually given. It is suggested that should not have been the sole question, as there was an actual breach by the disponent owners, of the promise that the master would be under the charterers' orders. However, the majority arbitrators also found that, whilst there was a measurable competitive disadvantage in being unable to trade the ship as being committed to Gulf of Aden transits if ordered, trading under that disadvantage would not have deprived the sub-charterers of substantially the whole benefit of the sub-charter. Popplewell, J., held that no error of law was involved in the arbitrators taking that view.

Agents

19.44 The provision in Lines 77 and 78 of the New York Produce form gives the charterers the right (and presumably the duty) to appoint the agents to handle the business of the ship in each port.

19.45 Lord Wright, in *Larrinaga Steamship* v. *The Crown* (1944) 78 Ll.L.Rep. 167, said, at page 172: "The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charter-party is to be consigned as agent. The selection is here left to the charterers."

19.46 Reference should also be made to Line 39 of the New York Produce form, which requires the charterers to "provide and pay for. . . Agencies". Comments on the responsibility of the charterers for the choice of suitable agents and the extent of their liability for the agents' acts or omissions appear at paragraphs 12.22 to 12.24, above.

U.S. Law

Employment clause

19A.1 It is a basic element of a time charter that the master and crew are employed by the owner and remain his employees throughout the term of the charter. At the same time, the master must carry out the instructions and orders of the charterer. The charterer's right to give orders to the master, however, is by no means unlimited or absolute. For example, the master may justifiably refuse to carry out orders from the charterer to enter an unsafe berth. Nor does the master act under the orders of the charterers insofar as the navigation or management of the ship is concerned. The master has very broad authority with respect to any matters which affect the seaworthiness of the ship. In addition, where circumstances dictate the necessity to deviate from the voyage, the master may do so. See, e.g., *The Medita*, SMA 1150 (Arb. at N.Y. 1977). In that case, in addition to holding that the master was justified in taking refuge at a port because of heavy weather, the arbitrators held that he was entitled to demand that the charterer supply additional bunkers to ensure that the ship could safely cross the North Atlantic in the bad weather conditions expected in the month of December.

19A.2 In *The Andros Mentor*, SMA 2125 (Arb. at N.Y. 1985), the master declined to follow charterer's instructions to follow the voyage routing recommendations of a weather routing service on a trip from Vancouver to the Philippines. Instead of taking a northerly route across the Pacific as suggested by the charterer's weather routing service, the master took a more southerly route suggested by a different routing service employed by the owner. The difference in the routes was about 688 miles, which added about four days to the voyage. The charterer argued that the master's failure to follow its instructions was a breach of Clauses 8 and 11. The panel found no breach of Clause 8. The panel majority further ruled that the master's statement to the charterer before the voyage commenced that he would not follow its voyage orders was a breach of Clause 11. The panel majority nevertheless denied the charterer's claim that it was entitled to withhold charter hire for the additional four days required to complete the voyage.

> . . . the panel majority finds that the Master erred only in indicating, while the vessel is still in Vancouver, that he would not follow the routing of Marincom. This, in our opinion, constituted a partial failure to follow Charterer's written voyage instructions, and was thus a breach of Clause 11 of the Charter Party. However, we do not find this breach to be fundamental, but only technical; there was no manifest disregard of the interests of Charterer which would have been sufficient to impugn the decision or judgment of the Master in following the track that he did. We find that the phrase "sailing directions" in Clause 11 only entitles a charterer to give general instructions; for instance, "via Panama Canal," or "via Capetown," but stops short of any interference with the navigation of the vessel without such context. Preservation of a Master's right to exercise his judgment and prerogatives in matters of navigation at sea are of paramount importance, and only in matters where the evidence shows such judgment to be severely flawed or negligent will he be subject to criticism or claim. We do not find such evidence in the instant case.

19A.3 See also the discussion concerning Clause 11 at paragraph 22A.2.

19A.4 *The White Manta*, SMA 3257 (Arb. at N.Y. 1996), involved a claim for damages arising from the master's failure to follow voyage orders. The ship was to carry a cargo of frozen butter from Seattle to China. Contrary to the charterer's voyage instructions, the master decided to follow a southern route to China rather than the northern routing proposed by the charterer, thereby prolonging the voyage by some five to eight days. The panel ruled unanimously that the master's decision was unreasonable and improper, and directed the owner to compensate the charterer for the extra time and costs incurred as a result of the master's failure to follow charterer's sailing instructions. The panel noted:

There is no dispute that the master is the final authority with respect to matters of navigation and safety, and no challenge has been raised to this authority. What has been raised here is the reasonableness of the master's decision. . . We accept the concept that the master should be given the benefit of doubt when matters of vessel and crew are involved but there are limits to such discretion.

19A.5 Based on the evidence, the panel ruled that the charterer's voyage orders were reasonable and should have been followed.

19A.6 *The White Manta* was relied upon in *The Hill Harmony* [2001] 1 Lloyd's Rep. 14 (H.L.), discussed at paragraph 18.2 *et seq*.

19A.7 Whether the master has acted in good faith in disregarding the instructions of a charterer is significant. In *The Yardimci*, SMA 3898 (Arb. at N.Y. 2005), the panel concluded that the owner had breached the charterparty when the master failed to vacate a berth promptly after unloading, contrary to the charterer's instructions. The panel disregarded the master's testimony that an alleged computer breakdown had prevented departure. Instead, the panel found that the master's real motivation had been to receive and install a replacement generator. Although the owner was in breach, the charterer failed to establish most of its damages claim.

19A.8 If the charter incorporates the U.S. Carriage of Goods by Sea Act, deviation from the charterer's orders is expressly permitted by Section 4(4):

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided*, *however*, that if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, *prima facie*, be regarded as unreasonable. [46 U.S.C. § 1304(4).]

19A.9 A master's protest of the charterer's instructions prior to a casualty may protect the owner, even if there is negligence on the part of the master. See *MacKenzie McAllister* v. *United States*, 1942 AMC 1215 (E.D.N.Y. 1942). In some situations, however, the master's negligence may result in liability resting with the owner, even if the charterer's directions were imprudent. For example, a master's acceptance of a port he knows is not safe has been held to be intervening negligence which relieves the charterer from liability for breach of its warranty of safe port. *American President Lines Ltd*. v. *United States*, 208 F.Supp. 573, 1968 AMC 830 (N.D.Cal. 1961). Moreover, if a master accepts a port nominated by a charterer with knowledge of local conditions, it has been held that the charterer will not be liable on its warranty of safe port, since the warranty was not relied upon by the master. See *Tweedie Trading Co*. v. *New York & Boston Dyewood Co*., 127 F. 278 (2d Cir. 1903), *cert. denied,* 193 U.S. 669 (1903); *Pan Cargo Shipping Corp*. v. *United States*, 234 F.Supp. 623, 1965 AMC 2649 (S.D.N.Y. 1964), *aff'd,* 323 F.2d 525, 1967 AMC 850 (2d Cir. 1967), *cert. denied,* 386 U.S. 836 (1967). See discussion at paragraphs 10A.51 *et seq*.

19A.10 Although the charterer employs the ship to carry such cargoes as the charter allows, the master has authority to refuse orders which adversely affect the ship's stability or seaworthiness in other respects.

19A.11 In *The Aetolia*, SMA 2157 (Arb. at N.Y. 1985), for example, the panel held that the master was justified in insisting that the cargo in slack holds be secured before the ship sailed. According to the panel, the master's request to secure both its slack holds was prudent and consistent with the ship's stability requirements. The ship was held to be on hire for the time lost while the holds were secured. The panel further held that the master was justified in following the advice of a local agent at Buenos Aires not to load his ship to a draft in excess of the maximum prevalent safe draft of 32 feet, even though there was evidence that certain other owners had exceeded the published draft. The charterer, therefore, did not have a claim for damages for shutout cargo.

19A.12 In *The Union Harvest*, SMA 2626 (Arb. at N.Y. 1989), the panel ruled that the charterer

could not put the ship off hire for delays caused by the master's order for additional lashing and securing of the cargo. The panel based its ruling on the wide latitude of control and authority which the master has in order to properly load and stow the cargo. At the same time, however, the shipper was ordered to reimburse charterer for the off-hire and additional expenses incurred because it had refused to follow the master's orders.

19A.13 Similarly, in *The Athanassia*, SMA 2752 (Arb. at N.Y. 1991), the panel ruled that the charterer could not recover alleged damages from the disponent owner for delays and unforeseen extra expenses as a result of the master's changes and revision to the stowage plan, which were made for considerations of seaworthiness of the ship; the charterer raised no protest regarding the captain's competence during the actual loading operations, nor did the charterer employ a supercargo to assist in loading the cargo.

Indemnity rights between owner and charterer

19A.14 The owner has a right of indemnity from the charterer for liabilities incurred in carrying out its orders. The basic rule was stated by the court in *Nissho-Iwai Co. Ltd.* v. *The Stolt Lion*, 617 F.2d 907, 913, 1980 AMC 867, 874 (2d Cir. 1980), that "a right to indemnification between a vessel owner and charterer exists when one is held liable for a fault for which the other is primarily liable." See *The Thorsfreddy*, SMA 3527 (Arb. at N.Y. 1999), where in applying this rule the panel held that the owner had a right to indemnity from the charterer for all expenses incurred as a result of the ship's arrest because the owner was complying with charterer's orders when it called at the particular port.

19A.15 In *The Adventure*, SMA 3161 (Arb. at N.Y. 1995), the charterer's main defense to the owner's indemnity action was that suppliers' liens against the ship would not have been effective were it not for the master's failure to post their general notice to all suppliers that the ship was on time charter to a sub-charterer who lacked authority to subject the ship to liens. The panel found that even if the notice had been posted, it would have been ineffective to defeat the liens because it did not contain language mandated by law to properly put suppliers on notice. In addition, pursuant to the charter the master was acting as the charterer's borrowed servant. Finding that both the charterer and sub-charterer had breached their respective charters, the panel awarded the owner full indemnity for claims asserted against the owner *in personam* and the ship *in rem*. The head charterer, in turn, was awarded full indemnity against the sub-charterer.

19A.16 In *Hodgen* v. *Forest Oil Corp.*, 87 F.3d 1512, 1997 AMC 140 (5th Cir. 1996), the court considered a time charterer's duty to third parties and, in particular, its liability for personal injury suffered by a crew member of the ship. After reviewing prior cases concerning this issue, the court ruled that the charterer had "a hybrid duty arising from contract and tort, to persons with whom it has no contractual relationship, including vessel passengers, to avoid negligent actions within the sphere of activity over which it exercises at least partial control." 1997 AMC at 150. In *Hodgen*, the passenger was an operator on an offshore platform who was being transported between platforms in heavy weather and was injured. The decision to make the trip despite the heavy weather was made by the charterer. The court apportioned liability 85/15 between the charterer and the owner. See also *Bourg* v. *Chevron*, 91 F.3d 141, 1996 AMC 2587 (5th Cir. 1996).

19A.17 Issues involving rights of indemnity most frequently arise in the context of cargo and injury claims brought against both the owner and charterer. See discussion at paragraphs 20A.1 to 20A.51.

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CHAPTER 20

Loading, Stowing, Trimming and Discharging Cargo

[Clause 8 continued]

"78. . . . and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, . . .

Transfer of responsibility to the charterers

20.1 In the absence of express provision, the obligation to load, stow, trim and discharge the cargo is at common law on the owners; but Line 78 of the New York Produce form has the effect of shifting to the charterers the primary responsibility for loading, stowing and trimming the cargo: see *Court Line* v. *Canadian Transport* (1940) 67 Ll.L.Rep. 161 (H.L.) (summarised in paragraph 20.24 below). As to what that transfer entails, see paragraphs 20.13 to 20.17, below.

Discharge

20.2 The words "and discharge" are frequently added after the word "trim" in Line 78 of the New York Produce form. If the words "and discharge" are not added, but if it is usual in the trade (as it almost invariably will be) for stevedores to be engaged to effect discharge, then it is submitted the position will be the same as if they had been added. This is because under Clause 2 of the New York Produce form the charterers are to "provide and pay for. . . all other usual expenses except those before stated". It is considered that stevedoring expenses at ports of discharge will fall within 'other usual expenses' where stevedores are usually engaged for discharge. Then, as was said by Greer, J., in *Brys & Gylsen* v. *Drysdale* (1920) 4 Ll.L.Rep. 24, a case relating to responsibility for stowage under a voyage charter, at page 25: "where a Charter-party uses the words 'provide and pay' or 'employ and pay' [stevedores], I think the effect of such a clause is to transfer the duty and obligation, which would otherwise rest on the shipowner, to the Charterer, of stowing the cargo in the way it ought to be stowed." The mere fact that the charterers agree to bear the cost of an operation may not be enough to shift responsibility for its being carried out properly, but language by which the charterers undertake to do something or procure its being done usually will: *The Jordan II* [2003] 2 Lloyd's Rep. 87 (C.A.); this point was not appealed to the House of Lords [2005] 1 Lloyd's Rep. 57 (H.L).

Discharge during the course of the voyage

20.3 The charterers' obligations in regard to discharge usually apply only to discharge at the designated discharging place. If discharge is necessary during the course of the voyage, then prima facie the cost of such discharge falls not upon the charterers but upon the owners. The position will be different if the discharge is necessitated by the charterers' breach and may be different if it can

be shown to be a necessary consequence of the charterers' orders; in the former case the owners would be entitled to recover the expenses of discharge as damages and in the latter they may be able to recover by way of indemnity under the employment clause: see paragraphs 19.15 *et seq*., above.

The *Aquacharm* was time chartered for a trip on the New York Produce form, Clause 8 being amended to include "and discharge". Having been ordered to load to maximum draught for a passage through the Panama Canal, the master negligently failed to take into account that in passing through a freshwater lake which forms part of the Canal, the ship's forward draught would increase. The ship was consequently refused entry to the Canal and part of the cargo had to be discharged, carried through the Canal on another ship and then reloaded. It was held by the Court of Appeal that the costs of discharging were not recoverable under Clause 8, which was applicable only to discharging at the port of discharge, and that the claim for an indemnity failed because of the master's negligence.

The Aquacharm [1982] 1 Lloyd's Rep. 7 (C.A.).

The *Pythia* was time chartered for a trip to the Shatt-al-Arab on the New York Produce form, Clause 8 being amended to include "and discharge". Part of the cargo had to be lightened at an anchorage at the mouth of the River Shatt, the remaining cargo being due for discharge at Khorramshahr, about 60 or 70 miles up river. After lightening at the anchorage, the ship was in collision and had to return to the anchorage to discharge the Khorramshahr cargo. It was held by Robert Goff, J., that the costs of discharging the Khorramshahr cargo at the anchorage (which the charterers had not designated as a new discharging place) were not the liability of the charterers under Clause 8.

The Pythia [1982] 2 Lloyd's Rep. 160.

(See also *The Hellas in Eternity* (1988) LMLN 221.)

20.4 In *The Pythia*, above, Robert Goff, J., said, at page 164: "If the time charterers order the ship to load cargo at one port for carriage to another, it is the owners' obligation to comply with those orders and therefore to carry the cargo in the chartered ship to the designated discharging port. If the ship encounters an impediment on the way, the owners may be excused responsibility for the consequences by reason of an exception clause in the charter, though if they can overcome that impediment by reasonable measures and they do not take such measures they cannot say that the consequent delay has been caused by the excepted peril. If those reasonable measures involve expense they must incur it." Although *The Pythia* does not appear to have been cited to him, Mance, J., reached the same conclusion in *The Darya Tara* [1997] 1 Lloyd's Rep. 42, and paragraph 20.34, below.

Provision of security to avoid discharge being delayed

20.5 Clause 8, even with the addition of "and discharge", does not oblige the charterers to provide security for costs other than those of loading and discharging cargo in order to prevent discharge being delayed.

The *Jalagouri* was time chartered on the New York Produce form for a voyage from Japan to India. Clause 8 was amended to include discharge. Having loaded general cargo the ship collided with a breakwater. During discharge it was discovered that seawater had entered a hold and damaged some cargo. The port authorities would not allow the damaged cargo to be discharged until they had received a guarantee for the cost of storing or removing it from the port area. The ship was delayed while a guarantee was arranged. The owners claimed that this delay was the responsibility of the charterers, as amended Clause 8 put upon them the duty to discharge the cargo and thus to provide security in these circumstances.

Rix, J., and the Court of Appeal rejected this proposition. Clause 8 merely made the charterers responsible for the loading and unloading of the cargo. "Nothing in the wording of the clause suggests that it imposes a wider responsibility for ensuring that a third party does not prevent cargo handling from being performed. The costs of storing or removing damaged cargo after it has been discharged are not costs of discharge and the clause is not wide enough to make them so simply because a third party has made security for their payment a condition precedent of discharge"; *per* Tuckey, L.J., at page 520.

The Jalagouri [1999] 1 Lloyd's Rep. 903 and [2000] 1 Lloyd's Rep. 515 (C.A.).

Discharge costs increased by the owners' breach

20.6 If the costs of discharge are increased by a breach of charter by the owners, the charterers are still obliged to pay them in the first instance under Clause 8, albeit that they may thereafter claim over against the owners for the increase. See the comments of Tuckey, L.J., in *The Jalagouri*, above, at page 520.

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20.7 In the 1993 revision of the New York Produce form, Clause 8(a) provides that "the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense, under the supervision of the Master": see Lines 103 to 105. The charterers are thus responsible for discharge operations at the designated discharging place. It is suggested, further, that as their responsibility is for "all cargo handling", including but not limited to loading and discharging, a discharge or re-stowage that is or becomes necessary during the course of the voyage is prima facie undertaken at the charterers' risk and cost under the 1993 revision (unlike the original form, paragraph 20.3, above).

Effect of the U.S. Carriage of Goods by Sea Act

20.8 The division of responsibility for cargo operations by Clause 8 is not, under English law, affected by the incorporation of the U.S. Carriage of Goods by Sea Act (U.S. COGSA) into the charter by Clause 24. This is so despite the obligation placed upon the carrier, in this context the owners (see *The Khian Zephyr* [1982] 1 Lloyd's Rep. 73), by Section 3(2) of that Act properly and carefully to load, stow and discharge the goods carried. The parties are free to divide the various cargo operations between themselves as they think fit, the Act providing for the manner in which the operations are to be carried out. Devlin, J., considering the equivalent provision in Article III, rule 2 of the Schedule to the Carriage of Goods by Sea Act 1924, said in *Pyrene* v. *Scindia Navigation* [1954] 1 Lloyd's Rep. 321: "The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules. Their object. . . is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the ship may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which the loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide." It follows that an agreement allocating responsibility for cargo operations (as opposed to a provision seeking to exclude the owners' liability for negligent performance of cargo operations for which they have accepted contractual responsibility) will not be struck down by Article III, rule 8 of the Hague Rules.

20.9 This interpretation was approved by the House of Lords in *Renton* v. *Palmyra* [1956] 2 Lloyd's Rep. 379, from which their Lordships declined to depart in *The Jordan II* [2005] 1 Lloyd's Rep. 57. It follows that the incorporation of Section 3(2) of the U.S. COGSA does not under

English law import into the charter an obligation on the owners, as carriers, to carry out or be responsible for the loading, stowing, or discharging of the cargo, when under other provisions of the charter the responsibility for undertaking these operations is put on the charterers.

20.10 It has, however, been suggested that if negligent stowage causes the ship to become unseaworthy, responsibility for consequent damages will revert to the owners, who cannot transfer their obligation to maintain the seaworthiness of the ship. This view draws strength from the *obiter* comment of Lord Steyn in *The Jordan II*, above, that "it is obvious that the obligation to make the ship seaworthy under article III, rule 1 is a fundamental obligation which the owner cannot transfer to another". But Morison, J., took the opposite view in *Compania Sud American Vapores* v. *MS ER Hamburg* [2006] 2 Lloyd's Rep. 66, drawing on the judgment of Langley, J., in *The Imvros* [1999] 1 Lloyd's Rep. 848. There was no authority for the full transfer of responsibility to the charterers by Clause 8 being interrupted, as between owners and time charterers, merely because the stowage was bad enough to cause unseaworthiness. In such circumstances, the principle in *Pyrene* v. *Scindia*, above, continued to operate. The speeches of their Lordships in *Court Line*, above, allowed the master to intervene to protect the seaworthiness of his ship, but did not put him under an obligation to the time charterers to do so; he had a right as against the charterers not a duty to them. So the owners did not lose their right to claim against the charterers if their stowage caused damage to the ship merely because that stowage had made her unseaworthy. Moreover, if the owners were successfully sued by the owners of damaged cargo on the basis of this unseaworthiness, they would be entitled to an indemnity from the charterers. Morison, J.'s reasoning has been criticised by Baughen in [2007] LMCLQ 1, but it seems consistent with the underlying time charter bargain. It also accords with U.S. law: in *The Farland*, see paragraph 20A.1 below, Friendly, C.J., rejected a similar argument on behalf of time charterers, saying that it "would drain too much meaning from clause 8's delegation of responsibility for the cargo to the charterer".

20.11 (For other comments on the effect of the incorporation of the U.S. COGSA into the charter, see chapter 34.)

20.12 An interesting and as yet unresolved problem arises where, somewhat unusually, the provisions of the New York Produce form are expressly incorporated into a bill of lading, binding on the shipowner, which is governed by the Hague or Hague-Visby Rules; in that case is the cargo owner barred by Clause 8 from pursuing the shipowner in respect of claims for bad stowage despite his apparent lack of contractual rights against the charterers? See *The Coral* [1993] 1 Lloyd's Rep. 1 (C.A.), where the point arose on a summary judgment application and was not finally decided. (In *The Jordan II*, above, the owner was not liable for rough handling of the cargo during loading or discharging under bills of lading incorporating the terms of a voyage charter, but the key voyage charter provision put responsibility on "Shippers/charterers/receivers", not just on charterers.)

Nature of the charterers' responsibility

20.13 At the heart of the performance of any time charter will be the loading and discharging of cargoes directed by the charterers to be carried under the charter. Clause 8 addresses explicitly only the question by whom those operations are to be undertaken or arranged and at whose cost. It does not in terms address which party, as between owners and charterers, bears legal responsibility for how those operations are performed. As a matter of language, there was room to contend that the charterers' commitment to, for example, load "under the supervision of the Captain" left that responsibility with the master and therefore the owners. Similarly, Clause 2 (which may shift to the charterers the obligation to discharge; see paragraph 20.2, above) speaks only of "provide and pay for". But in *Court Line* v. *Canadian Transport* (1940) 67 Ll.L.Rep. 161, the House of Lords definitively rejected the argument that "under the supervision of the Captain" meant that

responsibility lay with the owners (see below) and held that responsibility for proper stowage *was* transferred to the charterers by Clause 8. Lord Atkin relied for that on *Brys & Gylsen* v. *Drysdale*, paragraph 20.2, above. Lord Wright said ". . . under clause 8. . . the charterers are to load, stow and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage. . ." Lord Porter said that the undertaking to load, stow and trim "means [the charterers] will stow with due care [which] imposes upon them the liability for damage due to improper stowage".

20.14 Accordingly, where there is damage to the cargo, to other cargo or to the ship, or personal injury, or financial loss or expense, resulting from negligent performance of cargo operations that are for the charterers under Clause 8 (and/or Clause 2), the charterers are liable to the owners for that. Thus, the frequently seen addition of the words "risk and" before "expense" in Line 78 is an unnecessary amendment. In practice, cargo operations will ordinarily be carried out by stevedores, or in the case of tankers terminal owners who are independent contractors (or their employees), for whose conduct neither the owners nor the charterers are vicariously liable. But they are the hands by which tasks that the charterers have undertaken to perform are in fact performed, the stevedores are in that sense and to that extent the charterers' 'agents'. References in the charter to the charterers 'or their agents' may therefore encompass stevedores or terminal owners carrying out the tasks for which the charterers have responsibility under Clause 8 (and/or Clause 2), or its equivalent in other forms of time charter. See *The Goodpal* [2000] 1 Lloyd's Rep. 638, *per* Colman, J., at 642 rhc–643 lhc, *The Jalajouri*, paragraph 20.6 above, *per* Tuckey, L.J., at 519–520, *The Crudesky* [2014] 1 Lloyd's Rep. 1, *per* Longmore, L.J., at [29]–[30] (a voyage charter case), and *The Global Santosh* [2013] 1 Lloyd's Rep. 455 (Field, J.,) [2014] 2 Lloyd's Rep. 103 (Court of Appeal). (This should not be taken too far, however. In *The Global Santosh*, the Court of Appeal disapproved Field, J.'s decision that receivers' failure to discharge within the laytime stipulated in their sale contract, and their failure to pay or secure their resulting demurrage liability to their sellers, were acts of the charterers' 'agents' in this sense. But they held that the off-hire proviso under consideration in that case used 'agents' in a broader sense, so as to apply nonetheless, see paragraph 23.35 below.)

20.15 Very often, of course, where cargo operations are performed badly, the only damage will be damage to the subject cargo, in which case (as in *Court Line* itself) the relevant loss to the owners will typically be a liability to the owners of that cargo, or the expense of reasonably settling a claim, under bills of lading placing responsibility for negligent cargo operations on the carrier. It is this typical chain of claims, above all, that led to the Inter-Club Agreement discussed in paragraphs 20.46 *et seq*., below, as a means of cutting through arguments about responsibility as between owners and time charterers.

20.16 Given Clause 8, the question arises whether, as against the charterers, the owners (by the master) retain any residual responsibility at all as regards cargo operations. In *Court Line*, Lord Porter postulated a responsibility on the master to act to preserve the seaworthiness of his ship where it is threatened by a method of stowage which he knows or ought to know, but the charterers' stevedore does not know, affects her stability: see the quotation in paragraph 20.24, below. Lords Atkin and Wright also referred to the master's responsibility for seaworthiness, but without explicitly restricting it as did Lord Porter, although they did so only in support of the proposition that the master always had the right to supervise the cargo operations if he so wished. In *The Imvros* [1999] 1 Lloyd's Rep. 848, Langley, J., rejected an argument, based on these speeches and on a comment of Steyn, J., in *The Panaghia Tinnou* [1986] 2 Lloyd's Rep. 586, at page 591, that the owners had an "overriding responsibility" for seaworthiness such that once the

charterers' stowage put the ship at risk, liability for that stowage would shift back from them to the owners. Langley, J., concluded that this shift occurred only where the damage was caused by the master's intervention or in the limited circumstances indicated by Lord Porter and, moreover, that the argument being advanced would have the curious result that "the worse the loading the better for the charterers". Langley, J.'s approach has been questioned (see Baughen [2000] LMCLQ 295 and *Sunlight* v. *Ever Lucky Shipping* [2004] 2 Lloyd's Rep. 174 (Singapore C.A.), although in the latter case not so much Langley, J.'s decision on Clause 8 as his view on the point referred to in paragraph 20.35, below). Morison, J., followed *The Imvros* (as regards Clause 8) in *Compania Sud America Vapores* v. *MS ER Hamburg* [2006] 2 Lloyd's Rep. 66, but the issue deserves appellate attention (see also Baughen [2007] LMCLQ 1).

20.17 It is suggested that the correct position is as follows:

(1) Where by the charter the charterers have undertaken responsibility for cargo operations, they are responsible for those operations being carried out as they would be by competent stevedores taking due care for the safety and preservation of the cargo in question, other cargo to be carried on the same voyage, the ship herself and persons likely to come into proximity with the cargo subsequently, such as stevedores at the discharge port.

(2) If those operations are carried out to that standard, the charterers' responsibility is discharged and so they will not be liable by reason of the transfer of responsibility for cargo operations under Clause 8 if those operations cause damage to the ship, the cargo, other cargo or personnel. Lord Porter's example of a ship being endangered by stowage, but only because of stability characteristics of which stevedores would not have been aware, would be one such case. Although Lord Porter, in his example, postulated also that the master knew or ought to have known of the stability problem, it is suggested that the charterers should not have to demonstrate that. It is possible that a stability problem might arise of which neither stevedores nor master ought to have been aware, in which case any loss should lie where it falls, at least so far as this part of Clause 8 is concerned.

(3) Lord Porter's example also underlines that the stevedores and the master do not inhabit separate worlds. Proper performance of cargo operations by competent stevedores may require exchange of information with the ship. If unsuitable stowage, for example, results from inadequate or incorrect information supplied by the ship, the owners will be responsible for the consequences.

(4) All of the foregoing remains true even if the way in which cargo operations have been performed leaves the ship unseaworthy, because the better view in respect of time charters is that the owners are not prevented, either at common law or by the Hague or Hague-Visby Rules, if incorporated, from allocating to the charterers responsibility for matters affecting seaworthiness (see paragraphs 20.10 and 20.16, above).

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20.18 The 1993 revision of the New York Produce form emphasises the transfer of primary responsibility for cargo operations by providing, in Lines 103 to 105, that "all cargo handling" is to be at the "risk" as well as at the expense of the charterers.

Baltime

20.19 Clause 4 of the Baltime form provides by Lines 58 to 61 that the charterers are to "arrange and pay for" loading, trimming, stowing, unloading, weighing, tallying and delivery of cargoes. It

is submitted that these words, likewise, are sufficient to transfer to the charterers the responsibility for these operations, including liability for damage resulting from negligence by stevedores. In *The Filikos* [1981] 2 Lloyd's Rep. 555, Lloyd, J., assumed that was the case (it was unnecessary for him to decide the point) See also, in the Court of Appeal, the judgment of Donaldson, M.R., [1983] 1 Lloyd's Rep. 9, at page 11. In *The Flintermar* [2005] 1 Lloyd's Rep. 409, it was common ground between the parties that that was the case and the Court of Appeal held that although the handling of a hatch cover pontoon by a container ship's own gantry crane would have been the responsibility of the owners, the use of a shore crane instead by the stevedores appointed by the charterers brought the handling of the pontoon within the cargo operations for which the charterers were responsible.

20.20 Moreover, Lines 177 to 182 (the final sentence of Clause 12) expressly make the charterers responsible for loss or damage to the ship or her owners caused by, inter alia, improper or careless loading, stowing or discharging of goods. Lord Roskill in *The TFL Prosperity* [1984] 1 Lloyd's Rep. 123, at page 128, doubted whether these lines imposed any greater liability on the charterers than would fall on them in any event either under the charter or at common law. Also in the same case (at page 127), he made it clear that the word "responsible" in what is now Line 177 means no more than "legally liable". See also *St. Quentin Shipping* v. *Anglo-Soviet Shipping* (1932) 44 Ll.L.Rep. 88 and *Royal Greek Government* v. *Minister of Transport* (1950) 83 Ll.L.Rep. 228.

20.21 It was held in *The White Rose* [1969] 2 Lloyd's Rep. 52 that in order to recover under these lines the owners must show that the 'loss or damage' was caused by one of the three categories of event set out therein.

20.22 "Loss" in Line 177 includes financial loss by settling a liability. Donaldson, J., said in *The White Rose*, above, at page 60: "The indemnity afforded by this clause is clearly wide enough to cover loss incurred by a reasonable settlement of a potential liability, as contrasted with physical loss of or damage to the ship or financial loss by, for example, the detention of the ship. However, it only operates if the loss is caused by either: (a) improper or careless loading or stowing by whoever is performing those functions, whether or not they are independent contractors appointed by the time charterers or servants or agents of such contractors; or (b) some other improper or negligent act of whatsoever nature on the part of the time charterers or their servants." Donaldson, J., in referring to "indemnity" in the above passage, must have been using that word in the sense of "damages awarded for tort or breach of contract", rather than in the sense of "all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties": see Staughton, L.J., in *The Eurus* [1998] 1 Lloyd's Rep. 351, at page 357. It was suggested in *The White Rose*, above, that "servants" in what is now Line 182 would be restricted to that class of person for whom the charterers are vicariously responsible.

Under the supervision of the Captain

20.23 Even without the words "under the supervision of the Captain" the master has the right to supervise the cargo operations; see the extracts below from the speeches of Lords Atkin and Wright in *Court Line* v. *Canadian Transport*. But it does not follow that he has any duty to the charterers to do so; see the comments of Steyn, J., in the voyage charter case of *The Panaghia Tinnou* [1986] 2 Lloyd's Rep. 586, at page 591. In *The Imvros* [1999] 1 Lloyd's Rep. 848, at page 851, Langley, J., said of these words and the phrase "to the master's satisfaction" in relation to loading and lashing cargo, that they "are not expressed as qualifications upon the obligations of the charterers but in the language of a right to be satisfied or to supervise its performance. A right to intervene does not normally carry with it a liability for failure to do so let alone relieve the actor from his liability."

20.24 The speeches in the House of Lords in *Court Line* v. *Canadian Transport* establish that the words "under the supervision of the Captain" do not prevent the charterers having primary

responsibility under the New York Produce form for loading and stowage (and for discharge, if "and discharge" is added to Clause 8, or in any event if paragraph 20.2 above is correct). However, if the master actually supervises the cargo operations and loss or damage is attributable to that supervision, then the owners bear the consequences despite the fact that the primary responsibility is upon the charterers.

The *Ovington Court* was time chartered under the New York Produce form for a voyage to the North Pacific and return to the United Kingdom or Continent. During the currency of the charter the owners became liable to compensate receivers of a cargo of wheat for damage caused by improper stowage. The charterers resisted the owners' claim for indemnity, contending that stowage was the responsibility of the captain. The House of Lords held that the improper stowage was the charterers' responsibility and that the owners were entitled to an indemnity.

Having rejected the contention that the words "under the supervision of the Captain" threw the responsibility for stowage on to the captain, Lord Atkin went on, at page 166:

"The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage, no doubt that might enable them to escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely; any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract."

Lord Wright also said, at page 168: ". . . under Clause 8 of this charterparty the charterers are to load, stow, and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them [the shipowners] of liability for bad stowage, except as qualified by the words 'under the supervision of the captain'. These words expressly give the master a right which I think he must in any case have, to supervise the operations of the charterers in loading and stowing. But I think this right is expressly stipulated not only for the sake of accuracy, but specifically as a limitation of the charterers' rights to control the stowage. It follows that to the extent that the master exercises supervision and limits the charterers' control of the stowage the charterers' liability will be limited in a corresponding degree."

Lord Porter said, at page 172: "It may indeed be that in certain cases as, e.g., where the stability of the ship is concerned, the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers'."

Court Line v. *Canadian Transport* (1940) 67 Ll.L.Rep. 161 (H.L.).

20.25 If the ship is damaged by the negligence of the stevedores in these operations, the damage will be recoverable by the owners from the charterers under this clause, subject to any defence that the damage was in fact attributable to the master's supervision or to matters pertaining to the ship within the actual or constructive knowledge of the master but not of the charterers or their stevedores.

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20.26 The 1993 revision of the New York Produce form includes a special clause dealing with stevedore damage: see Clause 35, Lines 419 to 432.

"and responsibility" of the Captain

20.27 Where it is intended by the parties that responsibility for the operations set out in Line 78 shall be upon the owners, it is usual for the words "and responsibility" to be inserted after "supervision". The addition of these words has been held to effect a prima facie transfer from the charterers back to the owners of liability for negligence in loading, stowing, trimming or (where "and discharge" is added to Clause 8) discharging the cargo, unless it can be shown that the charterers have intervened and in so doing have caused the relevant loss or damage. It thus remains the charterers' contractual obligation to procure and pay for the operations, normally by engaging stevedores, but the additional words negative the normal implication established by *Court Line* that legal responsibility for how those operations are conducted goes with the "provide and pay for" undertaking. This prima facie transfer of liability back to the owners (or more properly this prevention of liability transferring to charterers in the first place) covers not only loss or damage to the cargo but also damage caused to the ship. It is not confined to the mechanical process of handling the ship's gear and cargo, but extends also to the strategic planning of cargo operations.

20.28 In each of the three cases which follow, the charter was on the New York Produce form, with Line 78 amended to include "discharge" and with "and responsibility" inserted after "supervision". Each charter also incorporated an additional clause providing, with insignificant variations, that: "The Master shall supervise the stowage of the cargo thoroughly and let one of his officers control all loading, handling, (stowage) and discharge of the cargo…" For decisions on certain other forms of words, see paragraph 20.68, below.

The *Shinjitsu Maru No. 5* was time chartered by disponent owners for a trip from New Zealand to West Africa. She was ordered to load palletised cargo in New Zealand and it was planned to construct boxing in the holds (which were not of a suitable shape for pallets) and also, after five tiers of pallets had been loaded, to build above them a wooden floor upon which forklift trucks could be used to load the rest of the cargo. Loading of the pallets began before the boxing was complete and the stow was insufficiently firm. Moreover, the shippers refused to allow forklifts to operate on the planned wooden floor, for fear of damage to the cargo already in stow, and the floor was not therefore constructed. The master was unhappy with the resulting stow. He protested to the stevedores, but was ignored. A surveyor appointed by the stevedores advised the master that the stow would be safe with additional lashing, but in fact the ship was, as the arbitrators found, unseaworthy on sailing by reason of the instability of the stow. Shortly after sailing the cargo shifted and the ship had to put back to restow the cargo, with consequent loss of time and expenses. Arbitrators held that the master was negligent, but apportioned liability as to 60 per cent to the owners and as to 40 per cent to the charterers.

It was held by Neill, L.J., (as he had then become), sitting at first instance, that:

(1) the addition of the words "and responsibility" prima facie transferred liability for bad stowage to the owners; they could escape this liability only by proving that the relevant loss had been caused by some intervention or interference by the charterers (the converse situation to that prevailing under the unamended clause);

(2) there was no evidence of interference by the charterers themselves and, although it was admitted that the charterers were responsible for the actions of the shippers, there was no interference by the shippers sufficient to found an estoppel or sufficiently causative of the loss to give rise to any liability on the charterers;

(3) the stevedores and the surveyor appointed by them were not to be regarded as agents of the charterers;

(4) the dominant and the effective cause of the loss was the negligence of the master, having regard to his responsibility for stowage under this charter and his overall responsibility for the seaworthiness of the ship;

(5) the Law Reform (Contributory Negligence) Act 1945 did not apply and no apportionment of fault could be made. (The Court of Appeal in *Forsikringsaktieselskapet Vesta* v. *Butcher* [1988] 1 Lloyd's Rep. 19, disagreed with Neill, L.J.'s reasoning on the question of the application of the

1945 Act, although it does not necessarily follow that they would have disagreed with the decision in this particular case: see paragraph 20.38, below.)

A.B. Marintrans v. *Comet Shipping* (*The Shinjitsu Maru No. 5*) [1985] 1 Lloyd's Rep. 568.

The *Argonaut* was time chartered for a trip and loaded granite blocks for discharge at two ports. At both discharging ports the ship's tank tops were damaged as a result of unsafe methods of working adopted by the stevedores and (at the first port only) the inadequacy of the forklift trucks employed. Arbitrators held that the master was not to blame for the damage caused at the first port, because that was mainly attributable to matters outside "the master's province" (inadequacy of stevedore's gear brought on board) and he had not failed to seek adequately to control the stevedoring operations. But they held that, with the experience of damage at the first port, he should have insisted on better precautions being taken at the second port and so was responsible for the damage suffered there.

Leggatt, J., followed Neill, L.J.'s decision as to the effect of the additional words "and responsibility" in *The Shinjitsu Maru No. 5*. He held that Clause 8 as amended placed the primary duty on the owners and, in the absence of actual intervention by the charterers, the owners were responsible for all cargo operations whether or not "within the master's province". The charterers were therefore not liable for the damage to the tank tops at either port.

The Argonaut [1985] 2 Lloyd's Rep. 216.

20.29 In the third case, *The Alexandros P* [1986] 1 Lloyd's Rep. 421, in which the New York Produce form charter was similarly amended, Steyn, J., followed the decisions in *The Shinjitsu Maru No. 5* and in *The Argonaut*. This case also related to stevedore damage to the ship and Steyn, J., emphasised that the prima facie transfer of liability from the charterers to the owners covered all the operations referred to in Clause 8 and included negligence of the stevedores in planning those operations as much as the mechanical carrying out of the operations themselves.

Charterers must appoint a competent stevedore

20.30 But the charterers may be liable, despite the amendment of Clause 8 to include the words "and responsibility" before "of the Captain", if the loss or damage results from the appointment by the charterer of stevedores who are not reasonably competent: see *The Clipper Sao Luis* [2000] 1 Lloyd's Rep. 645. In that case, where there had been a fire in the cargo possibly started by a stevedore smoking, the charge of appointing incompetent stevedores failed on the facts. As to the principle of such a claim, however, at page 650, David Steel, J., said: ". . . it seems to me to be necessary that the master should be entitled to proceed on the basis that the stevedores furnished by the charterers are competent. It is one thing to supervise, quite another to train." He therefore held that the responsibility for appointing stevedores carried with it a warranty of competence, and not merely an obligation to take reasonable care to ensure that competent stevedores were appointed. The charterers' liability for appointing incompetent stevedores is, therefore, consistent with and part of the Clause 8 regime, albeit amended by the words "and responsibility", since under that regime it remains the charterers' positive contractual obligation to appoint.

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20.31 In the 1993 revision of the New York Produce form the words "under the supervision of the Master" appear in Line 105. To be sure that the addition of the words 'and responsibility' would have the effect described above, it would be advisable to delete the words 'risk and' which appear immediately before. It is suggested, however, that the better view is that if those words are *not* deleted the words "and responsibility", added by the parties, should still govern, on the familiar rule of construction that additional words specially added by the parties prevail over inconsistent words in a standard form.

Estoppel

20.32 Circumstances might conceivably arise in which it could not be said that intervention by the charterers or those for whom they were responsible actually caused the relevant loss or damage, but in which the conduct of the charterers or their representatives (for example, a supercargo or a surveyor appointed by them) might be held to estop them from asserting that the master was at fault. Neill, L.J., considered such an argument in *The Shinjitsu Maru No. 5*, above, but rejected it as there was no finding of fact by the arbitrators which would have supported such a conclusion. In *Ismail* v. *Polish Ocean Lines* (*The Ciechocinek*) [1976] 1 Lloyd's Rep. 489, a voyage charter case, the Court of Appeal held that a shipper was estopped from asserting that the stowage of cargo was deficient, when the charterers' appointed representative had attended the loading, had given assurances as to the packing of the cargo and had issued instructions as to the stowage.

20.33 On the facts of *The Ciechocinek*, the matter could have been put as one of intervention instead of estoppel. It is suggested that the scope for a defence of estoppel to succeed where there was no intervention will be limited to a case where the estoppel arises because of communications away from the ship, as where the charterers misrepresent the characteristics of the cargo in correspondence with owners and cause them to give incorrect information or instructions to the master.

Deck cargo

20.34 It is not unusual for time charters to include an additional clause or clauses purporting to place upon the charterers responsibility for cargo carried on deck. See, for example, *The Imvros* [1999] 1 Lloyd's Rep. 848. The interaction of such a clause or clauses with the other responsibility provisions of the charter may be complex. The commonly used expression "at charterers' risk" will not normally be effective to transfer responsibility away from the owners in a case where they or their crew are negligent: see, for example, *The Fantasy* [1991] 2 Lloyd's Rep. 391, [1992] 2 Lloyd's Rep. 235 (C.A.), where, by other words of the clause in question, the owners' liability in that regard was nonetheless narrowly defined. The next case is another example in which the scope and effect of particular provisions were considered, in this case placing the 'risk and expense' of deck cargo on the charterers.

The *Darya Tara* was sub-chartered on the New York Produce form for a trip from Europe to South East Asia. Line 25 gave the charterers "the option to load a full deck cargo including containers at their own risk and expense subject to Master's approval . . .". Clause 57 added: "Charterers' option deck cargo; ok– but vessel has no lashing materials on board, and cargo to be loaded always at Charterers' risk and expense." The words "and discharge" had been added to Clause 8, but not the words "and responsibility". At Teesport, steel beams, prefabricated bridge sections, plant and crane materials were loaded on and under deck. The stowage was adequate, but the deck cargo shifted in a storm off Ushant and the ship, for her safety, put into Brixham, where she was repaired and the deck cargo restowed.

Mance, J., drawing on the approach of Phillips, J., in *The Alara* (Lexis, 23 October, 1992), held that the owners could recover from the charterers under Line 25 and Clause 57 only those expenses that related specifically to the deck cargo. He therefore allowed recovery of disbursements and cargo survey fees at Brixham to the extent that these were concerned with the restowage and on-carriage of the deck cargo, but not repairs to the ship nor bunkers consumed and hire lost. Mance, J., rejected a submission by the owners that, regardless of Line 25 and Clause 57, they could recover all these items under Clause 8 of the charter; absent those special provisions the owners would, by permitting deck cargo, have accepted its associated risks and these losses would be regarded as resulting from the heavy weather and not from the charterers' orders to load cargo on deck: see *The Island Archon* [1994] 2 Lloyd's Rep. 227 (and compare paragraphs 20.4 and 20.5, above).

The Darya Tara [1997] 1 Lloyd's Rep. 42.

20.35 In *The Danah* [1993] 1 Lloyd's Rep. 351, a special clause stipulated for deck cargo to be at the shipper's risk and the use of the additional words "howsoever caused" prevented crew negligence from falling outside the clause: see also *Joseph Travers* v. *Cooper* [1915] 1 K.B. 73 (C.A.). That amounted to an agreement as to the basis upon which any deck cargo was to be carried, so that any claim by the time charterers against the owners in respect of claims by the owners of on-deck containers lost overboard was doomed to fail. Saville, J., held that if the provision in question had been incorporated into bills of lading it would have defeated any such cargo owners' claim. The special clause, however, did not touch the charterers' claim in respect of a liability to the local coastal authority which located and salved some of the containers in the belief that they were dangerous. In *The Imvros* [1999] 1 Lloyd's Rep. 848, Langley, J., followed and extended *The Danah*, in relation to the effect of a 'howsoever caused' provision in a bill of lading, rejecting an argument by the charterers that a different result should follow where the relevant loss was caused by unseaworthiness (see paragraphs 20.10 and 20.16, above, and especially cf. *Sunlight* v. *Ever Lucky Shipping* mentioned at 20.16).

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20.36 The 1993 revision of the New York Produce form provides by Clause 13(b) that the owners are to be indemnified by the charterers "for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded": see Lines 188 to 190. That is not effective to exclude the owners' liability for loss of or damage to deck cargo resulting from negligence (for example inadequate stowage, unsatisfactory stowage equipment and inadequate care of lashings during the voyage), or unseaworthiness, for which they are otherwise responsible under the charter: see *The Socol 3* [2010] 2 Lloyd's Rep. 221.

Law Reform (Contributory Negligence) Act 1945

20.37 On the authorities as they stand, it appears that the Law Reform (Contributory Negligence) Act 1945, which provides for the apportionment of liability for negligence where damage is suffered by the claimant as a result partly of his own fault, applies only where the defendant is in breach of a duty of care in tort and the existence and/or terms of any contract with the claimant do not preclude him from pursuing the tortious claim. It is not enough to bring the Act into play that the defendant is in breach of a contractual duty to take care where no duty of care would exist without the contract.

20.38 In *Forsikringsaktieselskapet Vesta* v. *Butcher* [1986] 2 Lloyd's Rep. 179 and [1988] 1 Lloyd's Rep. 19 (C.A.) – a case relating to breach of the professional duty of care in tort owed by reinsurance brokers to their clients – Hobhouse, J., with whom the Court of Appeal agreed, identified three categories of contract cases in which the application of the 1945 Act to a claim in negligence might conceivably arise. The categories were:

(1) where the defendant's liability arose from some contractual provision which did not depend on negligence on the part of the defendant;
(2) where the defendant's liability arose from a contractual obligation which was expressed in terms of taking care (or its equivalent) but did not correspond to a common law duty to take care which would exist in the given case independently of contract;
(3) where the defendant's liability in contract was the same as his liability in the tort of negligence, independently of the existence of any contract.

20.39 In *The Shinjitsu Maru No. 5*, above, Neill, L.J., concluded in broad terms that the 1945 Act did not apply at all to a claim in contract. Insofar as the effect of that decision was to exclude the operation of the 1945 Act from cases within category (3) above, Hobhouse, J., and the Court of Appeal in *Vesta* v. *Butcher* held that he was wrong, that in such cases (including the case before them) the Act did apply and that an apportionment of damages could be made (a decision followed by Phillips, J., in the category (3) *Superhulls Cover* case [1990] 2 Lloyd's Rep. 431). Hobhouse, J., expressed the view ([1986] 2 Lloyd's Rep. 179, at page 197) that *The Shinjitsu Maru No. 5* was probably a category (1) case, but at most a category (2) case, and that in regard to category (1) cases "one would not expect there to be much dispute that the Act does not apply". It was not necessary to decide whether the 1945 Act applied to category (2) cases, but the Court of Appeal expressed agreement with the construction of the 1945 Act adopted by Pritchard, J., in the New Zealand case *Rowe* v. *Turner Hopkins & Partners* [1980] 2 N.Z.L.R. 550, to the effect that the power to apportion arose only where the defendant was liable in tort and the concurrent liability in contract was immaterial.

20.40 Previously, Paull, J., had held in *Quinn* v. *Burch* [1966] 2 Q.B. 370 that the Act did not apply to a case which might be categorised as either a category (1) or a category (2) case. Then Brabin, J., at first instance in *De Meza* v. *Apple* [1974] 1 Lloyd's Rep. 508, decided that the Act did apply to a category (2) situation. Although the Court of Appeal in that case ([1975] 1 Lloyd's Rep. 498) declined to express a view on the issue, Brabin, J.'s view cannot stand with *Vesta* v. *Butcher*.

20.41 In relation to category (3), the House of Lords settled the law as to concurrent liabilities in tort and contract in *Henderson* v. *Merrett Syndicates* [1995] 2 A.C. 145, holding that a duty of care in tort was owed by Lloyd's managing agents to underwriting members at Lloyd's because they had assumed the responsibility of advising the members on underwriting and claims matters and a legal duty of care in respect of such advice was not excluded by the existence or terms of their contractual relationship. Lord Goff stated at page 194: ". . . an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous."

20.42 It is outside the scope of this book to attempt a detailed analysis of the circumstances in which a duty of care is imposed by the general law rather than under contract. However, it is possible to envisage circumstances in connection with the loading, stowing and discharging of cargo under a time charter in which the 1945 Act could apply; for example, if an employee of the charterers, present during loading operations, and the chief officer, both give negligent instructions to the stevedores as a result of which cargo belonging to the charterers and the hull of the ship sustained damage. In that example, the Act would apply to the charterers' claim in respect of the cargo damage and to the owners' claim in respect of the hull damage; the time charter may, in one sense, be the reason why the chief officer and charterers' man found themselves in the situation they did, but it is irrelevant to the imposition of their respective duties of care, which simply arise out of their conduct in relation to or in proximity to, respectively, the charterers' and the owners' property. For circumstances in which the 1945 Act might possibly apply in certain unsafe port cases, see paragraphs 10.73 and 10.74, above. See generally on the 1945 Act, *Voyage Charters* (4th edn), paragraphs 21.62 to 21.77.

Berth Standard of Average Clause

20.43 This clause, which is often incorporated in time charters for liner trading, reads as follows:

In the event of the vessel loading on the berth and/or loading general cargo the Charterers shall bear a sum equal to. . . per gross ton of the vessel's maximum register in respect of claims arising on any cargo voyage from improper handling during loading and discharging, improper stowage, short delivery (whether from pilferage or any other cause whatsoever) or over-carriage for which there may be as between Owners and Charterers responsibility on the part of the Owners and also in respect of any reconditioning expenses incurred in order to avoid or mitigate any such claims. If the Owners shall pay any such claims in the first instance they shall be indemnified by the Charterers to the foregoing extent.

20.44 The words "in respect of claims arising on any cargo voyage' were previously '[of claims] on any one cargo", leading Roskill, J., to hold that owners were entitled to a separate (limit of) indemnity against each parcel of cargo: see *Clan Line* v. *Ove Skou* [1969] 2 Lloyd's Rep. 155. This meant a separate indemnity for each bill of lading. The current wording reverses that decision, applying a single indemnity in respect of all claims arising on any one voyage. As to the nature of the clause, it was held in *The Filikos* [1981] 2 Lloyd's Rep. 555 and [1983] 1 Lloyd's Rep. 9 (C.A.) that it overrode any allocation of responsibility for the matters referred to by other provisions of the charter. In that case, the express language of the charter immediately preceding the clause made that particularly clear. But it is suggested that this is likely to be the result whenever the clause is incorporated, for otherwise it is difficult to see the purpose of its incorporation.

Charterers to have benefit of owners' P. & I. cover

20.45 There is sometimes added to Clause 8 of the New York Produce form a provision for the charterers to have the benefit of the owners' protection and indemnity cover (liability insurance usually provided by mutual P. & I. Clubs; see paragraph 20.46, below). Such a provision, but limited "so far as Club rules allow", was considered in *Court Line* v. *Canadian Transport* (1940) 67 Ll.L.Rep. 161. The House of Lords there found that the Club rules in question effectively ruled out any such benefit, so the charterers were liable for the full amount of the third party cargo claim in respect of which the owner had claimed under the charter. In the absence of any such limitation, it is suggested that a provision that the charterers are to have the benefit of the owners' P. & I. cover should mean that owners may not claim on charterers in respect of claims suffered by the owners falling within that cover, except to the extent of any shortfall between the liability incurred, or settlement agreed, by the owners and the amount of indemnity available from the Club. Although in *Court Line* several of their Lordships indicated surprise at the idea of such an agreement, it is nowadays a common commercial arrangement, particularly in the construction and shipbuilding industries: see, for example, *MacGillivray*, paragraphs 1–161 to 1–163, 23–99 to 23–102.

The Inter-Club New York Produce Exchange Agreement

20.46 As was alluded to in paragraph 20.15, above, the room under the New York Produce form for disputes about liability as between owners and time charterers for third party cargo claims induced the major Protection and Indemnity Associations, so-called 'P. & I. Clubs', who insure the cargo liabilities of most owners and many time charterers, to draw up an agreement to facilitate the settlement of claims between them. The Agreement delights in the cumbersome title above, but is more commonly referred to simply as the Inter-Club Agreement.

20.47 Owners and charterers are not bound to follow the Agreement merely because they are members of the Associations, but the Associations do undertake to recommend their members to consent to their disputes being resolved in accordance with its terms. Frequently, the Agreement is expressly incorporated into a New York Produce form charter. Where this is done, the effect is "to make the terms of an agreement between clubs applicable directly between charterer and owner":

see *The Ion* [1980] 2 Lloyd's Rep. 245, *per* Mocatta, J., at page 248. See also *The Strathnewton* [1983] 1 Lloyd's Rep. 219 (C.A.), and paragraph 20.50, below. But it should be remembered that the Agreement was and is designed and thus drafted to be effective as a rough and ready arrangement between insurers to avoid the cost of determining the precise legal allocation of their assureds' liabilities under this form of charter; it was neither designed nor drafted to be incorporated into charters and thereby to govern contractual relationships between shipowners and time charterers.

20.48 The Inter-Club Agreement, in its current (1996) form (as amended in 2011) and in its immediately prior (1984) form, is set out in Appendix C. Although clauses incorporating the 1984 Agreement are now encountered only very rarely, it will be useful to be able to refer to the 1984 Agreement if consulting the commentary on the 1996 Agreement, below.

NYPE 93

20.49 The 1993 revision of the New York Produce form states, in Clause 27, that cargo claims are to be settled as between the owners and the charterers in accordance with the 1984 version of the Inter-Club Agreement or any subsequent modification or replacement thereof: see Lines 285 to 287, above. As noted above, the current version is that of 1996, as amended in 2011.

Incorporation of the Inter-Club Agreement and U.S. Carriage of Goods by Sea Act

20.50 The one-year time limit on cargo claims by charterers against owners, to which a charter on the New York Produce form is normally subject as a result of the incorporation of the U.S. COGSA (see *The Agios Lazaros* [1976] 2 Lloyd's Rep. 47), does not apply to claims dealt with by the Inter-Club Agreement under a charter into which that Agreement has been incorporated: see *The Strathnewton* [1983] 1 Lloyd's Rep. 219 (C.A.). In that case Kerr, L.J., said, at page 225, that the Agreement "cuts right across any allocation of functions and responsibilities based on the Hague Rules; indeed, the avoidance of such allocation is the very objective of the Inter-Club Agreement. . ." which instead "provides a more or less mechanical apportionment of financial liability which is wholly independent of these standards of obligation". Clause 5 of the 1996 Agreement provides in terms that it is to apply regardless of any incorporation into the charter of the Hague or Hague-Visby Rules (the same appeared in Clause 1(iii) of the 1984 Agreement). See also *The Benlawers* [1989] 2 Lloyd's Rep. 51.

20.51 Apportionment of responsibility for a cargo claim under the Agreement can leave the owners with no, or reduced, liability in circumstances where they would have been liable under the Hague Rules regime of U.S. COGSA incorporated by Clause 24 of the New York Produce form. Given Clause 5 of the Agreement, and the evident purpose of the Agreement as expressed in *The Strathnewton* and *The Benlawers*, above, there is no room for arguing in such a case that Section 3(8) of U.S. COGSA prevents the owners from relying upon the Agreement (see the owners' argument recorded by Morison, J., in paragraph 38 of his judgment in *Compania Sud America Vapores* v. *MS ER Hamburg* [2006] 2 Lloyd's Rep. 66, at page 78).

Commentary on the Inter-Club Agreement

20.52 The parties are, of course, free to vary or supplement the Agreement, as it is to apply under their charter. For example, in *The Holstencruiser*, below, they had added as a precondition to recovery under the Agreement that the party settling the claim with cargo should have done so with the approval of the other party (and see paragraph 20.54, below, on Clause 2 of the 1996

Agreement). The commentary below works through the provisions of the 1996 Agreement (as amended in 2011) and references to clauses are to those of that version, unless otherwise indicated. (The 2011 amendment simply added Clause 9 (Security), with consequent renumbering of the Governing Law provision (now Clause 10).)

Scope of application (Clauses 1 to 5)

Clause 1

20.53 By Clause 1, the Agreement, as amended in 2011, applies to any charter entered into after 1 September 2011 (the date of the Agreement, as amended) on the New York Produce form, 1946 or 1993, or on the Asbatime form 1981 (or on any subsequent amendment of any of those forms). Prior to amendment in 2011, Clause 1 applied the Agreement to any such charter entered into after 1 September 1996. Where the parties have expressly incorporated the Agreement or part thereof into a time charter entered into on or before 1 September 2011, the terms of the incorporation clause will determine whether their agreement results in the application of the 2011 amendment.

Clause 2

20.54 Clause 2 is a paramount clause that did not appear in the 1984 Agreement. It contains a general provision and a specific provision concerning Clause 6. The specific provision is considered below, under Clause 6. The general provision is that the terms of the Agreement "shall apply notwithstanding anything to the contrary in any other provision of the charterparty". This means that, where the parties have incorporated the Agreement, cargo claims for which it provides an apportionment must be dealt with between owners and charterers on that basis and not under whatever charter provisions would otherwise have governed. But that is plainly the effect of incorporating the Agreement anyway (see paragraphs 20.50 and 20.51, above). It is suggested that Clause 2 cannot achieve anything more, and so cannot override an express provision specifically varying the terms of the Agreement as they are to apply under a particular charter. It would seem, therefore, that the general provision in Clause 2 merely makes explicit that which was obvious.

Clause 3

20.55 Clause 3 contains a definition of a "Cargo Claim", to which the operative provisions of the Agreement will apply, that was new to the 1996 Agreement. It provides expressly that a Cargo Claim includes claims by the third party cargo claimant for legal costs or interest and also defence costs. In relation to defence costs, Hobhouse, J., held in *The Holstencruiser* [1992] 2 Lloyd's Rep. 378, at page 388, that they were not dealt with by the 1984 Agreement. Clause 1(i) of the 1984 Agreement contained the phrase "the cargo claim, including any legal costs incurred thereon", but Hobhouse, J., considered that referred only to the legal costs of the underlying cargo claimant. This, with respect, seems dubious. But since *The Holstencruiser* has now stood for some while and the 1996 Agreement is available for parties who do not like that result, it is perhaps unlikely that the courts would now depart from it, should the point come up again between parties who have chosen nonetheless to incorporate the 1984 Agreement.

20.56 As well as providing that those consequential items are part of a Cargo Claim, more fundamentally Clause 3 provides a definition of the types of primary claim that qualify, namely

claims for "loss, damage, shortage (including slackage, ullage or pilferage), overcarriage of or delay to cargo including customs dues or fines in respect of such loss, damage, shortage, overcarriage or delay". The reference to customs dues or fines may have been in response to a finding in *The Holstencruiser* that customs fines were not covered by the 1984 Agreement; see [1992] 2 Lloyd's Rep. 378, at page 388 and page 396, item (a). Under Clause 3 of the 1996 Agreement, read with Clause 4(a), customs dues or fines are covered by the Agreement if paid by a party claiming under a bill of lading or other contract of carriage entered into pursuant to the charter, but not if levied on the owners or the charterers themselves (as was the position in *The Holstencruiser*). As discussed below in relation to Clause 4(a), the major issue decided by Hobhouse, J., was that it was a necessary ingredient of a "shortage" claim under the 1984 Agreement that the claimant under that Agreement prove that the claim concerned goods that had been shipped in the first place. The definition of Cargo Claim in Clause 3 appears to confirm this under the 1996 Agreement, as the claim must be for loss, damage, shortage, and so on, of or to cargo. Goods never shipped are not cargo. It should, however, be noted that as between bill of lading holder and carrier, the bill of lading may create an estoppel preventing the carrier from denying that goods stated to have been shipped were in fact shipped. To the extent that liability is incurred as a result, the responsibility for it, as between owners and charterers, will be borne by the party responsible for the error in the bill of lading, and it will not be apportioned under the Agreement: see *The Holstencruiser*, above, at page 388 rhc.

Clause 4

20.57 The general requirement in the second Line of Clause 4 is that that the Cargo Claim be made under a contract of carriage. This would seem to prevent the Agreement applying where cargo interests claim against the owners as sub-bailees, bills of lading having been issued to them under which the charterers contract as carriers. Moreover, that would seem to be so even if the owners have the benefit of the Hague or Hague-Visby Rules under bills of lading issued by them (a sub-bailment on terms) or under the charterers' bills of lading through a Himalaya clause (see paragraphs 21.74 to 21.76 below for sub-bailment on terms and Himalaya clauses). In relation to Himalaya clauses, the mechanism by which they are given effect under English law is to hold that a contract comes into existence for the benefit of certain of the bill of lading terms, but that contract is probably not a contract of carriage; see *The Starsin* [2003] 1 Lloyd's Rep. 571 (H.L.). None of this was a difficulty under the 1984 Agreement, which required only that the cargo should have been carried under a bill of lading incorporating the Hague or Hague-Visby Rules or terms no less favourable to the carrier and so would apply in case of bailment or sub-bailment claims, so long as any sub-bailment was on the terms of such a bill of lading.

20.58 Clause 4 then sets out three preconditions to any apportionment of liability for a Cargo Claim (as defined) under the Agreement. Where one of the preconditions is not met, the party that has paid out on the Cargo Claim in the first instance will have no claim under the Agreement and must revert to proving a claim for damages, indemnity or contribution, if it can, by reference to the relevant provisions of the time charter, for example Clause 8 and/or U.S. COGSA under Clause 24. The preconditions are (*a*) that the Cargo Claim was made under a contract of carriage, whatever its form, satisfying the detailed requirements set out in Clauses 4(a)(i) to (iv) (see paragraphs 20.60 to 20.67, below); (*b*) that the cargo responsibility clauses in the time charter have not been materially amended (see paragraphs 20.68 and 20.69, below); and (*c*) that the Cargo Claim has been properly settled or compromised and paid (see paragraphs 20.70 and 20.71, below).

20.59 The contract of carriage that Clause 4 requires to exist need not be contained in or evidenced by a bill of lading, as the requirement is for a contract of carriage "whatever its form".

In that regard the 1996 Agreement is of wider scope than the 1984 Agreement, which required that the cargo should have been carried under a bill of lading.

Clause 4(a)

20.60 Clause 4(a)(i) requires that the contract of carriage under which the Cargo Claim is brought "was authorised under the charterparty". This language may have been taken from *The Holstencruiser* [1992] 2 Lloyd's Rep. 378, at pages 384 and 385, but, as explained below, probably gives the 1996 Agreement an effect quite different from that given to the 1984 Agreement by Hobhouse, J., in that case.

20.61 Hobhouse, J., in *The Holstencruiser*, above, answered a series of questions that had been put to him about the scope and interpretation of the 1984 Agreement in a number of friendly actions between several owners and a charterer operating in the containerised liner trade who wished to understand how the Agreement affected claims in respect of outturn shortage of container contents. One particular complication of concern to the parties was the possibility that bills of lading might be issued overstating the quantities of goods in fact shipped. The 1984 Agreement was expressly incorporated into the applicable charters which were on the New York Produce form. Several of the judge's conclusions have been overtaken by changes to the wording of the 1996 Agreement, but they included the following:

1. The 1984 Agreement applied only to claims paid or settled under a bill of lading which could properly be issued under the time charter. (As noted above in paragraphs 20.58 and 20.59, the 1996 Agreement requires a "contract of carriage, whatever its form", rather than a bill of lading.)
2. Clause 8 of the New York Produce form restricts the bills that may be issued on behalf of the owners to bills signed by the master acknowledging receipt of cargo "in conformity with Mate's or Tally Clerk's receipts"; alternatively, the charterers may exercise an implied authority to sign bills that the master might properly have signed for his owners, but that authority itself extends only to bills for cargo actually received by the owners (or their servants or authorised agents).

20.62 It is possible to read Hobhouse, J., as ruling, or implying, that if the bill of lading is in that sense unauthorised, the 1984 Agreement did not apply to any cargo claim under it. That cannot have been the judge's intention, it is suggested, since his conclusion was that the Agreement *did* apply, in relation to a shortage claim under such a bill of lading, so far as there was shortage of cargo in fact shipped. Hobhouse, J., did not say that the upshot was that the Agreement did not apply, but only that charterers seeking to claim contribution under the Agreement "must be prepared to prove that the relevant goods were actually received into the possession of the owners". In *The Elpa* [2001] 2 Lloyd's Rep. 596, Morison, J., confined these first and second propositions in the judgment of Hobhouse, J., in effect, to "shortage" claims in respect of goods never shipped, so as not to restrict unduly the claims to which the Agreement applies. Owners and charterers wanted to avoid legal complexities caused by Clause 8 by using the "rough and ready" mechanism of the Agreement to apportion between themselves the cost of claims they had to pay to cargo interests. Accordingly Morison, J., held that a claim arising from unseaworthiness was subject to the 1984 Agreement despite the bills being antedated and not claused in accordance with mate's receipts, in circumstances where neither the antedating nor the lack of clausing had any impact on the cargo claim or its settlement. The claim was therefore 100 per cent for the owners' account, and so arbitrators had rightly dismissed the owners' claim for indemnity or contribution in respect of it.

20.63 Morison, J., said that the only requirements for the 1984 Agreement to apply were that

"there must be a cargo claim under the bill and the bill must contain the Hague-Visby Rules or their equivalent"; see [2001] 2 Lloyd's Rep. 596, at page 600, "If the goods were never shipped so that the bills never applied to the cargo then the claim would be outwith the [Agreement]. If the goods were shipped but the bills were not issued in accordance with the charter, provided the cargo claim was not affected, that is provided the claim was still a claim under the bill and subject to the regime of the rules, then the [Agreement] applies." In this approach, Morison, J., accepted and extended some of the conclusions of Judge Diamond, Q.C., in *The Hawk* [1999] 1 Lloyd's Rep. 176, which he said "respect the decision of Mr Justice Hobhouse but confine it to shortage claims". In *The Hawk*, which concerned the original 1970 Agreement, which was in identical terms, so far as material, to the 1984 Agreement, bills of lading had failed to conform strictly to mate's receipts, but arbitrators had held that there needed to be a causal connection between the cargo claim and the discrepancy between the bills of lading and the mate's receipts before the applicability of the Agreement could be affected. That was also the judge's conclusion, which is the opposite of strict conformity with mate's receipts being a condition precedent to the applicability of the Agreement. The judge's reasoning, however, is far from satisfactory. He could, and it is suggested should, have said, very simply, that the 1984 Agreement did not defeat or override a claim for damages or indemnity founded upon provisions in the governing charter stipulating the form or content of bills of lading to be issued under it. Instead, however, the judge said that there *was* an implied condition precedent that the cargo claim be under a bill of lading authorised by the charter, but then reasoned that a bill of lading that fails to conform to the mate's receipts is not unauthorised or should not be regarded as unauthorised for the purposes of the Agreement. The notion that a bill of lading not conforming to mate's receipts is authorised by the charter is suspect: see *The Hector* [1998] 2 Lloyd's Rep. 287, *per* Rix, J., at page 297. (For completeness, note that *The Hector* may not be good law on the different question of ostensible authority.)

20.64 The decision that the cargo claim in *The Elpa* was to be apportioned under the 1984 Agreement seems right, but Morison, J.'s formulation of the requirements for the 1984 Agreement to apply appears to go further than was contended for by the charterers in that case (see paragraph 9 of the judgment; [2001] 2 Lloyd's Rep. 596, at page 598) and, with respect, relaxed those requirements too far. Thus, for example, a failure to clause bills of lading in accordance with clausing in mate's receipts as to the condition of the cargo can be the sole reason why owners incur liability under the bills. In such a case, if the bills were issued by the charterers, it seems beyond the purpose of the Agreement to prevent the owners from claiming a full indemnity from the charterers. Yet that would seem to be the effect of Morison, J.'s formulation. The judge appears to have intended just that, in that he went on to doubt the primary ruling in *The Holstencruiser* (namely that in relation to shortage claims proof that the claim concerned goods that had been shipped was required by the Agreement) and disagreed with Judge Diamond, Q.C.'s view in *The Hawk* that a claim for damages or indemnity in respect of the consequences of issuing a bill of lading that did not conform to the mate's receipts survived the Agreement. It is suggested the better view, under the 1984 Agreement, was that *The Holstencruiser*, *The Hawk* and *The Elpa* were all correct in their results, but were to be explained not by the importation into the Agreement of a condition precedent that the bill of lading be authorised under the charter, but rather by the proposition that the 1984 Agreement did not purport to and by nature could not defeat or override a claim for damages or indemnity founded upon provisions in the governing charter stipulating the form or content of bills of lading to be issued under it. So, for example, in *The Elpa* the owners argued in the arbitration that the charter required a particular statement as to the ship's equipment to be incorporated into bills of lading and that, had that been done, there would have been no liability under the bills on the facts that had occurred. They failed to persuade the arbitrators of the premise, so the argument did not feature on appeal. Had the premise been established, the resulting

claim for damages or indemnity for the consequences of breaking a requirement of the charter concerning the terms in which bills of lading should be issued may have had other difficulties but, it is suggested, should not have been defeated or limited by the Agreement.

20.65 By contrast, Clause 4(a)(i) of the 1996 Agreement makes it, expressly, a condition precedent to the application of the 1996 apportionment regime that the bill of lading or other contract of carriage "was authorised under the charterparty". Although presumably influenced by *The Holstencruiser*, that does not reflect the decision in that case; see paragraphs 20.61 and 20.62, above. Further, it restricts the operation of the Agreement, and introduces legal complexity to it, exactly contrary to what the courts have generally taken to be its purpose. It is perhaps conceivable that the courts will manipulate the notion of an "authorised" bill of lading or other contract of carriage in this context (compare *The Hawk*, above), but that seems an unsatisfactory solution. Whether a contract of carriage, in particular a bill of lading, issued to third party cargo interests is authorised under a time charter may be important outside the niceties of the Agreement. Commercial parties should not be asked to grapple with different meanings of the concept of an authorised bill in different aspects of a single time charter relationship. It is suggested, therefore, that Clause 4(a)(i) should be given its plain meaning. If that has consequences not intended by the draftsmen, the Agreement should be amended again. In the meantime, if that is not what particular parties desire, they should consider deleting or amending Clause 4(a)(i) in their incorporation clauses.

20.66 Clauses 4(a)(ii) and (iii) render the Agreement applicable, despite Clause 4(a)(i), where the bill of lading or other contract of carriage was unauthorised because it was a through transport or combined transport contract, but only if the charterers prove that the loss, damage, shortage, overcarriage or delay in respect of which the Cargo Claim was made occurred after commencement of loading the cargo onto and prior to completion of its discharge from the chartered ship. That was also the position under the 1984 Agreement and *The Holstencruiser*.

20.67 Clause 4(a)(iv) is the final precondition for the applicability of the Agreement that concerns the bill of lading or other contract of carriage under which the Cargo Claim has been brought. It requires the contract or carriage to incorporate terms no less favourable to the carrier than the Hague or Hague-Visby Rules, or the Hamburg Rules when they are compulsorily applicable by operation of law to that contract. The 1984 Agreement required by its Clause 1(i) that the Hague or Hague-Visby Rules, or terms no less favourable, be incorporated and so did not apply where the underlying cargo claim was governed by the Hamburg Rules.

Clause 4(b)

20.68 Clause 4(b) is similar to Clauses 1(ii)(a) and (b) of the 1984 Agreement. It makes it a requirement for the applicability of the Agreement that the cargo responsibility clauses in the time charter have not been materially amended. A material amendment is defined as "one which makes the liability, as between Owners and Charterers, for Cargo Claims clear", although by Clause 4(b)(i) the common amendment of adding "and responsibility" to Clause 8 of the New York Produce form (see paragraphs 20.27 *et seq*., above) is not for these purposes a material amendment. Clause 4(b)(i) goes on to provide that "any similar amendment of the charterparty [that is, similar to adding 'and responsibility'] making the Master responsible for cargo handling" is *not* a material amendment disapplying the Agreement. That provision did not appear in the 1984 Agreement. There was a marked reluctance to regard amendments other than adding "and responsibility" as having equivalent effect, because the effect was to preclude any apportionment under the 1984 Agreement, rather than to apply the special apportionment regime for "and responsibility" charters. For example, all of these were held not to have made liability for cargo claims clear: ". . . charterers are to load, stow, trim *and discharge* at their *risk and* expense *but always understood*

these operations remain under the supervision and direction and responsibility of the Captain" (*London Arbitration 17/84* (LMLN 128)); ". . . charterers are to load, stow, trim and discharge the cargo at their expense *but such stowage shall be directed by and under the control of the Master*. . ." (*The Trade Yonder*, SMA No. 2435); ". . . charterers are to load, stow and trim the cargo at their expense under the supervision *and direction* of the captain" (*The Labrador* [1998] 2 Lloyd's Rep. 387). In that last example, the same result might be reached now, under the 1996 Agreement. But it is suggested that the first two examples would be regarded as amendments similar to adding "and responsibility", so that under Clause 4(b)(i) of the 1996 Agreement, the Agreement would still apply, but apportionment would be under the "and responsibility" regime of Clause 8(b).

20.69 Clause 4(b)(ii) deals specifically with another very common amendment, providing that if "cargo claims" is added to the second sentence of Clause 26 of the form then apportionment under the Agreement shall not apply. The 1984 Agreement went on to state that in that case, "Owners shall bear all cargo claims subject to Charterers' contribution under the Berth Standard of Average Clause/Charterers' Contribution Clause (1971), if applicable". By contrast, the 1996 Agreement appears merely to disapply apportionment under the Agreement, leaving liability to be dealt with independently of it. Although, then, Clause 26 will render the owners "responsible for. . . cargo claims", it is suggested that this will not prevent them from making a claim against the charterers in respect of a cargo claim brought against the owners if, independently of the Agreement, the owners had some such claim, for example because a breach by the charterers of some provision of the time charter gave rise to the cargo claim.

Clause 4(c)

20.70 Clause 4(c) requires that the Cargo Claim should have been "properly settled or compromised and paid". The phrase "properly settled or compromised" appeared in Clause 1(i) of the 1984 Agreement, but that Clause went on to provide that "*Ex gratia* settlements made for business or other reasons where there is no legal liability to pay the claim shall be borne in full by the party by whom the payment is made and for the purpose of this Agreement no regard shall be had to such payments". The removal of that extra provision from the 1996 version, it is suggested, ensures that the Agreement applies (subject to paragraphs 20.56, above, and 20.82, below) to cases in which a Cargo Claim has been reasonably compromised even if it could be shown that the Cargo Claim would not have succeeded if it had been fought. The weaker the Cargo Claim the more difficult it may be to establish that it was reasonable to compromise it, but if that has been established apportionment should not be denied by second-guessing what would have happened if it had been fought. It is also suggested that if the owners or charterers, as the case may be, reasonably decide to compromise but do so at an excessive figure, Clause 4(c) will preclude recovery under the Agreement only in respect of the unreasonable excess.

20.71 Clause 4(c) also provides that it is a precondition to recovery of a contribution or indemnity under the Agreement that the liability or settlement amount in respect of which a claim under the Agreement is presented should have been "paid", not merely ascertained or agreed. In a recent case in New York, this precondition was fatal to an attempt by owners to attach their charterers' assets as security for their claim under the Agreement in London: see paragraph 20A.40, below.

Clause 5

20.72 This provision (repeating Clause 1(iii) of the 1984 Agreement except that Clause 5 refers also to the Hamburg Rules) renders the Agreement applicable regardless of the legal forum or

place of arbitration specified in the time charter and regardless of any incorporation of the Hague, Hague-Visby or Hamburg Rules into the time charter (see paragraphs 20.50 and 20.51, above).

Time bar (Clause 6)

20.73 By Clause 6, recovery under the Agreement by either party under the time charter is "deemed to be waived and absolutely barred" unless written notification of the Cargo Claim is given to the other party to the charter within 24 months of delivery of the cargo in question or the date when it should have been delivered (save that if the Hamburg Rules are compulsorily applicable to the underlying contract of carriage, then the period is 36 months). Apart from the provision concerning the Hamburg Rules, this is similar to Clause 1(iv) of the 1984 Agreement.

20.74 Clause 6 requires a written notification of the Cargo Claim, not the commencement of legal proceedings. It operates as an additional requirement to any statutory limitation period requiring arbitration or litigation to be commenced within any particular period. That period may be longer than the notification period under Clause 6. For example, under English law, the party claiming under the Agreement will have six years from the accrual of the cause of action under the Agreement to commence arbitration or litigation (as the charter may require) to avoid becoming time barred under the Limitation Act 1980 (the one-year Hague Rules limit will not apply; see paragraph 20.50 above). Clause 6 says nothing to affect that and is not overridden by it. Conversely, if the charter is not governed by English law, there may be an applicable limitation period under the governing law of the charter requiring legal proceedings to be commenced prior to the expiry of the period referred to in Clause 6. That, it is suggested, would remain effective. Thus, where there is an applicable statutory limitation period, whether it is longer or shorter than the Clause 6 notification period, a claim to apportionment under the Agreement will be defeated if either there is no timely written notification under Clause 6 or if no proceedings are commenced within the applicable limitation period. However, that has been held not to be true as regards contractual provisions limiting the time within which arbitration or litigation must be commenced and barring the claim if the time limit is not observed. Evans, J., held in an unreported case, *The Mary L* (1990), that an amended Centrocon arbitration clause requiring any arbitration under the charter to be commenced within three months of redelivery did apply to defeat a claim under the 1984 Agreement. However, Clause 2 of the 1996 Agreement provides that "the provisions of clause 6 (time bar) shall apply notwithstanding any provision of the charterparty or rule of law to the contrary" and Teare, J., held that a different result therefore followed: *The Genius Star 1* [2012] 1 Lloyd's Rep. 222.

20.75 In doing so, Teare, J., disagreed with the view expressed in the previous edition of this book, namely that Clause 2 does not save a claim under the Agreement from becoming time barred for failure to commence proceedings within the time limited by the limitation law of a foreign governing law or an express provision in the charter, because Clause 6 says nothing about the commencement of proceedings and because to be "contrary" to Clause 6 would require a term entitling the parties to a charter (or either of them) to pursue a claim under the Agreement without giving written notice of the Cargo Claim within the 24 (or 36) months referred to in Clause 6. Even under the decision in *The Genius Star 1*, we suggest, Clause 2 could not defeat a contrary provision in the charter expressly stated to apply to claims under the Agreement, since the parties are masters of how much or how little of the Agreement they choose to bring into their charter, or with what alterations (see paragraphs 20.52, and 20.53, above).

The apportionment (Clauses 7 and 8)

Clause 7

20.76 Clause 7 provides that the amount to be apportioned under the Agreement is the amount in fact borne (and, in view of Clause 4(c), this must mean paid, see paragraph 20.71, above) by the party claiming under the Agreement, "regardless of whether that claim may be or has been apportioned by application of this Agreement to another charterparty". This replaces Clause 1(vi) of the 1984 Agreement, but seems to be no different in effect. If there is a chain of charters, each incorporating the Agreement, and a cargo claim which the Agreement requires to be apportioned 50/50, what proportion of the cargo claim each party in the chain ultimately bears will vary depending upon whether the cargo claim comes in at the bottom of the chain, at the top of the chain, or somewhere in the middle (and in that last case it will depend also on whether the initial recipient of the cargo claim looks for contribution under the Agreement first up or first down the chain). That might seem an odd result, since (assuming solvency throughout the chain) one might imagine that in a back-to-back chain of charters a 50/50 apportionment principle would be intended to leave the head owners and the ultimate charterers bearing 50 per cent each and intermediate charterers nothing. But the wording of Clause 7 is clear. Thus:

Example 1: Owners—Charterers—Sub-Charterers; Cargo Claim against Sub-Charterers; Sub-Charterers recover 50% from Charterers and Charterers recover 50% of that 50% from Owners; so Owners and Charterers ultimately bear 25% each, Sub-Charterers 50%.
Example 2: Owners—Charterers—Sub-Charterers; Cargo Claim against Owners; Owners recover 50% from Charterers and Charterers recover 50% of that 50% from Sub-Charterers; so Owners ultimately bear 50%, Charterers and Sub-Charterers 25% each.
Example 3: Owners—Charterers—Sub-Charterers—Sub-Sub-Charterers; Cargo Claim against Charterers, Charterers seek contribution first against Owners; when Charterers claim on Owners, the amount at that point borne by Charterers is 100%, so that is the amount to be apportioned although the Charterers also have a claim under the Agreement against Sub-Charterers; but when Charterers then claim on Sub-Charterers, the amount at that point borne by Charterers is only 50%; so Owners ultimately bear 50%, Charterers 25%, Sub-Charterers and Sub-Sub-Charterers 12.5% each.
Example 4: Owners—Charterers—Sub-Charterers—Sub-Sub-Charterers; Cargo Claim against Charterers, Charterers seek contribution first against Sub-Charterers; Owners, Charterers, Sub-Charterers and Sub-Sub-Charterers ultimately bear 25% each.

Clause 8

20.77 Clause 8 sets out the apportionment regime itself (in the 1984 Agreement, it was split between Clause 1(ii)(c) and Clause 2). That regime is mostly straightforward and does not call for substantial elaboration. A few points do arise, however, as follows.

20.78 Clauses 8(a) and 8(b) deal with Cargo Claims "in fact arising out of" various causes. In *The Benlawers* [1989] 2 Lloyd's Rep 51, Hobhouse, J., approved arbitrators' decisions under the 1984 Agreement: (a) to investigate the facts of the underlying cargo damage to discover whether it was due to unseaworthiness; and (*b*) (in effect) to test unseaworthiness as under the bill of lading under which the cargo claim was brought without asking in addition whether such unseaworthiness (if found) was actionable under the charter. One consequence of (*b*), it is suggested, is that seaworthiness under the Agreement is as extensive as Article III, rule 1 of the Hague and Hague-Visby Rules, and so, in particular, encompasses cargoworthiness. In relation to (*a*) (investigating the facts), Hobhouse, J., said this at page 62: "Those questions of causation have to be answered by investigating the evidence. The impracticality of any other conclusion is, of course, obvious: the cargo-owner may simply, as is very often the case, just put forward a case

of shipment in undamaged condition and discharge in a damaged or short condition. He may make formal allegations of unseaworthiness and formal allegations of breach of art. III r. 2 without giving any particulars. The mere way the case is presented by the cargo-owner may provide no answer: the case may be settled without any adjudication; the claim may be put forward on some mistaken basis which the owners and charterers know to be mistaken but which the cargo-owner does not. . . . it is quite clear that in the event of any dispute between time charterers and shipowners as to whether or not the loss or damage to cargo was due to unseaworthiness or whether it was due to some other matter, as for example bad stowage or handling, the dispute will ultimately have to be decided upon the evidence in order to decide what the correct apportionment is. The Inter-Club Agreement cuts across the scheme of the New York Produce Exchange form, and in particular across cl. 8 and the complications that arise from cl. 8, but it does not obviate wholly the need to investigate in certain cases what is the cause of the loss or damage the subject-matter of the claim by the cargo owner and the payment to the cargo owner." In *The Labrador* [1998] 2 Lloyd's Rep. 387, Colman, J., said at page 406, "On its proper construction the Inter-Club Agreement is brought into play not by reference to the way in which cargo interests formulate their claim, but by reference to what on the evidence is the true cause of the cargo damage: see. . . *The Benlawers*. . . Accordingly, in a case where the issue as between owners and charterers is whether charterers are liable to indemnify owners in respect of the settlement of a cargo claim asserted on the basis of bad stowage or unseaworthiness, but based on damage which is proved as between owners and charterers to have been caused by the inherent vice or unsafety of the cargo and not by any defect in stowage, the [1984] Agreement is not brought into operation." As to inherent vice or dangerous cargo cases under the 1996 Agreement, see paragraph 20.81, below.

20.79 By Clause 8(c), claims for shortage and overcarriage, unless they are shown to fall within Clause 8(a) or Clause 8(b), fall to be apportioned 50/50 "unless there is clear and irrefutable evidence that the claim arose out of pilferage or act or neglect by [owners or charterers] (including their servants or sub-contractors) in which case that party shall then bear 100 per cent of the claim". A submission that 'clear and irrefutable evidence' imported the criminal burden of proof beyond a reasonable doubt was not pursued in *The Holstencruiser* [1992] 2 Lloyd's Rep. 379 above, in which Hobhouse, J., said, at page 390, that the phrase "tells [an arbitrator] what his task is and of what he must be satisfied" and added "I see no merit in attempting to provide any paraphrase or amplification for the perfectly intelligible expressions which appear in the agreement". The corresponding proviso in the 1984 Agreement required "act, neglect or default on the part of Owners' or Charterers' servants or agents". In *The Goodpal* [2000] 1 Lloyd's Rep. 638, the master of a ship chartered on the New York Produce form agreed to the demand of receivers at the first of two discharge ports to discharge more cargo there than had been ordered by the charterers. Colman, J., rejected the owners' argument that the resulting shortage at the second discharge port had been caused by an act on the part of the charterers' servants or agents. Once the ship had discharged at the first port the quantity of cargo ordered by the charterers, the receivers "were no longer the delegates of the charterers and there were no further orders that they could properly give to the master": see page 644. Accordingly, as between the owners and the charterers, the shortage at the second discharge port was due to the act, neglect or default of the master and the claim was 100 per cent for owners' account under the Agreement.

20.80 Clause 8(d), which is new to the 1996 Agreement, sweeps up "All other cargo claims whatsoever (including claims for delay to cargo)". They are to be apportioned 50/50 unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of one or other party to the charter, including their servants or sub-contractors, in which case the claim is 100 per cent for that party's account. This may give rise to an oddity, where as often happens, for example in fire cases like *The Elpa*, above, a bill of lading claim is presented to the owners and an allegation

of unseaworthiness is made, without which the claim would plainly fall within Article IV, rule 2 of the Hague or Hague-Visby Rules, so that when the owners reasonably settle the claim their only justification for doing so is the risk of a finding of causative unseaworthiness against them. Under the 1984 Agreement, the owners could have no claim: if they were liable, it was because of unseaworthiness and under the Agreement they had to bear 100 per cent of the claim; if they were not liable, they were required by the Agreement to bear the claim in full. However, under the 1996 Agreement, it would seem that the owners are entitled to 50 per cent contribution from the charterers unless the charterers prove that there was causative unseaworthiness. Since in such cases the owners have only paid anything because they might have been under a liability they could not pass on to the charterers, it seems odd that the Agreement should ever contemplate contribution by the charterers.

20.81 Also in relation to Clause 8(d), note again *The Labrador*, paragraph 20.78 above. Where it is shown, as between the owners and the charterers, that cargo damage resulted from inherent vice or unsafety of the cargo, the 1984 Agreement did not deal with any resulting cargo claim against the owners or the charterers in respect of that damage. Under Clause 8(d), however, the 1996 Agreement does cover such a claim as it seems to fall within the definition of Cargo Claim, but provides for it to be apportioned 50/50 unless the inherent vice or unsafety of the cargo can be regarded as an "act or neglect" of the charterers (including their servants or sub-contractors). The question will be whether the shipment of cargo with the characteristics in question is always such an "act" or only if the owners prove that the characteristics in question took the cargo outside the limits of the charter (on which see chapter 9, above).

20.82 Finally, the question arises whether the Agreement covers the case where there is a real issue on the third party's claim against the owners or the charterers as the case may be, as to whether the cargo was in fact damaged, lost, or short-landed, as the third party alleges. The question may be acute where the third party's claim is reasonably compromised with uncertainty over that issue remaining in the air. The point has not been considered by the courts. *The Benlawers*, *The Holstencruiser* and *The Labrador*, above, would indicate that the Agreement concerns, and deals only with, third party claims in respect of loss, damage, shortage and so on that in fact occurred, and not with credible but inaccurate assertions by third party cargo interests that cargo damage had occurred. But the more radical approach of Morison, J., in *The Elpa* (criticised above) would suggest that the Agreement should apply where cargo damage or loss was alleged, whether or not any such damage or loss in fact occurred.

Security (Clause 9)

20.83 Clause 9, introduced by the 2011 amendment of the Agreement, deals with the provision of security to the Cargo Claim claimant. The wording seems clear and the effect simple. If either owners or charterers provide security to the claimant, they are entitled to counter-security from, respectively, charterers or owners, provided that (a) they have given written notification of the Cargo Claim within the time limit under Clause 6 and (b) they provide reciprocal counter-security if asked.

Governing law (Clause 10)

20.84 By Clause 10 (which was Clause 9 prior to the amendment of the Agreement in 2011), the Inter-Club Agreement, as incorporated into a time charter, is governed by the law governing the charter. It is suggested that was also the position under the 1984 Agreement, although this contained no provision as to governing law.

U.S. Law

20A.1 The leading American case on the respective obligations of owner and charterer for the loading and stowage of the cargo is *Nichimen Company* v. *The Farland*, 462 F.2d 319 (2d Cir. 1972). In that case, the cargo interests sued both A/S Vigra, the shipowner, and Seaboard Shipping Co. Ltd., the time charterer, for damage to a cargo of steel. The court held that the cargo interests were entitled to recover, and it was then left to determine whether Vigra, as the owner, or Seaboard, as charterer, was ultimately liable for the loss. The court first noted the long recognized principle that "absent any special provision or circumstance, the duty to load, stow and discharge cargo—and the consequences for failing to do so properly—fall upon the ship and her owners." 462 F.2d at 330. The court then went on to find that Clause 8 of the New York Produce form shifts responsibility for stowage to the charterer: " . . . Under Clause 8, the safety of the stowage, insofar as cargo damage is concerned, generally is the primary responsibility of the charterer." 462 F.2d at 332.

20A.2 The court further noted, however, that there are instances in which an owner may be liable for cargo damage, even where the master was not involved in the loading or stowage. Thus, if cargo damage was caused by the owner's failure to exercise due diligence to make the ship seaworthy or maintain her in a "thoroughly efficient state" during the voyage, the owner would be liable:

> If cargo damage were to occur because of some defect in the vessel which the Captain had failed to discover and correct, primary liability would rest with the owner; the cause of the damage would not be within the scope of the responsibilities which Clause 8 was intended to shift from the owner to the charterer . . . Likewise, if some inherent vice of the vessel would make otherwise proper stowage hazardous and the Captain and owner failed to reveal this to the charterer or his stevedore, we doubt whether Clause 8 would relieve the owner of primary liability for cargo damage. [*Id*.]

20A.3 The decision in *The Farland* is in line with the earlier Supreme Court case of *The Nidarholm*, 282 U.S. 681 (1931). There a cargo of lumber was shipped on deck under a time charter with provisions similar to those of Clause 8. Immediately after loading the ship developed a five-degree list. This was followed by the collapse of the "cribs" upon which the deck cargo had been stowed, and a quantity of cargo went over the side and was lost. The court held that the list, which contributed to the collapse of the deck stow, was a fault attributable to the owner as part of its responsibility to maintain the ship's seaworthiness in the sense of her stability and trim. The court also found fault on the part of the charterer, however, insofar as the cribs, which were a function of stowage, should have been able to withstand the stress of a five-degree list. Hence, damages were divided evenly.

20A.4 In an early decision, the district court in New York held in *The Santona*, 152 Fed. 516 (S.D.N.Y. 1970):

> The ship is the Owners' ship and the Master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of the cargo, and those earnings of the vessel which flow into the pockets of the Charterers, the Master and crew are the servants of the Charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the Charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, Master and crew, for the advancement of the Charterers' gains.

20A.5 In *Nissho-Iwai Co. Ltd*. v. *The Stolt Lion*, 617 F.2d 907, 1980 AMC 867 (2d Cir. 1980), *rev'g* 1979 AMC 2415 (S.D.N.Y. 1979), the court reiterated the rule it enunciated in *The Farland*,

stating that the responsibility for discharge of cargo remained with the owner in the absence of any "Clause 8" charterparty provision or any action or custom of the parties which would serve to shift the burden onto the charterer.

20A.6 *The Farland* was also followed in *Seguros Banvenez S.A*. v. *The Oliver Drescher*, 761 F.2d 855, 1985 AMC 2168 (2d Cir. 1985). See also *Nitram Inc*. v. *The Cretan Life*, 599 F.2d 1359, 1366 (5th Cir. 1979); *Demsey & Assoc. Inc*. v. *The Sea Star*, 461 F.2d 1009, 1972 AMC 1440 (2d Cir. 1972); *Assoc. Metals & Minerals Corp*. v. *The Arktis Sky*, 978 F.2d 47, 1993 AMC 509 (2d Cir. 1992).

20A.7 See also *The Tulsa*, SMA 2794 (Arb. at N.Y. 1991), where the panel held the charterer liable to indemnify the owner for improperly stowed and lashed cargo which washed overboard and *The Janna*, SMA 3605 (Arb. at N.Y. 2000), where a Port Captain/Supercargo's attempt to exercise remote control of the ship's loading process was a failure for which the charterer had to bear the burden under Clause 8.

20A.8 In *The Praxitelis*, SMA 3564 (Arb. at N.Y. 1999), the panel did not accept the charterer's argument that a master can only interfere with a charterer's stowage plan when there is a threat to the ship's stability or seaworthiness. The panel found that the master had acted from genuine concern for the safety of the ship and the cargo when he interfered with loading.

20A.9 In *The Punica*, SMA 3513 (Arb. at N.Y. 1999), the panel majority found the charterer liable for the improper stowage of a cargo of steel slabs.

20A.10 In *The Caribbean Sky*, SMA 2827 (Arb. at N.Y. 1992), the charterer sought indemnity and other damages from owner in connection with cargo loss claims. The owner sought to hold the charterer liable for the loss pursuant to Clause 8 of the charter. The panel unanimously found the owner at fault for the breaking away of the first flatbed which was loaded on the ship, due to inadequate lashing equipment which the owner was obligated to provide. This caused a chain of events leading to the loss and/or damage of other cargo, as well as damage to the ship. The panel stated that "regardless of which party carries liability under the charter party to supply the lashings or to pay for stowing and securing, the ultimate responsibility for the safety of the ship, crew and cargo rests with the Master." Finding that the master had failed in the "duty to exercise due diligence to ensure that the ship is in all respects fit for the voyage," the panel disallowed the owner's claim and awarded the charterer all claimed damages.

20A.11 See generally *Thyssen Inc*. v. *The Fortune Star*, 777 F.2d 57, 1986 AMC 1318 (2d Cir. 1985), stating in *dictum* that a charterer responsible under a Clause 8 type charter provision for a deviation because of the on-deck stowage of cargo could not be held liable for punitive damages.

20A.12 A time charterer must exercise reasonable care in performing its obligations under the charterparty and can potentially be held liable in negligence to third parties who are injured. See *Dahlen* v. *Gulf Crews, Inc*., 281 F.3d 487, 496, 2002 AMC 566 (5th Cir. 2002). However, the charterer's obligation is only one of reasonable care; the charterer does not need to supervise loading and unloading or to warn of open and obvious conditions. See *id*.

20A.13 When carriage is subject to the Carriage of Goods by Sea Act (COGSA), the owner's duty to load and stow the cargo is non-delegable, meaning that the owner is always liable in the event of improper loading or stowage. However, when COGSA does not apply—as when carriage occurs pursuant to a charterparty—the owner can delegate the obligation to load and stow the cargo and avoid liability in tort. See *Great Am. Ins. Co*. v. *M/V Handy Laker*, 2003 AMC 116, 137–138 (S.D.N.Y. 2002).

Under the supervision of the Captain

20A.14 Perhaps the most difficult problem under Clause 8 concerns the role of the master. The English view, that the master's active participation in loading and stowage may render the owner *ipso facto* liable, generally has not been followed in New York. Rather, the approach is to consider not whether the master acted, but in what capacity he acted. Thus, it is said that the master "wears two hats" or performs a dual agency. To the extent he is carrying out the owner's responsibility to furnish a ship that is seaworthy in the traditional sense (i.e., watertight, stable, in proper trim and structurally sound) he acts as the owner's agent. However, to the extent he is carrying out the charterer's responsibility properly to load, stow and discharge (which also represents "seaworthiness" in the modern sense, *vis-à-vis* cargo interests) he acts as the charterer's agent. Thus, both the master and crew become the charterer's "borrowed servants" when the charterer uses them to discharge the responsibilities assumed by the charterer under Clause 8. The principle was enunciated in *The Farland* as follows:

> . . . we think the Owner's liability for cargo damage due to improper stowage is limited to instances in which the Captain intervenes in the stowage process to protect the vessel's safety and ability to withstand the perils of the sea; to the extent that he acts merely to protect the cargo, the charterer is responsible. [462 F.2d at 333]

20A.15 See also *The Agios Panteleimon*, SMA 1477 (Arb. at N.Y. 1980), where the panel concluded that the master was responsible for the proper stowage of the cargo and the safe and proper navigation of the ship which included proper draft planning. It was the responsibility of the owner and the master, when making plans as a navigator to implement load and trim parameters, to take into account the fact that the ship had a sag. In *The Drosia*, SMA 1303 (Arb. at N.Y. 1979), the panel ruled that time lost in off-loading fuel and water when the master negligently allowed the ship to be loaded over her load line was for the owner's account and charterer was entitled to off-hire. But in *The Robertina*, SMA 1151 (Arb. at N.Y. 1977), the panel held that while the captain may be the servant of the owner with respect to ship safety and stability, he is the servant of the charterer with respect to the utilization of the ship's available capacity, and the risk of being unable to load a particular quantity of cargo because of improper stowage or trimming must be borne by the charterer.

20A.16 In *Spence* v. *Mariehamns R/S*, 766 F.2d 1504, 1986 AMC 685 (11th Cir. 1985), the court held that "under the supervision of the captain" did not impose a duty on the shipowner to supervise stevedoring operations in loading or discharging cargo. In that case, the shipowner was excused from liability for injuries suffered by a longshoreman during the unloading of cargo.

20A.17 In *The Punica*, SMA 3513 (Arb. at N.Y. 1999), the panel majority held that the master's statement in writing that the stowage and security of the cargo had been completed to his satisfaction did not excuse charterer from liability or damages caused by improper stowage. The panel ruled that the master was entitled to rely on assurances from the shipper that the stow was secure and proper. The fact that it was not secure remained charterer's responsibility under Clause 8.

20A.18 In *The Aetolia*, SMA 2157 (Arb. at N.Y. 1985), the panel held that the owner was not liable for the cost of securing cargo which resulted from the master's failure to prepare a pre-plan for the stowage of the cargo in a way which would not have required the cargo's securing. According to the panel, this fell within the charterer's duty to load, stow, and trim the cargo.

20A.19 In *The Carib Eve*, SMA 2749 (Arb. at N.Y. 1991), the charterer sought to hold the owner liable for cargo which was lost overboard. The owner maintained that the charterer failed to properly stow the cargo. The panel held that notwithstanding the fact that the crew participated in the loading of the cargo pursuant to a non-contractual arrangement between charterers and the crew, this was outside the scope of the charter and did not bind the owner. Moreover, pursuant to

Clause 8 of the charter, the charterer had the responsibility for loading, stowing and discharging the cargo, and to the extent that the crew and the master participated in such activities they did so as the borrowed servants of charterer.

20A.20 In *The Labrador Rex*, SMA 2472 (Arb. at N.Y. 1988), the arbitrators denied the charterer's claims for damaged cargo based on the inclusion of language in the charter similar to Clause 8 which allocated the risk and expense of loading, stowage and discharging to charterer. The charterer failed to establish any negligence on the part of the ship or owner.

20A.21 In *The Ocean Prince*, SMA 2517 (Arb. at N.Y. 1988), after concluding that the cargo damage was in fact caused by poor packaging and improper loading, stowing and discharge, the panel determined that owner was not liable for these risks. The panel granted the owner indemnification from the charterer for the cargo damage claim. The panel also ruled that expenses incurred in the securing of the cargo for purposes of trim are for the charterer's account under Clause 8. See also *The Unibulk Fir*, SMA 1505 (Arb. at N.Y. 1980); *The North Emperor*, SMA 1284 (Arb. at N.Y. 1978); *The Dorothea Bolton*, SMA 1211 (Arb. at N.Y. 1978); *Int'l Produce Inc*. v. *The Frances Salman*, 1975 AMC 1521, 1523–1524, 1544 (S.D.N.Y. 1975); *A/S Brovanor* v. *Central Gulf S.S. Corp*., 323 F. Supp. 1029, 1032 (S.D.N.Y. 1970); *Isbrandtsen Co*. v. *George S. Boutwell*, 1958 AMC 351 (S.D.N.Y. 1957); *Socomet* v. *Sliedrecht*, 1975 AMC 314 (S.D.N.Y. 1975); *The Mesologi*, 1971 AMC 2498 (Arb. at N.Y. 1971); *Interstate Steel Corp*. v. *The Crystal Gem*, 317 F. Supp. 112 (S.D.N.Y. 1970); *Yeramex International* v. *The Tendo*, 595 F.2d 943, 1979 AMC 1282 (4th Cir. 1979), *rev'g* 1977 AMC 1807 (E.D.Va. 1977); and *Board of Commissioners of the Port of New Orleans* v. *The Space King*, 1978 AMC 856 (E.D.Va. 1978).

20A.22 Still another difficulty arises when the words "and responsibility of the Captain" are added at the end of Clause 8, as is frequently done. Do these words shift liability for improper stowage back to the owner, as may be the case in England? Probably not. In *Coca-Cola Co*. v. *The Norholt*, 333 F. Supp. 946, 1972 AMC 388 (S.D.N.Y. 1971), the owner of a cargo of tea commenced an action against the shipowner and the time charterer. The cargo owner reached a settlement agreement with both parties, who then had a trial to determine which should bear the loss. The court held that the cargo damage was caused in part by an unseaworthy condition, and in part by improper stowage. As to the latter cause, the charterer attempted to shift liability to the owner by contending that under Clause 8 of the charter, the owner had assumed responsibility for the stowage. The printed charter form had been amended, so that Clause 8 included the following language:

> Charterers are to load, *discharge*, stow and trim the cargo at their own expense under the supervision of the Captain *and responsibility of the Captain*.

20A.23 The trial judge found that notwithstanding the amendments to Clause 8, "in reading the charter agreement as a whole, and as supplemented by the various acts of the parties, I must conclude that the charterer took great pains to reserve to itself virtually every facet of the stowage." The charterer had prepared a preliminary cargo stowage plan, and had made the alternate decision, over the master's protest, to stow the tea in the No. 1 hold, immediately above a cargo of noxious cresylic acid. The decision appears to be correct, since the words "and responsibility" may be read as merely emphasizing or enlarging the master's basic obligation to protect both the ship and her cargo. If a shift of responsibility to the *owner* is intended, with the potentially drastic consequences attendant, clearer language should be employed. For example, an addition at the end of Clause 8, reading "provided, however, that any act or omission by the Master or crew in assisting in the loading, stowage or discharge of the cargo shall be the responsibility of the owner," should certainly suffice to achieve this objective.

20A.24 In *The Trust 38*, SMA 2911 (Arb. at N.Y. 1992), there was a head charter on the New

York Produce form and a sub-charter on the Stemmor form. The head charter included a standard Clause 8, as well as additional clauses whereby owner expressly assumed "responsibility as to proper stowage which shall be under the supervision and responsibility of the Master." During loading operations a portion of the cargo was damaged by rain, and a number of bags were torn and ripped. The spoiled cargo was allowed to remain on board, and clean mate's receipts and bills of lading were issued. Rejecting the owner's argument that it was not liable because it was not a party to the bills of lading, the arbitrators held that pursuant to the terms of both charters, the owner remained responsible for the supervision of the cargo operations, which included loading and stowing. Therefore, the charterer, who was also held liable for the damaged and lost cargo, was awarded full recovery from the owner.

20A.25 In *The Holland*, SMA 2114 (Arb. at N.Y. 1985), the charter had been amended to include a typewritten clause which stated: "if on deck, at charterer's risk and responsibility and at Master's discretion." The ship loaded a cargo of rolled liner board paper which was stowed in the holds and on deck. The ship was unstable, however, because too much cargo was loaded on deck. As a result of the ship's unstable condition, it developed a serious list which resulted in the loss of deck cargo overboard and the wetting of cargo in the holds. The panel ruled that the owner bore sole responsibility for the cargo damage. The panel stated that insofar as the seaworthiness and safety of the ship were concerned, the master was responsible on behalf of the owner to assure himself that the ship was stable. Because the cargo damage was attributable to the master's failure to make proper stability calculations, the owner was responsible for the damage. According to the panel, the amendment to the charter relating to the loading of deck cargo did not shift liability to the charterer.

20A.26 A further issue which arises under Clause 8 concerns the extent of the charterer's liability for improper stowage. In the vast majority of cases, of course, the loss is limited to cargo. There are instances, however, where improper stowage can damage the ship itself or some third party. That the charterer's liability might extend beyond cargo cases was noted in *The Farland* but was not an issue there. However, the issue was squarely met in *Fernandez* v. *Chios Shipping*, 71 Civ. 2786 (S.D.N.Y. 1976), *aff'd,* 542 F.2d 145 (2d Cir. 1976), where the court permitted a shipowner to recover indemnity from a time charterer with respect to a claim by a longshoreman injured during unloading operations. The court's decision was based on the time charterer's responsibility under Clause 8. The court stated:

> It is possible to read. . . *Nichimen*. . . to stand for the narrow proposition that, in cases of cargo damage, the ship owner is entitled to indemnity from the time charterer only upon a showing that either the direct or statutorily imputed negligence or other fault of the charterer caused the damage. . . However, such a restricted reading seems unjustified.
>
> What seems more likely is that, as between the ship owner and the charterer, Clause 8 of the time charter agreement shifts responsibility for loading, stowage, trimming, and discharge of cargo to the charterer, and the charterer must indemnify the ship owner for cargo damage which results from any improper performance of any of the stipulated cargo operations. In this view, the duty to perform the cargo operations carried with it an absolute obligation to indemnify the owner for any such damage, irrespective of any "fault" on the part of the charterer, and irrespective of the relationship, under agency law, between the charterer and the party which it employs to carry out its duties under the time charter agreement.
>
> The court is persuaded that the latter is the correct view. . . As between the shipowner and the charterer, it seems both a reasonable and fair construction of this clause [Clause 8] to require indemnity from the charterer for cargo damage, as discussed above. Since the charterer is "primarily responsible" for stowage and discharge, and since the ship captain's supervisory role is reduced to that of vetoing any plan which would imperil the seaworthiness of the ship, it would seem unfair to later predicate the indemnity *only* upon a direct showing of negligence by the charterer (who would, presumably hire a reputable stevedore to do the loading or discharge), or to allow the charterer to argue that it should not be held liable for the negligence of the stevedore, because the stevedore might be technically an independent contractor under the laws of . . . agency. . . .

It seems clear to this court that, as construed by the Court of Appeals in *Nichimen*, Clause 8 shifts primary responsibility for the active control of cargo operations to the charterer. . . Moreover, where, as in this case, the finding of unseaworthiness against the shipowner is, in fact, predicated upon unsafe conditions created by stevedore and shipper rather than upon any conditions created by the shipowner, there seems to be no basis in equity for denying indemnity from the charterer, when the ship's captain retained such limited responsibility for cargo operations under the charter agreement.

20A.27 The holding in *Fernandez* was expressly followed by the Ninth Circuit in *Turner* v. *Japan Lines Ltd*., 651 F.2d 1300, 1981 AMC 2223 (9th Cir. 1981), *cert. denied,* 459 U.S. 967 (1982), *and amended,* 702 F.2d 752, 1984 AMC 2703 (9th Cir. 1983).

20A.28 In *Haluapo* v. *Akashi Kaiun, K.K.S.A.M. Inc*., 748 F.2d 1363, 1985 AMC 1107 (9th Cir. 1984), the Ninth Circuit explained its decision in *Turner* extensively in order to distinguish it from the instant case. In *Haluapo*, the ship was bareboat chartered, then time chartered, then voyage chartered. The plaintiff was a longshoreman who was injured while discharging cargo. The injury was caused by a defective winch on board the ship. The only party over whom the plaintiff could obtain jurisdiction was the time charterer. The court dismissed that action on the grounds that the time charterer had no involvement in the operation of the ship or the loading of the cargo, nor did it have knowledge of any defects on board the ship nor the ability to control the actions of the crew. The court distinguished *Turner*, finding that in *Turner* the time charterer had actually hired the stevedore. Moreover, according to the court, unlike the situation in *Turner*, the time charterer had no right or ability to control the actions of the crew members. It is questionable whether the latter statement of the court is a valid distinction. It appears that the court reached this conclusion based on uncontradicted affidavits submitted by the time charterer. In *Turner*, the court had found that the master of the ship was an agent of the time charterer for certain purposes relating to the loading and discharge of cargo.

20A.29 Similarly, in *The Mount Athos*, SMA 1570 (Arb. at N.Y. 1981), the ship's shell plating was punctured during the loading of a cargo of steel scrap as the result of stevedore negligence. The panel held that the damage was the responsibility of the charterer. According to the panel, the fact that the master was personally involved in the loading operation did not operate to shift liability for the damage away from the charterer.

20A.30 In contrast, the court in *Desormeaux* v. *Oceans International Corp*., 1979 AMC 1962 (W.D. La. 1979), held that under Clause 8 a time charterer is liable neither to an injured longshoreman for damages nor to the shipowner for indemnification in the absence of any evidence that the charterer exercised the kind of supervision and control over loading operations which would give rise to liability on the part of the charterer as an independent contractor. In holding thus, the court rejected *Fernandez* in favor of the Fifth Circuit interpretation of Clause 8 as stated in *D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 1966 AMC 2223 (5th Cir. 1966), *cert*. *denied,* 400 U.S. 902 (1970). In *Ove Skou*, the court denied the owner's claim for indemnity from the charterer, reasoning that:

The typical clause specifying that the Captain shall be under the orders of the Charterers "as regards employment and agency" and that "charterers are to load, stow, and trim the cargo" does not give to Time Charterer any operational control over these activities. Rather, these charter party provisions are essentially a specification of the party—owner or charterer—upon whom the ultimate financial cost rests for any one or more of the activities.

Although the charterer is to secure and pay for such port authorities as pilotage, towage, port charges, including arrangements for loading and discharging of cargo, such activities if conducted by the ship or its crew do not become those for which the time charterer has an operational responsibility. . . In the absence of circumstances which would give rise to a liability for action taken by an independent contractor—none of which are present here—Time Charterer had no responsibility to shipowner or to third persons including longshoremen for acts of omission or commission by the stevedores.

20A.31 See also *Bourgeois* v. *Bergen Juno*, 1979 AMC 1396 (E.D. La. 1978); *Warnock* v. *Daiichi Chuo Kisen Kaisha*, 1983 AMC 1463 (E.D. Ore. 1981); *Shaw* v. *South African Marine Corp*., 1983 AMC 1578 (E.D.Va. 1982); *Roby* v. *Hyundai Merchant Marine*, 700 F. Supp. 316, 1989 AMC 1126 (E.D. La. 1988). Accord, *Irby* v. *Tokai Lines*, 1990 AMC 1042 (E.D. Pa. 1990); *Harris* v. *S.P. Shipping*, 818 F. Supp. 149, 1993 AMC 1538 (E.D. Va. 1993); and *Hines* v. *British Steel Corp*., 907 F.2d 726, 1990 AMC 2986 (7th Cir. 1990).

20A.32 In *Hayes* v. *Wilh. Wilhelmsen Enterprises Ltd*., 818 F.2d 1557, 1988 AMC 259 (11th Cir. 1987), the court dismissed a personal injury claim asserted against the time charterer of the ship. The plaintiff was a longshoreman who was injured when he slipped on hydraulic fluid which had leaked from the hydraulically-operated cargo doors of the ship. The court noted that while Clause 8 of the New York Produce form shifts responsibility for cargo operations to the time charterer, maintenance of the ship's cargo doors was not within the scope of the responsibility assumed by the time charterer under Clause 8. According to the court, the condition on the deck affected the seaworthiness of the ship and remained the responsibility of the owner. The owner was liable for the negligence of the master and crew in failing to clean up or warn of the fluid. In so holding, the court appears to have relied upon the Second Circuit's decision in *Fernandez* v. *Chios Shipping*. The same reasoning was adopted in *American Home Assur*. *Co*. v. *Sletter M/V*, 43 F.3d 995 (5th Cir. 1995), where it was held that the charterer was responsible for damage to the ship's cargo caused by stowaways.

20A.33 Accord, *Torres* v. *Cool Carriers*, 26 Cal. App. 4th 900, 31 Cal. Rptr. 2d 790, 1994 AMC 2690 (1994). See also *Cooper* v. *Offshore Express*, 171 F. Supp. 1180, 1990 AMC 666 (W.D. La. 1989), *aff'd without opinion,* 915 F.2d 1569 (5th Cir. 1990), where the owner was held 100 per cent liable for personal injuries caused by the ship's collision with a stationary platform because the charterer did not exercise any operational control over the ship's navigation.

20A.34 In *The Reliant*, SMA 3077 (Arb. at N.Y. 1994), the owner sought indemnification from the charterer pursuant to Clause 8 for amounts paid to settle longshoremen's claims for personal injuries sustained during the loading of cargo. The charter provided for New York arbitration but gave no indication of which law should govern. The owner argued for the Second Circuit's interpretation of the issue, and the charterer contended that the Fifth Circuit's approach should be followed. The panel decided that the law as interpreted by the Second Circuit should apply, based on the agreement of the parties to arbitrate in New York.

20A.35 See also *Padro* v. *Vessel Charters Inc*., 731 F. Supp. 145, 1990 AMC 1664 (S.D.N.Y. 1990), where the charter contained provisions which the court found evidenced the intent of the parties that owner remain responsible for any personal injuries sustained by the crew.

Right to indemnity for settlement payments

20A.36 In order to have a right of indemnity, the owner or charterer must have a liability to a third party. Where a court or arbitrators have determined that a party has such a liability, that ordinarily satisfies this requirement. Problems may arise, however, where a party faced with a claim decides to settle it without any determination of its actual liability, and then seeks indemnity. In this situation, the burden is on the settling party to show that it had an actual liability to the third party. In *The TFL Jefferson*, SMA 3256 (Arb. at N.Y. 1996), the panel held that the owner was not entitled to indemnification from the charterer for a settlement payment to an injured stevedore. The panel stated that only if there was a basis for the owner's liability to the stevedore could the owner then seek indemnity from the charterer. The panel ruled that the owner had not breached any duties, could not have been found liable for the stevedore's injuries, and, despite its settlement of the stevedore's claim, was not entitled to indemnity from the charterer. In *The Atlantic Power*, SMA 3886 (Arb. at N.Y. 2005), the panel denied the charterer's claim for indemnity from the owner for

a cargo damage claim that the charterer had settled. The charterer had not notified the owner of the claim, and had instead proceeded to secure a survey and settle with the claimant on its own.

Effect of right of indemnity on third parties

20A.37 In *Robinson* v. *Orient Marine Co. Ltd.*, 505 F.3d 364, 2007 AMC 2742 (5th Cir. 2007), the court held that the charterer's obligation under Clause 8 to indemnify the owner does not inure to the benefit of third parties. A longshoreman was injured while unloading cargo and brought suit against the owner and time charterer. The court held that the charterer had no liability to the longshoreman. The court further ruled that Clause 8 of the charter created no right in favor of the longshoreman against the charterer. According to the court, Clause 8 did no more than shift ultimate responsibility for liability from the owner to the charterer, and it did not expand or alter the turnover duty owed to the longshoreman.

Interclub Agreement

20A.38 The Interclub Agreement has been enforced as a contractual agreement between the parties when it is incorporated in a charter.

20A.39 In *Siderius Inc.* v. *The Amilla*, 880 F.2d 662, 1989 AMC 2533 (2d Cir. 1989), the charter incorporated the New York Produce Exchange Inter-Club Agreement. The Second Circuit affirmed the judgment of the district court which found the shipowner liable for damages to the transported goods based upon unseaworthiness of the ship, but required the charterer to indemnify the shipowner for 50 per cent of the damages based upon the court's application of the Agreement. The dissenting opinion of Judge Pratt that the charterer was denied a fair opportunity to present its case concerning the indemnity issue should be noted.

20A.40 The background to the Inter-Club Agreement is discussed by Judge Charles S. Haight in *Sonito Shipping Company*, *Inc.* v. *Sun United Maritime Ltd.*, 2007 U.S. Dist. LEXIS 19531 (S.D.N.Y. 2007). A cargo claim was made against the owner in a London arbitration. The owner brought an action in New York against the charterer to obtain a maritime attachment of its assets as security for its indemnity claim. Applying English law, Judge Haight vacated the attachment and dismissed the complaint as being premature because the owner had not yet been held liable on the underlying cargo claim. Judge Haight ruled that under the Inter-Club Agreement, "the obligation to indemnify only arises once the underlying claims have been met." *Id.* at * 28. Judge Haight stated:

> Moreover, I interpret (with deference) the Court of Appeal's judgment in *The Strathnewton* [D/S A/S *Idaho* v. *Peninsular & Oriental Steam Navigation Co.* [1983] 1 Lloyd's Rep. 219 (C.A. 1982)] to indicate rather clearly that the Court would not accept Mr. Jacob's suggestion that a claim by a shipowner alleging breach by the charterer of Clause 8 of the charter party could be asserted, and would accrue, independently of the agreed-upon ICA protocol. In *The Strathnewton* the Court of Appeal stressed that the object of the ICA "was clearly to cut through" the difficulties created by Clause 8 and the Hague Rules in respect of the fixing of liability for cargo damage as between shipowner and charterer, and added that the "condition precedent" for apportionment and indemnification under the ICA was that the cargo claims had been paid.
>
> "Condition precedent" is a term of art in the law; ordinarily, such a condition must be satisfied before an obligation arises or a cause of action accrues. This works no unfair hardship upon Sonito in this case. Sonito was not required to agree to the incorporation of the ICA in the charter party, but having done so is bound by it. For these reasons, I conclude that Sonito has not carried its burden of showing that at the time of the attachment it had a valid maritime claim against Sun United.

Judge Haight further declined to exercise his discretion to uphold the attachment and queried whether a court has such discretion following the ruling of the Second Circuit in *Aqua Stoli Shipping Ltd.* v. *Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006).

20A.41 In *The Atlantic Power*, SMA 3886 (Arb. at N.Y. 2005), the panel concluded that the Inter-Club Agreement did not apply, even though it was incorporated by the charter. The panel found it significant that the charter otherwise addressed the relative responsibilities between the owner and the charterer by providing that the owner would not be liable for losses or damages due to the failure to repair the ship. The charterer had alleged that the owner was responsible because (inter alia) it had failed to keep refrigeration equipment in good repair. The panel also found it significant that the charterer had never notified the owner of the claim for cargo damage until after it had completed a survey and settled the claim. See also *Steel Coils* v. *M/V Lake Marion*, 2001 U.S. Dist. LEXIS 20114 (E.D.La. 2001).

20A.42 In *The Finnfalcon*, SMA 2873 (Arb. at N.Y. 1992), the panel unanimously denied the charterer's claim for contribution pursuant to the allocation outlined in the Interclub Agreement. In doing so, it found that since Clause 8 did not contain the specific addition "and responsibility" to the words "under the supervision of the master" damages resulting from improper lashing were 100 per cent attributable to the charterer.

20A.43 In *The Trade Yonder*, SMA 2435 (Arb. at N.Y. 1987), the charter incorporated the February 1970 Interclub Agreement. The panel denied most of the charterer's claims for indemnity with respect to the settlement of cargo claims for shortage, physical damage and staining. The panel held that, because the charter was not amended to add the word "responsibility" to Clause 8 of the charter, under the Inter-Club Agreement, liability remained with the charterer. However, the arbitrators apportioned liability as between owner and charterer 50/50 with respect to shortage claims on the basis of the Interclub Agreement.

20A.44 The owner and the charterer had been sued by the cargo receivers for condensation damage, shortages, and handling damage. Prior to trial, the cases were settled by the owner, who then demanded contributions from the charterer in accordance with the Inter-Club Agreement. The charterer declined the owner's demand, and the matter was submitted to arbitration. In holding the charterer liable to pay for 50 per cent of the condensation damage, the panel applied paragraph 2 of the Inter-Club Agreement. The panel found that the condensation damage at issue was not caused solely by bad stowage, nor was it the result merely of improper ventilation. Although the panel stated that it appeared insufficient ventilation was the major cause of the condensation and that one might conclude there was a greater degree of owner's faults, under the Inter-Club Agreement there is to be an equal sharing of the damages unless there is "clear evidence" that one party was "solely" at fault. Having found that the condensation damage was not solely the fault of either improper ventilation or bad stowage, the arbitrators ruled they were bound to divide damages equally as provided for in the Inter-Club Agreement. Other cases involving the Inter-Club Agreement include: *M/V Porer*, SMA 3680 (Arb. at NY 2001); *M/V Bjorn*, SMA 3559 (Arb. at NY 1999); *M.S. Caribbean Sun*, SMA 3545 (Arb. at NY 1999); and *M/V Sarah*, SMA 2671 (Arb. at NY 1990).

20A.45 In *The Adriana*, SMA 3795 (Arb. at N.Y. 2003), the panel concluded that the water damage sustained by a cargo of plywood had occurred during the ocean voyage, but it found that there was a lack of "decisive evidence" establishing that the damage was caused by seawater or the unseaworthiness of the ship. The panel accordingly permitted the charterer to recover 50 per cent of its claim settlement from the owner pursuant to the Inter-Club Agreement.

20A.46 In *The Mustafa Nevzat*, SMA 3820 (Arb. at N.Y. 2004), the panel considered the addition of Clause 8(d) to the 1996 revision to the Inter-Club Agreement which provides that "all other cargo claims whatsoever" will be apportioned 50/50 in the absence of clear and irrefutable evidence of fault. The panel concluded that Clause 8(d) encompassed claims asserted due to inherent vice or unsafety of the cargo. The panel ruled that damages should be divided 50/50 in the

absence of clear and irrefutable evidence of fault, even though the panel generally opined that the ship did not appear to have been responsible for the cargo damage.

Vouching-in

20A.47 "Vouching-in" is a common law procedure by which a defendant in a suit notifies a non-party that the suit is pending, tenders defense of the case to the non-party and notifies it that if it refuses to take over the defense and defendant is found liable, then defendant will look to the vouchee for indemnity. If the non-party declines the tender of defense, it is bound by the court's findings and is not permitted to relitigate matters decided in the underlying suit in the subsequent indemnity action. *Humble Oil & Refining Co*. v. *Philadelphia Ship Maintenance Co*., 444 F.2d 727, 735 n.14 (3d Cir. 1971). "Vouching-in" has been largely supplanted by impleader rules, and is generally not available if the third party can be impleaded in the underlying action. See, e.g., *Ferrostaal*, *Inc*. v. *Am. Comm'l Barge Lines*, *L.L.C*., 2002 AMC 986, 988–989 (N.D. Ill. 2002), and *Farrell Lines* v. *Nalfleet Bull & Roberts Inc*., 1995 U.S. Dist. Lexis 1091 (S.D.N.Y., January 31, 1995), citing *Atlantic Richfield Co*. v. *Interstate Oil Transp*. *Co*., 784 F.2d 106, 111 (2d Cir.), *cert*. *denied,* 479 U.S. 817 (1986). It remains an option in situations where personal jurisdiction or consent cannot be obtained or there are other limitations which make impleader unavailable.

20A.48 In *SCAC Transport* (*USA*) *Inc*. v. *The Danaos*, 845 F.2d 1157, 1163, 1988 AMC 1827 (2d Cir. 1988), the court held that "absent a particularized showing of prejudice, a stevedore may be vouched into an arbitration under a charter party [without its consent] by a charterer where the stevedore is the charterer's indemnitor." Further, the court held that the stevedore, who ignored the vouching-in notice, was bound by the arbitrators' findings that its negligence caused the accident for which the charterer was seeking indemnification in a later proceeding.

20A.49 See *Universal American Barge Corp*. v. *J-Chem*. *Inc*., 946 F.2d 1131, 1993 AMC 1888 (5th Cir. 1991), holding that an indemnitor was not bound by issues determined in a prior proceeding into which it was vouched because of a conflict of interest between indemnitee and indemnitor which prevented indemnitee from effectively representing indemnitor's interest; *Marathon Int'l Petroleum Supply Co*. v. *I.T.I. Shipping S.A*., 740 F.Supp. 984 (S.D.N.Y. 1990), where the court stated that issues determined in an arbitration would not be given preclusive effect in a subsequent action for indemnification against a non-party who failed to assume defense of the defendant in the arbitration, because the defendant's position that the non-party was solely liable to the plaintiff foreclosed the defendant from arguing that it adequately protected the non-party's interests in the arbitration; *Jamaica Commodity Trading* v. *Connell Rice & Sugar*, 766 F.Supp. 138 (S.D.N.Y. 1991), where the court in applying the "Danaos" test, found that the defendant, seller of commodities, was not bound by results of arbitration between the plaintiff and ocean carrier because the defendant was not the plaintiff's indemnitor and the plaintiff did not adequately represent the defendant's interests in the arbitration action.

20A.50 See also *The Vakis Tsakiroglou*, SMA 3567 (Arb. at N.Y. 1999), where the panel found that although a time charterer was within its rights when it vouched the shipowner into its arbitration with a sub-charterer due to an indemnity relationship, the time charterer had the burden to fully and fairly protect the owner's rights in that arbitration. The panel, therefore, granted the owner the right to present to the panel additional evidence not previously submitted to the London panel.

20A.51 In *The Aristidis*, 2001 AMC 1954, SMA 3686 (Arb. at N.Y. 2001), the panel majority ruled that a time charterer properly vouched its sub-voyage charterer into a London arbitration with the owner and that the voyage charterer was liable to indemnify it for damages awarded

to the owner. The case involved damages which London arbitrators found to have been caused by the sub-charterer's nomination of an unsafe berth. The arbitration award was upheld by the court on a challenge by the voyage charterer that it was in manifest disregard of the law. *Duferco International Steel Trading* v. *T. Klaverness Shipping A/S*, 184 F. Supp. 2d 271 (S.D.N.Y. 2001), *aff'd,* 333 F.3d 383 (2d Cir. 2003).

CHAPTER 21

Signing of Bills of Lading

[Clause 8 continued]

"78. . . . the Captain, who is to sign Bills of Lading for
79. cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

Owners' or charterers' bills?

21.1 There has been much litigation on the question of whether bills of lading issued under a time charter, particularly (but not only) where they are issued by the time charterers or their agents, are bills which are contractually binding on the owners or on the time charterers themselves. Two questions arise in such cases: first, the identity of the bill of lading carrier, as a matter of construction of the bill; and second, the authority of the party by whom the bill has been issued.

Identifying the carrier: owners or charterers

21.2 The House of Lords in *The Starsin* [2003] 1 Lloyd's Rep. 571 provided clarification of the approach that should be adopted in determining the first question, namely whether the bill of lading purports to evidence a contract of carriage with the owners, or with the charterers, as carrier. In *The Starsin*, summarised at paragraph 21.7, below, it was held by the House of Lords that an identification of the carrier on the face of a bill of lading, in particular in the manner of signature of the bill, is the dominant consideration in deciding whether the bill is an owners' or a charterers' bill. If there is a clear and unambiguous statement on the front of the bill of lading as to the identity of the contracting carrier, pre-printed terms and conditions to a contrary effect – particularly those on the reverse side of the bill – will be ignored. The earlier cases must now be read with this decision in mind.

Bills expressly identifying the carrier

21.3 The approach adopted in the authorities before *The Starsin*, below, was that the determination of the question whether a bill of lading was an owners' bill or a charterers' bill depended upon the construction of the bill of lading as a whole, considering not only the manner of signature and any identification of the contracting carrier on the face of the bill, but also all the terms and conditions of the bill of lading with particular reference to the presence or otherwise of any demise clause and/or identity of carrier clause. (A demise clause will typically provide that if the issuer of the bill is not the owner or demise charterer of the ship, the bill is a contract with the owner.) As a matter of legal principle this was an unexceptional approach, but commercially it is obviously unsatisfactory that a bill of lading holder should not be in a position to identify his contracting carrier easily and with certainty.

21.4 This problem was particularly acute in cases where the bill of lading referred to the charterers as "carrier", but without indicating that they were not (also) the owners of the ship. In the

two cases which follow, it was held that in such circumstances the charterers were the contracting carriers.

The owners of the *Samjohn Governor* fixed her on the Baltime form to charterers who in turn sub-time chartered her to a company who ran a regular liner service from Japan to South America. The sub-charterers' agents in Japan issued a bill of lading on the sub-charterers' usual liner form, the back of which was headed with the initials of the sub-charterers and another company with whom they operated a joint service, and contained an identity of carrier clause referring to whichever was the operator as "the carrier": there was no demise clause or other indication in it that the ship was on time charter. Under the printed words "signed by or on behalf of the Master", the agents had signed in ink; below their signature was printed first a horizontal line, then the initials of the sub-charterers and then the name of the agents, "general agents and as agents for the Master".

In the Admiralty Court, Sheen, J., held that the sub-charterers and not the owners were the party to the bill. He said that if there had been nothing in the bill other than the agents' signature to indicate who was the contracting party, he would have accepted that this was the owner, on the authority of *Tillmanns* v. *Knutsford*, below; but the contents of the bill clearly indicated that it was the sub-charterers alone who were contracting as carrier and it was they who were bound by the bill.

The Venezuela [1980] 1 Lloyd's Rep. 393.

21.5 In *The Hector* [1998] 2 Lloyd's Rep. 287, at page 295, Rix, J., commented that what he thought Sheen, J., was saying in *The Venezuela* was that "without the knowledge that the vessel was on charter, a third-party holder of the bill of lading, such as the shipper, only knew what he was told in the bill: he would therefore suppose that there was no conflict between a bill signed for the master and a bill under which [the sub-charterer] C.A.V.N. was the designated carrier. If, however, the bill had expressly stipulated that the Panamanian owners were the carriers, then that would or might have been different." The position was similar in *The Hector*. It was, Rix, J., considered, critical that there was nothing in the *Hector* bill of lading to say who the owners (and therefore the carriers) were, save for a clause stipulating that U.S. Express Lines were the carriers.

The *Hector* was time chartered on an amended New York Produce form to U.S. Express Lines and then sub-voyage chartered. A bill of lading was issued by the sub-voyage charterers on the Conline form which was headed in typescript "Carrier: U.S. Express Lines". The bill was signed by the voyage charterers' agents "For and on behalf of the Master" and contained an identity of carrier clause to the effect that the contract of carriage was between the merchant and the owner of the ship, but that if any other was adjudged to be the carrier, such other was entitled to all limitations and exonerations of liability under the bill. The bill contained no demise clause. U.S. Express Lines having got into financial difficulties, the court was asked to determine whether the owners were bound to deliver the cargo to destination.

It was held by Rix, J., that the statement on the face of the bill of lading that the time charterers were the carrier was unambiguous and overrode the *prima facie* rule that bills signed by or on behalf of the master are owners' bills.

The Hector [1998] 2 Lloyd's Rep. 287.

21.6 By contrast, it was held in *The Ines* [1995] 2 Lloyd's Rep. 144 and *The Flecha* [1999] 1 Lloyd's Rep. 612, that references in the bills of lading to the charterers by name did not unambiguously identify them as carriers. In both cases the bills of lading issued bore prominently the name under which the charterers operated their liner services and the bills were signed by agents for the "carrier", coupling "carrier" with the name of the charterers. But the attestation clauses and the other express terms of the bills (including identity of carrier clauses) were construed as overriding these indications. In *The Flecha*, the bill also contained a demise clause, which Moore-Bick, J., regarded as reinforcing his conclusion.

The time charterers of *The Ines* operated a liner service in the name of Maras Linja. Under the Baltime form charter, the charterers had implicit authority to sign bills of lading on behalf of the owners. Bills of lading were issued, bearing on both sides the name "Maras Linja" in large letters and attesting on their face that ". . . the Master or the Agent of the said vessel has signed the number of original Bills of Lading stated below. . ." In the signature box, after the printed words "signed for the carrier Maras Linja", the bills were

signed by Rotterdam agents "as agents only" these words being typed in. Clarke, J., said that was ambiguous. The bills also contained on their back an identity of carrier clause (referred to by the judge as a demise clause) stipulating that the contract was between the shipper and the owner of the ship.

Clarke, J., held that, given in particular the attestation clause and the identity of carrier clause, the better view, on the document as a whole, was that the bills were binding on the owners; the Rotterdam agents had signed as agents for Maras Linja who in turn were agents for the owners.

The Ines [1995] 2 Lloyd's Rep. 144.

The Ines was not expressly overruled in *The Starsin*, below, but, were it to be decided today, it cannot be certain it would go the same way, given the emphasis placed by their Lordships in *The Starsin* on considering the signature box and the fact that Clarke, J., himself, taking the signature box on its own, preferred the view that it meant that the Rotterdam agents signed "as agents for the carrier, namely Maras Linja". On any view, the bills in *The Ines* seem on the borderline between owners' and charterers' bills.

21.7 *The Flecha* was decided before but only reported after Rix, J.'s decision in *The Hector*, above, and was held by the House of Lords in *The Starsin* to have been wrongly decided. Rix, J.'s approach on this point in *The Hector* (and, dissenting, in the Court of Appeal in *The Starsin* itself) was approved. The House of Lords held that the identification of the carrier on the face of the bill of lading, in particular in the manner of signature of the bill, is the dominant consideration. If there is a clear and unambiguous statement on the face of the bill as to the identity of the contracting carrier, pre-printed terms and conditions to a contrary effect – particularly those on the reverse side of the bill – will be ignored. In so deciding, the House of Lords went a considerable way to making it easier for shippers, transferees and bankers to identify the party with whom they are contracting. But it is only if the statement as to the identity of the contracting carrier on the face of the bill is "clear and unambiguous" that the detailed terms on the reverse side of the bill can be ignored.

The *Starsin* was time chartered on the New York Produce form to Continental Pacific Shipping (CPS). Cargo was shipped under bills of lading issued on CPS's liner form, bearing prominently on their face CPS's name and logo. The bills which contemplated in the printed attestation clause that they would be signed by the master, were in fact signed by agents of CPS for the carrier and not for the master. The wording in the signature boxes on the face of the bills of lading differed slightly, but a typical example was a signature "As Agent for Continental Pacific Shipping (The Carrier)".

On the reverse side of the bills of lading was set out 35 conditions. Condition 1 defined "Carrier" to mean "the party on whose behalf this Bill of Lading has been signed". Conditions 33 and 35 at the end of the lists of conditions were an identity of carrier clause stipulating that the contract was between the merchant and the owners and a demise clause to the effect that if the ship was not owned by or chartered by demise to the company or line by whom the bill of lading was issued, "as may be the case notwithstanding anything that appears to the contrary", the bill should take effect as a contract with the owners.

It was held by Colman, J., and by Rix, L.J., in the Court of Appeal that the bills evidenced contracts with CPS and not with the owners. But a majority of the Court of Appeal held that the identity of carrier clause and the demise clause overrode the implications to be drawn from the signature of the bills on behalf of CPS as carrier, and that the bills were owners' bills.

Allowing an appeal against the majority decision of the Court of Appeal, the House of Lords held on this issue that:

(1) "Carrier" meant, and would mean to anyone in maritime trade, the party contracting to carry the goods.

(2) In identifying who was the contracting party, the approach must be to read the bill of lading as a reasonable shipper, transferee or banker would do.

(3) Such a person would expect to be able to identify the party he was contracting with by looking at the front of the bill of lading and particularly the manner of signature; he would not expect to have to resort to detailed conditions on the reverse side of the bill.

(4) Greater weight should be given to words specially chosen and inserted in the printed form than to pre-printed terms and conditions – especially those on the reverse side of the bill.

(5) In the present case, although the printed forms of bill of lading were obviously drafted as owners' bills, the words inserted in the signature boxes on the face of the bills were clear and unambiguous statements that CPS were the contracting carriers. In those circumstances there was no need to look to the conditions on the reverse side. The terms of the identity of carrier clause and demise clause were overridden by the clear identification of CPS as the contracting party on the front of the bills.

The Starsin [2000] 1 Lloyd's Rep. 85, [2001] 1 Lloyd's Rep. 437 (C.A.) and [2003] 1 Lloyd's Rep. 571 (H.L.).

21.8 All the members of the House of Lords in *The Starsin* were influenced by the ICC Uniform Customs and Practice for Documentary Credits ("the UCP"), which as a matter of standard banking practice are incorporated into documentary letters of credit. The current version of the code, UCP 500, provided that, if a credit calls for a bill of lading, banks will accept a document which:

"appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

– the carrier or a named agent for or on behalf of the carrier, or
– the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting."

The UCP made plain that banks will not examine terms and conditions on the back of the bill of lading and the ICC's Position Paper No. 4 reiterated that the name of the carrier must appear as such on the front of the bill and that banks would not examine the terms and conditions of carriage.

21.9 Although, as was pointed out, these provisions govern relations between issuing banks and beneficiaries, it was said by Lord Hoffmann that, "Since it is common general knowledge that banks almost invariably issue letters of credit on the terms of UCP 500, those terms will be part of the background available to the reasonable reader seeking to ascertain the meaning of the bill of lading. He will know that a bank, one of the potential addressees which anyone issuing a bill of lading must have in mind, would accept it as meaning that the person named on the front as the carrier was indeed the carrier. And the reasonable reader will not think that the bill of lading could have been intended to have one meaning to a bank and another to a consignee or assignee."

21.10 Where bills of lading, construed as required by *The Starsin*, do not identify the carrier, expressly and unambiguously, the considerations mentioned in paragraphs 21.11 to 21.14, below will inform the decision in any particular case whether the bills purport to be contracts with the owners or the charterers as carrier.

Bills signed by the master

21.11 Since a time charter does not amount to a demise of the ship, the contract evidenced by a bill of lading signed by the master himself is *prima facie* a contract made with the owners and not with the charterers: *Wehner* v. *Dene* [1905] 2 K.B. 92, *per* Channell, J., at page 98. The master has, under common law, an ordinary or general authority to sign bills of lading on behalf of the owners. Where he does sign the bills they will, save in exceptional circumstances, be binding on the owners: see *Tillmanns* v. *Knutsford* [1908] 2 K.B. 385 (C.A.), [1908] A.C. 406 (H.L.); *Wilston* v. *Andrew Weir* (1925) 22 Ll.L.Rep. 521; and *The Rewia* [1991] 2 Lloyd's Rep. 325 (C.A.). Moreover, the owners will be bound by a bill of lading issued within the general authority of a master even if, in any particular case, the owners have limited the master's authority, unless the bill of lading holder knew of the limitation.

The time charter for the *Boston City* contained the unusual provision that "In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers". The master signed bills of lading

which expressly incorporated all the conditions of the charter, but the endorsees of the bills of lading did not see the charter and were unaware of the provision in question.

It was held by the Court of Appeal that the bill of lading contracts were with the owners. Lopes, L.J., said: "The holders of the bill of lading, in the absence of [very clear and very explicit words], would naturally believe and imagine that the master when he signed the bill of lading was exercising the ordinary authority which attaches to him in his capacity of master."

Manchester Trust v. *Furness, Withy* [1895] 2 Q.B. 539 (C.A.).

21.12 It is, however, possible for the master's signature to bind the charterers; but only if the wording of the bill of lading and the surrounding circumstances make it quite clear that the master, in signing, was not exercising his general authority to bind the owners but was doing so only as agent for the charterers. In *Harrison* v. *Huddersfield Steamship* (1903) 19 T.L.R. 386 an agreement was made between the owners and the charterers that the master was to be the agent of the charterers and that he was to have no authority to enter into bill of lading contracts on behalf of the owners. The words "as Master" which were printed on the bill were struck out and the words "as agent for time charterers" were substituted in writing. It was held that the bill was not binding on the owners. *Samuel* v. *West Hartlepool Steam Navigation* (1906) 11 Com. Cas. 115 is another example. See also *Elder Dempster* v. *Paterson, Zochonis* [1924] A.C. 522 (H.L.) (a case concerning the bills of a well-known liner company signed by the master of one of their occasional chartered-in ships, summarised at paragraph 21.73, below).

Bills signed "for the master"

21.13 Bills of lading signed "for the master" by the charterers or their agents (or their sub-agents; see *The Berkshire*, below, and *LEP International* v. *Atlanttrafic Express Service* (1987) 10 N.S.W.L.R. 614) will usually be regarded as binding on the owners.

The *Wilston* was employed under a time charter which provided that bills of lading might be signed by the master on the orders of the charterers. Bills of lading were issued headed "Joint Service to River Plate. Andrew Weir & Co. Agents: Turner Morrison & Co. Ltd. . . .". Turner Morrison, who were the agents of the time charterers, Andrew Weir, signed the bills of lading. Andrew Weir paid claims under the bills of lading and sought an indemnity from the owners. The owners resisted on the ground that they and not the time charterers were the party to the bills of lading. There were references in the body of the bills of lading to "The Company" which might have referred to the time charterers, but there were also references to "master, owners or agents of the ship".

Roche, J., held that the bills of lading evidenced contracts with the owners and not with time charterers, because the bills were signed in print "for the master" and in writing "for captain A. Souter, master steamship *Wilston*, for Turner, Morrison & Co. Ltd", the time charterers' agents. The agents had signed for the captain.

Wilston v. *Andrew Weir* (1925) 22 Ll.L.Rep. 521.

The *Rewia* was chartered on the New York Produce Form which provided as usual by Clause 8 that the master was to sign bills of lading as presented. The charter further provided that "the Master will authorise Charterers, or their Agents, to sign Bills of Lading on his behalf . . .". Liner bills of lading were issued by sub-charterers bearing their name and the name of their managers. The bills were signed by agents "for the Master". The cargo owners, in a dispute over jurisdiction, argued that if bills were issued by charterers in liner form and the shippers did not know that the ship was on charter, then, in the absence of clear words to the contrary, bills signed on behalf of the master were binding on the charterers.

The Court of Appeal rejected the argument, holding that the bills evidenced contracts with the owners. Leggatt, L.J., said, at page 333: "the bills . . . which on their true construction were signed for the master by agents to whom he was empowered to give authority and must be taken to have done so, since he was required to sign them as presented."

The Rewia [1991] 2 Lloyd's Rep. 325 (C.A.).

Bills signed by the charterers or their agents on their own behalf

21.14 Where the charterers or their agents do not purport to sign the bills of lading for the master or the owners, but do so on their own behalf, it is likely to be held that the charterers are the only contracting party and that the bills do not bind the owners. The case which follows is just such a case. There, sub-charterers signed on their own behalf as principals rather than 'for the master', the carrying ship having been chartered in to supplement a regular liner service provided by their own ships.

A collision occurred between the *Ruggiero di Flores* and the *Okehampton* and the question arose in subsequent proceedings whether or not MacAndrews as sub-time charterers of the *Ruggiero di Flores* would have been entitled to the bill of lading freight for cargo on that ship. The cargo of fruit had been loaded at Spanish ports and had been in the possession of MacAndrews who ran a regular service from those ports with their own ships, the *Ruggiero di Flores* having been chartered in to supplement the service. MacAndrews signed the bills of lading without qualification and in their own name, giving two copies to the shippers and sending one to their own representative in Hamburg who was to take delivery from the ship and then hand the cargo over against presentation of the bills by the endorsees.

It was held by the Court of Appeal that the bills of lading evidenced contracts of carriage with MacAndrews and not with the owners. There was nothing in the bills or the surrounding circumstances to suggest that the sub-charterers signed as agents for the master or the owners. The form of the bills may have been an owners' form, but it was to be construed as if it referred to "chartered" ship and so on.

The Okehampton [1913] P. 173 (C.A.).

(See the remarks of Leggatt, L.J., on this case in *The Rewia* [1991] 2 Lloyd's Rep. 325, at page 332. See also *The Starsin* [2003] 1 Lloyd's Rep. 571 (H.L.), *per* Lord Bingham, at [12].)

May both owners and charterers be liable?

21.15 Where the contracting carrier is clearly identified on the front of the bill of lading, the guidance from the House of Lords in *The Starsin* is unequivocal. But it seems likely that there will still be instances where the identity of the contracting carrier does not appear clearly and unambiguously on the front of the bill of lading. The solution may lie in some cases in making both owners and charterers liable under the bill, where the charterers have actual or ostensible authority to bind the owners, but the bill, as issued, does not make it sufficiently clear on its face that either the charterers or the owners are the only contracting carrier. This question was indeed posed and discussed by Rix, L.J., in *The Starsin*, above, at page 451 of the Court of Appeal report, but not determined. In the House of Lords the point was argued but was rejected on the ground that the bills of lading in that case contemplated a single carrier only. It remains to be seen whether this line of argument will be pursued further.

Master's authority

21.16 As noted in paragraph 21.11, above, it is part of the ordinary authority of the master of a cargo ship to sign bills of lading on behalf of the owners (or demise charterers) by whom he is engaged to run the ship. Restrictions placed on that authority by the owners, not known to the holder of the bills, will not affect the holder, who may therefore sue on the master's signature as having bound the owners as ordinarily it would. It is beyond the scope of this book to attempt a comprehensive assessment of the limits of a master's ostensible authority. The cases are reviewed in detail in *Bills of Lading*, paragraphs 3.53 to 3.74.

21.17 A restriction on the master's actual authority may come from the terms of the time charter itself. In *Manchester Trust* v. *Furness, Withy*, above, the limit was upon the master's authority to bind the owners at all, which is perhaps an extreme and unusual case. However, a time charter will ordinarily impose implicit, if not explicit, limitations. For example, it follows from the

confinement of the charter to certain trading limits that the owners do not authorise signature of bills of lading for ports or cargoes outwith those limits (see paragraph 21.42, below). But the limits upon the master's authority imposed by a time charter, which will naturally be apparent to the time charterers, will not affect a holder of the bills of lading who is unaware of them.

"without prejudice to this charterparty"

21.18 The stipulation in Lines 78 and 79 of the New York Produce form that the captain is "to sign Bills of Lading for cargo as presented" is sometimes amended by the addition of the phrase "without prejudice to this [or the] charterparty". This phrase means that nothing in the bill of lading shall be taken as a variation of the terms of the charter; it does not have the effect of limiting the master's authority to sign bills of lading as presented: see paragraph 21.36, below.

Charterers' implied authority to sign for the master

21.19 The stipulation in Lines 78 and 79 of the New York Produce form that the captain is "to sign Bills of Lading for cargo as presented" coupled with the provision in Line 77 that he is to be under the orders and directions of the charterers as regards employment and agency, generally gives the charterers or their agents authority to sign bills of lading as agents for the master. Brandon, J., in *The Berkshire* [1974] 1 Lloyd's Rep. 185, at page 188, said: "The effect of such a clause [Clause 8 of the New York Produce form] in a charter-party is well settled. In the first place, the clause entitles the charterers to present to the master for signature by him on behalf of the shipowners bills of lading which contain or evidence contracts between the shippers of goods and the shipowners, provided always that such bills of lading do not contain extraordinary terms or terms manifestly inconsistent with the charter-party; and the master is obliged, on presentation to him of such bills of lading, to sign them on the shipowners' behalf. In the second place, the charterers may, instead of presenting such bills of lading to the master for signature by him on behalf of the shipowners, sign them themselves on the same behalf. In either case, whether the master signs on the directions of the charterers, or the charterers short-circuit the matter and sign themselves, the signature binds the shipowners as principals to the contract contained in or evidenced by the bills of lading. Authority for the propositions set out above is to be found in *Tillmanns & Co*. v. *S.S. Knutsford* [1908] 2 K.B. 385, [1908] A.C. 406." (On "extraordinary" or "manifestly inconsistent" terms, see further paragraphs 21.39 to 21.41, below.)

21.20 In *The Berkshire* the master had in fact given express authority to the charterers' agents to sign the bills of lading. Where there is such actual authority from the owners or the master, either by a special charter clause to that effect or by agreement after the charter is signed, then there is no doubt that the charterers or their agents may bind the owners. But in the passage set out above, Brandon, J., was not relying on the express authority given by the master and it appears that the authority will normally be implied from the usual terms of a time charter.

The *Knutsford* was time chartered to Watts, Watts & Co. of London. Cargo for Vladivostock was loaded, during the currency of the charter, at Middlesbrough and London. Three bills of lading were signed by the master personally, dated 12 October. A fourth bill (presumably for the London cargo) dated 26 October was signed by Watts, Watts & Co. "For the Captain and Owners". The charter provided that the captain was to be "under the orders and direction of the charterers as regards employment, agency, or other arrangements" and that the charterers were to "indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents".

The owners argued that they were not bound by the bill signed by the charterers, but it was held by Channell, J., the Court of Appeal (Vaughan Williams, L.J., doubting) and unanimously by the House of Lords that the owners were as much bound by the bill signed by the charterers as they were by those signed by the master personally. Kennedy, L.J., said in the Court of Appeal [1908] 2 K.B. 385, at page 406: "It does not lie

in the mouth of the [owners] to deny the authority of the signature as one made on behalf of the owners and captain, because they have themselves by the contract agreed that the captain shall act as the charterers shall direct, and therefore a signature which the charterers have made as on behalf of the owners and captain must, I think, be treated, when they are sued by the shippers who put their goods on board, as a signature which they cannot repudiate, because they gave the charterers, in the express terms of their contract, the right of directing the signature to the document to be made, and must be taken impliedly to have given, both as against the captain and against themselves, an authority to the charterers to sign on behalf of either or both of them."

Tillmanns v. *Knutsford* [1908] A.C. 406 (H.L.).

21.21 Although there is some suggestion in the above case that the master may have tacitly approved the signature of the bill of lading on his behalf (see the speech of Lord Loreburn, L.C., [1908] A.C. 406, at page 408), nevertheless the clear reason for the decision is that authority was to be implied from the terms of the charter.

Baltime form

21.22 Under Clause 9 of the Baltime form, there is no provision that the master is to sign bills of lading as presented, but it is stipulated that the master is to be under the orders of the charterers as regards employment and agency and that the charterers are to indemnify the owners against the consequences of the master or agents signing bills of lading. This has been held to give the time charterers implied authority to sign bills of lading on behalf of the owners: *The Ines* [1995] 2 Lloyd's Rep. 144, *per* Clarke, J., at page 149. So the position under the Baltime form is the same as it is under the New York Produce form. See also the judgment of Clarke, J., in *LEP International* v. *Atlanttrafic Express Service* (1987) 10 N.S.W.L.R. 614.

Tanker charters

21.23 In some tanker time charters the position regarding the signature of bills of lading is spelt out specifically. Thus, Clause 20(a) of the ExxonMobil Time 2005 form provides: "Bills of Lading shall be signed by the Master as presented. . . However, at Charterer's option, Charterer or its Agents may sign Bills of Lading on behalf of the Master . . .".

NYPE 93

21.24 Clause 30(a) of the 1993 revision of the New York Produce form, having stated that the "Master shall sign the bills of lading or waybills", continues: "However, the Charterers may sign bills of lading or waybills on behalf of the Master, with the Owner's prior written authority, always in conformity with mates or tally clerk's receipts" (see Lines 308 to 310). The express requirement of prior written authority may be taken to indicate that in the absence thereof no such authority will be implied.

Sub-charterers' implied authority to sign for the master

21.25 Authority for sub-charterers or their agents to sign bills of lading on behalf of the master may also be implied from a head time charter in similar terms, particularly where the charter contains an express option to sub-let.

The *Vikfrost* was time chartered by the owners to Salen on terms that bills of lading issued for voyages under the charter might be signed by the charterers' agents on the master's behalf and might contain the demise clause in the Salen bill of lading or a similar demise clause. The Salen demise clause provided that if the ship

was not owned by or chartered by demise to the company or line issuing the bill of lading, the bill should take effect as a contract with the owner or demise charterer as principal. The charter also contained an employment and indemnity clause and the master was to sign bills of lading as presented.

Under an option to sub-let, Salen sub-chartered to Lauritzen. Sub-agents of Lauritzen signed bills of lading on Lauritzen's headed bill of lading form on behalf of the master. These bills contained a demise clause in terms similar to the Salen demise clause.

It was held by Mocatta, J., and the Court of Appeal that the sub-charterer's agents had implied authority to sign bills of lading so as to bind the owners. The head charter imposed no restrictions on clauses to be inserted in bills of lading and gave liberty to include a demise clause. It expressly authorised sub-letting and the owners must have contemplated that sub-charterers would be entitled, under a sub-charter, to require the master to sign bills of lading or to sign bills on his behalf.

The Vikfrost [1980] 1 Lloyd's Rep. 560 (C.A.).

(On the inclusion of an English jurisdiction clause in the bills of lading, see paragraph 21.60, below.)

Charterers' apparent or ostensible authority to bind the owners

21.26 Owners who time charter their ships and put them on the charterers' berths without taking positive steps to indicate the contrary may well be taken to have held out the charterers and their agents as having authority to make bill of lading contracts on their behalf. The charterers and their agents would thus have apparent or ostensible authority to bind the owners irrespective of any actual authority.

The *Nea Tyhi* was chartered for a trip on the New York Produce form. An additional clause gave the owners an express indemnity from the charterers in respect of liabilities arising from the charterers or their agents, including the master, signing bills of lading.

The ship loaded on deck a consignment of plywood which there suffered damage by rainwater. The bills of lading were issued by the charterers' agents and signed by them for the master; they contained the typewritten words "shipped under deck". The owners contended that they had no liability to the receivers of the plywood under these bills as the charterers' agents had no authority to issue or sign them in that form.

Sheen, J., held that, although the charterers' agents had no actual authority to issue and sign "under deck" bills for cargo on deck, they did have ostensible authority and accordingly the owners were bound by the bills.

The Nea Tyhi [1982] 1 Lloyd's Rep. 606.

21.27 In *The Starsin* [2000] 1 Lloyd's Rep. 85, at page 97, Colman J., at first instance, in dealing with the alternative hypothesis that the bills of lading were owners' bills, expressed his agreement with Sheen, J.'s decision in *The Nea Tyhi*, above, and with the decision of the same judge in *The Saudi Crown* [1986] 1 Lloyd's Rep. 261. Colman, J., considered that a contrary opinion expressed by Rix, J., in *The Hector* [1998] 2 Lloyd's Rep. 287, at page 298, was not supported by authority and was wrong. In *Alimport* v. *Soubert Shipping* [2000] 2 Lloyd's Rep. 447, Timothy Walker, J., concurred with Colman, J., and it is suggested that indeed Colman, J., not (on this point) Rix, J., accurately stated the law.

21.28 *The Nea Tyhi*, above, illustrates one problem that may arise from the charterers or their agents signing bills rather than presenting them to the master for his signature, namely that they may sign bills which the master could or even should have refused to sign. To take another example, they may sign a bill for a port outside the trading limits in the charter. No doubt this will be beyond any actual authority (express or implied) which they may have from the owners. But if, as may well be the case, they have apparent or ostensible authority through being held out by the owners as empowered generally to sign bills for them, the bill of lading will bind the owners to a shipper or holder of the bill of lading who has no notice of the lack of actual authority. Where the charterers have so bound the owners, and loss results, the owners are likely to be entitled to an indemnity: see paragraphs 21.61 *et seq*. below.

21.29 In short, a time charterers' ostensible authority will ordinarily be co-extensive with the master's, as to which see paragraph 21.16, above.

Owners' bills

Right to freight

21.30 Contracts which are made with the owners are not entered into by the master and owners as agents for the time charterers, although they are entered into for the time charterers' benefit. It follows that it is the owners rather than the time charterers who are entitled to collect the bill of lading freight under such contracts, although they will be bound to account for it to the charterers, after deduction of any hire outstanding under the charter: for further comment, see paragraphs 30.67 *et seq*.

As presented

21.31 Clause 8 of the New York Produce form states that the master is to sign bills of lading "as presented", that is to say presented to him by the charterers or their agents for him to sign. That has a wide effect under a time charter, although it does not mean that the charterers are entitled to have the master sign any bill of lading, no matter what it says about the cargo and no matter what its terms of carriage (which will govern the relationship between the shipowners and the holder of the bills). But the circumstances in which the master of a ship under time charter may refuse to sign bills of lading, and the consequences of the master signing bills of lading which he might be entitled to refuse to sign, have not yet been comprehensively defined by the courts.

21.32 A right to have the master sign bills of lading "as presented" is also commonly found in voyage charters and the old leading cases on the meaning and limits of that right concern voyage charters (*Jones* v. *Hough* (1879) L.R. 5 Ex. D. 115 (C.A.); *Hansen* v. *Harrold* [1894] 1 Q.B. 612 (C.A.); *Kruger* v. *Moel Tryvan* [1907] 1 K.B. 809 (C.A.), [1907] A.C. 272 (H.L.)). They established that in general terms voyage charterers enjoying that right were entitled to decide for themselves the form and contents of the bills of lading to be issued in respect of cargo shipped under the voyage charter. That was, of course, subject to any express provision in the charter. For example, the charter might expressly require a certain form of bill of lading (as in, for example, *Dawson Line* v. "*Adler*" (1931) 41 Ll.L.Rep. 75; *The Garbis* [1982] 2 Lloyd's Rep. 283; and *The Paros* [1987] 2 Lloyd's Rep. 269) or certain bill of lading terms (as in, for example, *The Garbis* and *The Paros*, above, and *The C Joyce* [1986] 2 Lloyd's Rep. 285). Those old authorities also held, however, that voyage charterers could not insist upon the issue of bills of lading on terms that were inconsistent with the voyage charter and that bills of lading imposing on the owners more onerous responsibilities for the cargo than would apply under the charter were inconsistent with the voyage charter. This was because, absent express contrary provision (such as in *The C Joyce*, above), the owners were to be taken to have agreed to bear under bills of lading only such responsibility for the cargo as was imposed, between themselves and the voyage charterers, by the charter. (Even on that basis, the converse is that if the bill of lading terms do not involve any inconsistency with the charter, the master is not entitled to insist upon the insertion of additional wording to make explicit some particular matter of concern to him: see *The Anwar Al Sabar* [1980] 2 Lloyd's Rep. 261).

21.33 Whether or not the old authorities are still determinative for voyage charters, the question arises whether, in a time charter, the obligation to sign "as presented" is limited to an obligation to sign bills imposing a liability regime consistent with that of the charter. In *Turner* v. *Haji Goolam* [1904] A.C. 826, the Privy Council considered that the master of a ship under time charter, obliged

to sign bills of lading "without prejudice to" the charter, was not bound to embody, in the bills, terms inconsistent with the charter. On the other hand, in *The Nanfri* [1979] 1 Lloyd's Rep. 201 (and see paragraphs 21.58 and 30.35), a case in which owners of ships chartered on the Baltime form instructed their masters to refuse to sign bills of lading marked "freight prepaid" and to insist that all bills be claused so as to incorporate the terms of the time charters, Lord Wilberforce said, at page 206: ". . . the present charters are time charters, the nature and purpose of which is to enable the charterers to use the ships during the period of the charters for trading in whatever manner they think fit. The issue of bills of lading in a particular form may be vital for the charterers' trade, and indeed in relation to this trade, which involves c.i.f. or c. & f. contracts, the issue of freight pre-paid bills of lading is essential if the trade is to be maintained. Furthermore, cl. 9, as is usual in time charters, contains an indemnity clause against all consequences or liabilities arising from the master signing bills of lading. This underlines the power of the charterers, in the course of exploiting the ship, to decide what bills of lading are appropriate for their trade and to instruct the masters to issue such bills, the owners being protected by the indemnity clause." It may not be entirely clear, however, whether Lord Wilberforce considered that time charterers were entitled to require the master to sign bills of lading on such terms as to create inconsistency between the bills and the time charter. For he decided (at page 206) that "freight pre-paid" bills, to which the owners had objected in *The Nanfri*, did not create any inconsistency with the terms of the charter. Meanwhile, Neill, J., in *The Caroline P* [1984] 2 Lloyd's Rep. 446, at page 475, seems to have assumed or concluded that it is a breach under the New York Produce form for the charterers to present for signature bills of lading placing on the ship responsibility for cargo operations for which, under Clause 8, the charterers have assumed responsibility.

21.34 However, in *The Island Archon* [1994] 2 Lloyd's Rep. 227, paragraph 19.16, above, the Court of Appeal proceeded on the basis that time charterers are in general entitled to require bills of lading to be issued that impose on the owners liability greater than is accepted by them under the cargo responsibility provisions of the time charter, but are then obliged to indemnify the owners against the consequences of doing so. In that case, under a time charter on the New York Produce form concluded in early 1979, the time charterers' order, in 1980, to carry cargo to and discharge it at Basrah, Iraq, exposed the owners to what the arbitrator called an "Iraqi system", prevalent at the time of the order, of ship detention and financial loss in respect of spurious cargo claims. Evans, L.J., with whom Mann, L.J., agreed, said at page 230 that, "If the claim had been presented on the basis that the bills of lading, which required the shipowners to deliver the cargo in Basrah, had exposed them to a liability towards the cargo receivers which the charter-party did not require them to bear, then the claim would have largely have been governed by cll.8 and 45 of the charter-party [the latter an express authority to sign bills of lading for the master], and by a substantial number of authorities in similar bill of lading cases. . . . In such circumstances I would have little difficulty in holding that there was an implied term [obliging the charterers to indemnify the owners against the consequences of the charterers' order to issue bills of lading requiring delivery at Basrah]." In so saying, Evans, L.J., did not address the question whether the charterers were entitled to insist that the master sign bills of lading exposing the owners "to a liability towards the cargo receivers which the charter-party did not require them to bear" and the tenor of that formulation might suggest that they were not. However, at pages 232 to 233, Evans, L.J., regarded the case "where the charter-party permits the charterer to present and requires the master to sign a bill of lading whose terms and conditions of carriage differ from those found in the charter-party itself" as the norm in time charters, and held that an implied indemnity arose. At page 238, Sir Donald Nicholls, V.C., with whom Mann, L.J., also agreed, seems also to have considered that time charterers were generally entitled to insist on bills of lading being issued that imposed upon the owners more onerous terms than those of the time charter. For he gave that situation as an example of a case

where the charterers would be obliged to indemnify the owners, if loss resulted, although "there is no question of the charterer's direction being given in breach of contract".

21.35 The position under a time charter seems to be, therefore, that the agreement that the master will sign bills of lading 'as presented' generally entitles the charterers to require signature of bills of lading imposing on the owners greater liability than would arise under the cargo responsibility provisions of the time charter, but carries with it a right of indemnity against the consequences of signing such bills. The courts have considered in respect of a variety of particular features of bills of lading whether their presence means that the charterers are not entitled to insist that the master sign and/or that the owners are entitled to an indemnity against loss resulting from those features, see paragraphs 21.37 to 21.60, below.

Without prejudice to the charterparty

21.36 Some time charters stipulate expressly that bills of lading are to be signed "without prejudice to the charterparty". These words neither enlarge nor diminish the obligation of the master to sign bills of lading "as presented" to him by the charterers; they merely confirm that the contract between the owners and the charterers contained in the charter remains unaffected by the signature of bills of lading in (possibly) different terms: see *Hansen* v. *Harrold* [1894] 1 Q.B. 612; *Turner* v. *Haji Goolam* [1904] A.C. 826; and *The Nanfri* [1979] 1 Lloyd's Rep. 201, at page 206. *Voyage Charters*, paragraph 18.203 expresses the view that a provision for bills of lading to be signed "without prejudice to the charter" entitles voyage charterers to present and have the master sign bills of lading imposing inconsistent terms, citing *The Berkshire* and *The Vikfrost*, below, but neither of those cases involved such a provision. At most (so far as material), *The Vikfrost* is authority for the obvious proposition that where there is an express indemnity provision (in relation to bills of lading signed under a time charter) it may be clear from its language that the charterers were to be entitled to have the master sign such bills. As to *The Berkshire*, see paragraph 21.41, below.

Bill imposing on the owners greater liabilities than imposed by the charter

21.37 This is considered above (paragraphs 21.32 to 21.35). *The Island Archon* has confirmed that under Clause 8 of the New York Produce form, the charterers are generally entitled to require the master to sign bills of lading imposing greater liabilities than are undertaken by the owners under the time charter.

21.38 Even were that not the position, the master would not be expected to examine the bill of lading terms in detail, or with the expert eye of a shipping lawyer, to check for consistency. He is generally entitled to take it that bills of lading presented to him by or on behalf of the charterers conform to the charter. Moreover, even if he happens to identify some discrepancy, or possible discrepancy, the severe and immediate commercial consequences of refusing to sign will very often lead him, quite reasonably, not to refuse (see again, as to that, what Hobhouse, J., said in *The Kanchenjunga*, quoted in paragraph 10.60, above, and also paragraphs 5.15 and 5.16, above). The issue of the master's entitlement not to sign will therefore arise, at all events directly, only in the very rare case where the master identifies some problem with the terms of the bills of lading proffered to him sufficiently serious, in his or his owners' judgement, to warrant provoking a dispute with the charterers about it with the ship at the loading port waiting to depart.

"Extraordinary" terms or terms "manifestly inconsistent" with the charter

21.39 It has been said that a master is not obliged to sign bills of lading which contain "extraordinary" terms or terms which are "manifestly inconsistent" with the charter. In *Kruger* v. *Moel Tryvan* [1907] A.C. 272, Lord Halsbury said, at page 282: "When it is said that the master must sign any bill of lading submitted to him, I cannot agree. If the bill of lading tendered is manifestly inconsistent with the charterparty, I think it would be his duty to refuse. . .". The *ratio* of *Kruger* v. *Moel Tryvan* is that the voyage charterers had no right to require a bill of lading that was inconsistent with the charter in the sense referred to in paragraph 21.32 above, and it has already been suggested that is not the law for time charters (paragraphs 21.33 to 21.35, above). However, even if, as under a voyage charter, the master were *entitled* not to sign, the view that he is *duty-bound* to the charterers not to sign up to a "manifest inconsistency" is very difficult (see paragraph 21.38, above). Under a time charter, it is suggested, there is no place at all for such a doctrine.

21.40 Lord Dunedin, in *Tillmanns* v. *Knutsford* [1908] A.C. 406, at page 410, spoke of stipulations of an 'extraordinary character' in the following passage: "Had the bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners." The facts of *Tillmans* v. *Knutsford* are set out at paragraph 21.20 above. The issue was whether a bill signed for the master bound the owners. Lord Dunedin's reference to "extraordinary terms", in that context, was (it is suggested) to terms so unusual or extreme that a shipper could not suppose that the master should have consented to them, that is, (in modern terminology) bill of lading terms beyond even the ostensible authority of the master himself. Such a bill could no more bind the owners if signed by the charterers on his behalf. That does not touch directly the question whether time charterers are entitled to require signature of bills of lading the terms of which are in that sense "extraordinary". It is suggested that they are not so entitled, as their discretion to decide the terms upon which bills of lading are to be issued does not extend beyond reasonable terms usual for the carriage in question. Once again, however, it does not follow that the master owes any duty to the charterers not to sign. He is not lightly to be regarded as acting unreasonably where he complies with an order of the charterers that he might have declined to obey (see paragraph 21.38, above).

21.41 In *The Berkshire* [1974] 1 Lloyd's Rep. 185, at page 188, Brandon, J., said (*obiter*) that *Tillmans* and *Kruger* had established that time charterers are entitled to the master's signature unless (only) the bill of lading contains "extraordinary terms or terms manifestly inconsistent with the charter-party". As regards "extraordinary terms", Brandon, J.'s proposition seems correct, although *Tillmans* is not in fact authority for it. As regards "manifestly inconsistent" terms, *Kruger* is in fact authority against Brandon, J.'s proposition for voyage charters, where the master's right to refuse to sign is not limited to "manifest" inconsistency, and no authority for time charters where the master is often obliged to sign notwithstanding inconsistency, manifest or otherwise. It would be better, it is suggested, not to attempt to define compendiously by a single label or shorthand the situations in which under a time charter the master may refuse to sign. Brandon, J.'s *dictum* was referred to without disapproval by Browne, L.J., *obiter*, in *The Vikfrost* at [1980] 1 Lloyd's Rep. 567. Mustill, J., referred to it, again *obiter* but this time with express approval, in *The Anwar Al Sabar* [1980] 2 Lloyd's Rep. 264; but later, as Mustill, L.J., he said in *The Nogar Marin* at [1988] 1 Lloyd's Rep. 421 that "The cases. . . show that. . . the charterer's right to issue bills to suit his own convenience must be constrained by the need not to make the terms of the new contract which he thus imposes on the shipowner more burdensome than those which the owner originally contracted to assume in exchange for the freight". Finally, Brandon, J.'s *dictum* in *The Berkshire* was referred to by Robert Goff, J., in *The Garbis* [1982] 2 Lloyd's Rep. 283, at page 287, where the judge noted

that it was a matter of "some controversy" whether charterers were entitled to require the master to sign up to more onerous terms.

Bill for destination outside charter limits

21.42 The master has the right to refuse to sign a bill of lading which names a port of discharge outside the charter trading limits. MacKinnon, L.J., said in *Halcyon Steamship* v. *Continental Grain* (1943) 75 Ll.L.Rep. 80: "The limits of trading. . . are Institute Warranty limits, not north of Holland. If the charterers shipped a cargo in America and then tendered bills of lading to the captain under which he was to deliver to Copenhagen or Danzig, of course he would rightly refuse to sign. . ." If the master nonetheless signs, that may make it impermissible, or at least impossible in practice, for the owners to refuse thereafter to allow the ship to complete the bill of lading carriage. But that should not generally prevent the owners from being entitled to claim damages or an indemnity from the charterers if breaching the charter trading limits results in loss, damage or liability.

Bill not incorporating a clause required by the charter

21.43 The master will be entitled to refuse to sign bills of lading presented to him for signature which do not incorporate particular terms which the time charter requires (expressly or by necessary implication) to be incorporated in bills of lading issued under it; for example, if clauses required by Clause 24 of the New York Produce form are not included in bills issued under a charter on that form. In *The Danah* [1993] 1 Lloyd's Rep. 351, the charter provided expressly that any deck cargo was to be carried "at Shipper's risk with responsibility for loss or damage howsoever caused". Saville, J., held that it was the charterers' obligation to ensure that the rights and obligations of the shippers under any bills of lading were as stated in that clause. Any claim by the charterers (who, by agreement with the owners, had dealt in the first instance with claims by cargo interests and Dutch authorities) to pass on, to the owners, liability to cargo interests that would not have existed if the charterers had complied with that obligation, was bound to fail. It is suggested, equally, that the master would have been entitled not to sign bills of lading that did not regulate the owners' and shippers' rights and obligations consistently with the deck cargo clause.

21.44 But the master generally may not refuse to sign bills of lading because they do not incorporate other terms of the time charter, such as the lien clause, or the terms of the time charter generally. In *The Nanfri* [1979] 1 Lloyd's Rep. 201, Lord Wilberforce said, at page 206: "It must be clear that the owners cannot require bills of lading to be claused so as to incorporate the terms of the time charter: such a requirement would be contrary to the whole commercial purpose of the charterers" (and see also *The Anwar Al Sabar*, paragraph 21.32, above). Despite Lord Wilberforce's reference to countermanding the commercial purpose of the charterers, it is suggested that the position would be different, i.e. the master would be entitled to refuse to sign, if the time charter provided expressly that bills of lading under it were to be so claused but bills presented for signature failed to comply with that requirement.

Bill misrepresenting the condition of the cargo

21.45 The master has the right, and the duty, not to sign bills which acknowledge the receipt in apparent good order and condition of cargo which is not in apparent good order and condition. This duty is generally a duty towards his owners and transferees for value of the bills of lading: it is not normally a contractual duty owed to the charterers (see *The Arctic Trader* [1996] 2 Lloyd's Rep. 449). The master must 'clause' the bills if the condition of the goods as presented for loading,

so far as it is reasonably apparent to him, falls short of the way they are described in the bills. See generally, *Bills of Lading*, paragraphs 3.75 to 3.95. The description the master must decide whether to accept or 'clause' will be that given in the bills as finally presented to him for signature, after any discussion there may have been as to the appropriate words to use. See the judgment of Aikens, J., in *The Sea Success* [2005] 2 Lloyd's Rep. 692.

21.46 It follows from the fact that the master has a duty to inspect the cargo and to ensure that the bills of lading reflect its apparent condition on shipment that normally there will be no implied indemnity in favour of the owners if the charterers present clean bills for damaged cargo which, upon reasonable inspection, would be seen to be damaged and the bills are signed by the master or the owners' agents without qualification.

The *Nogar Marin* was chartered for a voyage on the Gencon form. On completion of loading a cargo of iron rods in coils, a clean mate's receipt was tendered by or on behalf of the charterers which was signed by the master. In fact some of the coils were rusty and the master, who had inspected the cargo before loading, was negligent in signing without adding a reference to the rust. Subsequently the ship's agents, on the strength of the clean mate's receipt, signed clean bills of lading on the master's behalf. The owners consequently incurred liability to the receivers of the cargo under the bills of lading.

On a claim by the owners for damages or an indemnity from the charterers it was held by the Court of Appeal, affirming the decision of Staughton, J., and the arbitrators, that the claim failed. The Court of Appeal's reasoning, which differed from that of Staughton, J., was that:

(1) the charterers were not in breach of any implied term of the charter; no term was to be implied that the charterers or their agents must tender a mate's receipt or bills of lading accurately describing the apparent condition of the cargo, since responsibility for properly inspecting the cargo and recording its apparent condition in these documents remains with the master;

(2) in any event, even if the charterers had been in breach of some implied obligation, the master's negligent failure to check the condition of the cargo properly and then to qualify the mate's receipt to ensure that bills of lading signed for him by the ship's agents would be claused, was the effective cause of the owners' liability to the receivers; it was not strictly an intervening cause breaking any chain of causation, since it preceded any breach in presenting inaccurate bills of lading for signature, but on the arbitrators' findings it was to be regarded as the predominant cause; and

(3) no indemnity was to be implied in favour of the owners; the master's duty to verify the apparent condition of the cargo before signing bills of lading was so well known in the trade that the charterers' tender to him of clean bills could not be understood as an implied request that they be signed clean in exchange for an indemnity against consequent claims.

The Nogar Marin [1988] 1 Lloyd's Rep. 412 (C.A.).

21.47 Although, in *The Nogar Marin*, above, the owners lost the right to an indemnity because the master's negligence in causing clean bills of lading to be issued was held to be the proximate cause of the owners' loss, the master may be justified in signing clean bills, and the owners may then be entitled to an indemnity, if there is a genuine dispute as to the condition of the cargo or if the only apparent defects are trivial, and the charterers insist on clean bills.

Agents for the owners of the *Titania* signed clean bills of lading acknowledging shipment in apparent good order and condition of cargo which was in fact shipped in patently defective barrels. The clean bills of lading were issued against letters of indemnity from the shippers. Having paid claims by the consignees of the cargo, the owners sought to recover under a letter of indemnity.

It was held by the Court of Appeal that the letter of indemnity was unenforceable against the shippers since the owners, through their agents, were a party with the shippers to a fraud. The bill of lading, containing a false representation, had been issued with knowledge that those into whose hands the bill might come (whether receivers or bankers) would rely upon the representation.

The court recognised, however, that the issue of clean bills against letters of indemnity might be proper in certain limited circumstances, as where there was a bona fide dispute as to the condition or packing of the cargo or where the defects were trivial.

Brown, Jenkinson v. *Percy Dalton* [1957] 2 Lloyd's Rep. 1 (C.A.).

21.48 Moreover, the master is not required to act in this regard as if he were an expert surveyor. His duty is confined to noting the apparent condition of the cargo with the diligence of a reasonably careful master. In *The David Agmashenbeli* [2003] 1 Lloyd's Rep. 92, Colman, J., held that he discharged this duty, under Article III, rule 3, of the Hague-Visby Rules, by making up his mind "whether in all the circumstances the cargo, in so far as he can see it in the course and circumstances of loading, appears to satisfy the description of its apparent order and condition in the bills of lading tendered for signature"; if he "honestly takes the view that it is not or not all in apparent good order and condition and that is a view that could properly be held by a reasonably observant master, then, even if not all or even most such masters would necessarily agree with him, he is entitled to qualify to that effect the statement in the bill of lading", in which case he can and should qualify the description, in the bill as tendered to him, by wording "which reflects reasonably closely the actual apparent order and condition of the cargo and the extent of any defective condition which he, as a reasonably observant master, considers it to have"; see page 105. The judge doubted whether *obiter* comments in the Court of Appeal in *The Arctic Trader*, below, were correct if they suggested that the master was under any higher duty.

In conformity with Mate's or Tally Clerk's receipts

21.49 The function of a mate's receipt under a charter such as the New York Produce form, apart from being a non-negotiable receipt for the goods, is to delimit the authority which the master, or where relevant the charterers, have to issue bills of lading. Although the master is authorised to sign bills of lading "as presented" and the charterers may be authorised to sign on behalf of the master, in both cases the bills must be in accordance with the mate's (or tally clerks', who are independent third parties) receipts: see *per* Evans, L.J., in *The Arctic Trader* [1996] 2 Lloyd's Rep. 449 (C.A.), at page 458. Earlier in his judgment Evans, L.J., explained that: ". . . the master or chief officer, when he is asked for signed mate's receipts, is under a duty to his employer, the shipowner, to record the apparent condition accurately, so that if he fails to do so he is in breach of that term of his employment. Similarly, since the mate's receipt will or may be used as the basis for the bill of lading, which will give rise to a separate contract in the hands of third parties, he may perhaps also owe a similar duty to those third parties. It is established law that any representation which is made in the bill of lading can give rise to claims in tort as well as under the bill of lading by third parties, and so in this sense also it may be said that he is under an actual or potential duty (depending on whether the mate's receipt is the basis on which the bill of lading is issued, as it usually is) not to make an inaccurate statement in it."

21.50 Nevertheless, no term is normally to be implied in a charter on the New York Produce form that the master or chief officer is under a duty to the charterers to clause mate's receipts if the cargo shipped is not in good order and condition. There is no room for the implication of a term imposing a duty on the master to tell the charterers what they already know or are deemed to know and whether the time charterers themselves are the shippers, or whether the shippers are independent third parties, the charterers must know or be deemed to know (since the shippers are to be regarded as agents of the charterers for this purpose) the apparent condition of the cargo.

The *Arctic Trader*, which was chartered on the New York Produce form, loaded a cargo of crude salt at Alexandria. The salt was contaminated and this was apparent on loading. The charter provided as usual by Clause 8 that the master was to sign bills of lading in accordance with mate's receipts and an additional Clause 46 authorised the charterers or their agents to sign bills on the master's behalf, but again in accordance with mate's receipts. The master was persuaded to issue clean mate's receipts and the bills of lading were likewise signed clean by the charterers' agents. As a result, the ship encountered problems when she came to discharge

the cargo at Lagos and the charterers suffered losses which they sought to recover from the owners, alleging a breach of an implied term that the master was under a duty to the charterers to clause mate's receipts for cargo not in apparent good order and condition on shipment.

It was held by Tuckey, J., and the Court of Appeal, reversing the decision of arbitrators, that no such term could be implied, because the charterers' own knowledge or deemed knowledge of the condition of the cargo made it unnecessary to do so.

The Arctic Trader [1996] 2 Lloyd's Rep. 449 (C.A.).

21.51 Conversely, however, the owners are likely to be in breach of contract if the master, or chief officer, refuses to sign clean mate's receipts for cargo loaded in apparent good order and condition. Evans, L.J., giving the judgment of the Court of Appeal in the above case, said, at page 459 of the report: "Suppose, for example, that the cargo loaded was in apparent good order and condition, and the charterers or their agents were authorised by the master to sign bills of lading on his behalf. Their authority to do so is limited by reference to the mate's receipt (*cf.* cl. 46) and there are good commercial reasons why the bills should be signed and issued promptly after shipment. If the master refused to sign a mate's receipt, or wrongly insisted on clausing it after having a reasonable time, if necessary, to take advice (*cf. The Boukadoura* [1989] 1 Lloyd's Rep. 393), or delayed unreasonably before doing so, then it could well be argued that the shipowners were thereby in breach of an implied term of the charterparty and liable to the charterers for any consequent loss."

Bill bearing an incorrect date

21.52 In *The Almak* [1985] 1 Lloyd's Rep. 557 Mustill, J., expressed the firm view that a master would not be bound to sign a bill of lading bearing an incorrect date. He continued, at page 561: "He would always be entitled to refuse if he noticed the discrepancy. If he did notice it and nevertheless chose to sign, it might be that the shipowner would lose his right of indemnity, on the grounds that: – (i) the decision to sign incorrect bills with knowledge of the true facts broke the causal connection between the request to sign and the subsequent loss, or (ii) the act of signing was 'manifestly unlawful in itself', so as to take the case outside the implied right of 'indemnity at common law'." See also *The Nogar Marin*, above.

Bill misstating the quantity or nature of the cargo shipped

21.53 There is an implied requirement that a bill should relate to goods actually shipped and that it should not contain a description of the goods which is known to be incorrect: see *The Boukadoura*, below; see also *The Almak* and *The Nogar Marin*, above.

The *Boukadoura* was voyage chartered on the STB Voy form. Clause 20(*a*) of the charter (which is in similar terms to what is now Clause 20(a) of the ExxonMobil Time 2005 form) provided that "Bills of lading shall be signed by the Master as presented. . . and the Charterer shall indemnify the Owner against all consequences. . . which may arise from. . . an irregularity in papers supplied by the Charterer or its Agents". The charterers presented bills for a certain quantity of oil which the master maintained (correctly as it turned out) was greater than the quantity actually shipped. The master wished to qualify his signature to the bill, but the charterers refused to accept this and the ship was delayed while the cargo was remeasured.

It was held by Evans, J., that the master was entitled to refuse to sign an unqualified bill, that the inaccuracy in the bill as to quantity loaded was an "irregularity" within the meaning of Clause 20(a) and that the owners could recover from the charterers the losses incurred as a result of the delay.

The Boukadoura [1989] 1 Lloyd's Rep. 393.

Bill wrongly stating cargo to be under deck

21.54 The master is entitled not to sign bills which state that cargo has been loaded under deck when he knows this to be untrue: see, by analogy, *The Almak* [1985] 1 Lloyd's Rep. 557, at page 561. (See also *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606, summarised at paragraph 21.26, above.)

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21.55 Clause 30(c) of the 1993 revision of the New York Produce form provides "Bills of lading covering deck cargo shall be claused: 'Shipped on deck at Charterers', Shippers' and Receivers' risk, expense and responsibility, without liability on the part of the Vessel, or her Owners for any loss, damage, expense or delay howsoever caused'": see Lines 315 to 317.

Bill containing a demise clause

21.56 It was argued in *The Berkshire* [1974] 1 Lloyd's Rep. 185 that a demise clause in a bill of lading was an "extraordinary clause", so that the charterers could not lawfully tender a bill of lading containing such a clause to the master for signature and, therefore, could not bind the owners by signing such a bill of lading themselves. Brandon, J., said: "I must confess that I do not understand this argument. All the demise clause does is to spell out in unequivocal terms that the bill of lading is intended to be a shipowners' bill of lading. The charter-party entitles the charterers to present to the master for signature by him on the shipowners' behalf, or to sign themselves on the same behalf, bills of lading of that kind. How then can it be said that the demise clause is. . . an extraordinary clause? In my view, so far from being an extraordinary clause, it is an entirely usual and ordinary one."

21.57 In *The Vikfrost* (see paragraphs 21.25 above, and 21.60 below) it was held that agents of sub-time charterers of a ship had implied authority to issue bills of lading containing a demise clause, where the head time charter gave the head charterers an option to sub-let and permitted the issue of bills of lading with a demise clause in similar form. See also *The Jalamohan* [1988] 1 Lloyd's Rep. 443.

"Freight prepaid" bills

21.58 The master may not refuse to sign "freight prepaid" bills of lading, nor require a lien clause in the charter to be incorporated into the bills where the lien clause requires the owners to have a lien, to secure sums due under the charter, upon cargoes and sub-freights belonging to the time charterers and "any bill of lading freight" (or similar).

The *Nanfri* and two other ships were fixed to the same charterers under similar charters on the Baltime form. The charterers made certain deductions from hire which the owners contended the charterers were not entitled to make. Despite the owners' protest and a reference of the dispute to arbitration the charterers made a further deduction. The owners thereupon instructed the masters of all three ships: (a) to withdraw all authority to issue or sign bills of lading on their behalf; (b) to refuse to sign "freight prepaid" bills of lading presented to them; and (c) to insist that all bills of lading be endorsed with a clause incorporating the terms of the time charter, including the lien clause. The charterers were using the ships in the Great Lakes grain trade and in that trade it was usual for bills to be marked "freight prepaid", without reference to the terms of any time charter. The owners argued, however, that they were entitled to instruct their masters to refuse to sign any bill of lading which might prejudice the owners' right under Clause 18 of the then current version of the Baltime form to lien "all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter".

It was held by the House of Lords, affirming the Court of Appeal and (on this point) Kerr, J., that under the employment clause in the charter (Clause 9) the charterers could require the masters to sign "freight prepaid" bills without any mention of the terms of the time charters; the lien clause gave the owners a lien only (so far as relevant) upon "such freights or sub-freights as, in the event, come to be payable, and which in fact are payable, under any sub-charter or bill of lading", *per* Lord Wilberforce at page 206; freight pre-paid bills of lading were not inconsistent with that.

The Nanfri [1979] 1 Lloyd's Rep. 201 (H.L.).

(And see also paragraphs 21.33 above and 30.80 below.)

21.59 As regards creating liens, the position is different, it is suggested, if the lien clause in the time charter requires a lien to be granted over cargoes not owned by the charterers, as is the position under the New York Produce form, see paragraph 30.15, below. In other words, the master would be entitled not to sign bills the terms of which did not reserve such a lien to the owners. It might be added that it is particularly important, in this example, that the master is entitled not to sign (rather than that he must sign, leaving the owners to a remedy in damages or under an express or implied indemnity), since the entire point of the lien is to provide a measure of security against any lack of creditworthiness of the charterers.

Bill containing a foreign jurisdiction clause

21.60 The fact that the charter contains a jurisdiction clause requiring disputes under the charter to be referred to arbitration in one country will not entitle the master to refuse to sign bills of lading containing a jurisdiction clause requiring disputes to be referred to arbitration in, or to the courts of, a different country. Such bills will not be inconsistent with the charter and the charterers or their agents will normally have implied authority to issue bills containing such a clause.

The *Vikfrost* was let under a head time charter which provided that disputes under the charter were to be decided in Oslo by arbitration in accordance with Norwegian law. The ship was then sub-let under a sub-charter which contained a London arbitration clause. Agents of the sub-charterers issued and signed, on the master's behalf, bills of lading which provided that the bills should be governed by English law and that disputes under them should be referred to the High Court in England to the exclusion of the jurisdiction of the courts of any other country. The issue for decision was whether the owners were bound by the English jurisdiction clause in the bills.

It was held by the Court of Appeal that the sub-charterers' agents had power to issue and sign such bills of lading. Browne, L.J., said, at page 568: ". . . there is no inconsistency between the jurisdiction clause in the charter-party and the jurisdiction clause in the bill of lading. The charter-party provided for disputes between the owners and the charterers under the charter to be referred to arbitration in Oslo. This is not inconsistent with the provisions of the bill of lading that disputes under a different contract between different parties – the owners and the bill of lading holders – are to be decided by the High Court here."

The Vikfrost [1980] 1 Lloyd's Rep. 560.

(For a fuller report of this case, see paragraph 21.25, above. See also *The Paros* [1987] 2 Lloyd's Rep. 269.)

The result would have been the same, although the analysis would have been different, if the time charter had specified that bills of lading were to contain a clause referring bill of lading disputes to Oslo arbitration. The master could then have refused to sign; but it would have been within the time charterers' and therefore the sub-charterers' ostensible authority to commit the owners to the English jurisdiction clause.

Owners' remedies

21.61 The question next arises what valid claim, if any, the owners of a ship under time charter have against the charterers where the form or terms of bills of lading signed "as presented", or issued on behalf of the owners by the charterers or sub-charterers, result in loss to the owners. The

typical case is where, by their form or terms, the bills of lading render the owners liable to cargo receivers, as holders of the bills, in circumstances where under the cargo responsibility provisions of the time charter the owners would not have been liable to the time charterers.

Breach of contract

21.62 It is a breach of contract for the charterers to require the master to sign a bill on terms which infringe any requirements of the charter in respect of bills of lading issued under it. Those requirements may be express, such as the requirement of Clause 24 of the New York Produce form to include a U.S.A. Clause Paramount there set out, or implied. As regards the latter, it is suggested that it is not generally to be implied in a time charter that bills of lading will not impose upon the owners more onerous responsibility for the cargo than they have undertaken by the time charter (see paragraphs 21.32 to 21.38, above). It is therefore, generally, not a breach of contract under a time charter to present for signature bills of lading imposing on the owners a greater liability than they have agreed to accept under the charter, for example because the bill does not include an exception against a particular peril which is excepted under the charter.

Implied indemnity

21.63 The other ground relied on in such cases, on its own or in the alternative, is that an inconsistency between charter and bill gives rise to an implied right of indemnity. Bingham, J., in *The C. Joyce* [1986] 2 Lloyd's Rep. 285, at page 290, expressed the view – which was endorsed by the Court of Appeal in *The Nogar Marin* [1988] 1 Lloyd's Rep. 412, *per* Mustill, L.J., at page 420 – that crucial to both bases for liability "was the finding of disparity between the bills which the charterers were under the charter-party entitled to present and the bills which they did present". Bingham, J., continued: "From this finding the conclusion naturally follows, and it matters little whether the owners claim damages for breach of contract, of which an indemnity will be the measure, or an indemnity arising from the loss they have suffered from complying with the charterers' request to do something which they were not obliged to do under the charter-party." In *The Caroline P* [1984] 2 Lloyd's Rep. 466 (see paragraph 21.71, below), Neill, J., at 475 held that where an implied indemnity arose, the owners could invoke it whether or not they would also have had a claim for damages for breach of contract. That, of course, begs the question whether it is necessary to imply a right of indemnity in the first place, which was conceded in *The Caroline P*.

21.64 Notwithstanding Staughton, J.'s contrary view in *The Nogar Marin* at first instance (see [1987] 1 Lloyd's Rep. 456, at pages 459 to 460), it is suggested that there is no need to imply a right of indemnity in respect of the presentation of a bill of lading inconsistent with the requirements of the charter. Except where a claim for breach would be time barred, but not a claim for indemnity, it may be academic whether that is correct, although it might be added that the availability of a more generous limitation period does not render it necessary to imply an indemnity.

21.65 That leaves, however, the question whether owners can claim in respect of loss caused by the issue of a bill of lading that the charterers *were* entitled to require the master to sign. No question of breach can arise in such a case. As noted above (paragraph 21.63), in voyage charter cases it was conventionally seen as crucial to any claim by the owners that they demonstrate a disparity between the bills presented and bills the charterers were entitled to present. So Hobhouse, J., noted in *The Paros* [1987] 2 Lloyd's Rep. 269, at page 273: "The starting point of any complaint giving rise to a claim for damages for breach of contract of an implied right of indemnity is the bill of lading which the charterers or their agents present to the master for his signature. If it is a

contractual and proper bill of lading then there is no cause for complaint and therefore no ground for claiming damages for breach of contract or an indemnity. To decide whether there is a cause for complaint one has to look at the bill of lading and see whether it is a proper one."

21.66 However, for time charter cases the Court of Appeal in *The Island Archon* held that a right to indemnity *does* arise where "the charter-party permits the charterer to present and to require the master to sign a bill of lading whose terms and conditions of carriage differ from those found in the charter-party itself" and/or where "far from the charterers being in breach by reason of presenting for signature a bill of lading containing different terms and conditions of carriage from the charter-party, the master would place the shipowners in breach of contract if he refused to sign, assuming only that the bill is accurate as to the apparent condition of the cargo loaded and is not in terms which can be said to be outside the scope of any which were contemplated by the charter-party", *per* Evans, L.J., at pages 232 and 233, or where "loss [arises] directly from a bill of lading which the charterer was entitled to require the master to sign but which imposed on the shipowner a different liability from that marked out, as between shipowner and charterer, by the charter-party itself", *per* Sir Donald Nicholls, V.C., at page 238.

21.67 The implied indemnity recognised in *The Island Archon* arises, it is suggested, from the time charterers' freedom to choose the bill of lading terms. If the time charter mandates that particular bill of lading terms be used, no unilateral choice is involved and, it is suggested, there is no obligation to indemnify the owners in respect of liabilities arising under those terms. So, for example, if a time charter did not itself incorporate the Hague Rules but required bills of lading issued under it to do so, there would be no obligation to indemnify the owners in respect of liability incurred to bill of lading holders under the Hague Rules where the circumstances fell within some wider exception clause in the time charter.

Express indemnity

21.68 Where the time charter contains an express indemnity (as in the Baltime form, Lines 123 to 127), the effect will depend on the precise language used, but, in general, an express indemnity is likely to include an indemnity against any imposition by the bill of lading of greater liability than under the charter.

The time charter of *The Port Victor* contained exceptions against the negligence of master and crew. It also provided that the master should "sign bills of lading at any rate of freight the charterers or their agents may choose, without prejudice to the stipulations of this charterparty, and the charterers hereby agree to indemnify the owners from any consequences that may arise from the captain following the charterers' instructions and signing bills of lading". Bills of lading which contained no exception from negligence were presented and signed by the master and in consequence the owners were unable to recover general average contributions from cargo following a collision caused by the negligence of the master. It was held by the Court of Appeal that the owners were entitled to an indemnity from the charterers in respect of the loss suffered through not being able to recover general average contributions.

Milburn v. *Jamaica Fruit* [1900] 2 Q.B. 540 (C.A.).

(See also *The Nanfri* [1979] 1 Lloyd's Rep. 201 and *The Vikfrost* [1980] 1 Lloyd's Rep. 560, *per* Browne, L.J., at page 567.)

21.69 Where that is so, the further question could arise whether the presence of such an express indemnity implies an entitlement in the charterers to have the master sign such bills; or whether the purpose of the indemnity is merely to make it explicit that if such bills come to be issued, the charterers must bear the consequences, in recognition that such bills might in fact be presented even though they should not be. That has not been raised squarely in the authorities, but *The Nogar Marin*, above, may perhaps suggest it is the former for the express indemnity under the Baltime form.

NYPE 93

21.70 Clause 30(b) of the 1993 revision of the New York Produce form reads, "All bills of lading or waybills shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading or waybills signed by the Charterers or by the Master at their request": see Lines 311 to 314. It is suggested, on that language, that the charterers are not entitled to have the master sign bills of lading inconsistent with the charter, but rather Clause 30(b) is only a recognition of what may happen in fact (compare paragraph 21.69, above). It is also suggested that the inclusion of an express indemnity, limited to cases of inconsistency, makes it impossible to imply under NYPE 93 an indemnity against the consequences of signing bills of lading that are consistent with the time charter.

Time when claim for indemnity arises

21.71 For limitation purposes, it is important to know when time starts to run on a claim for indemnity. If the claim is under a general indemnity against consequences, time starts to run only upon the ascertainment of the liability by court judgment or otherwise. If the claim is under a specific indemnity against incurring liability, time will run from the time the liability is incurred. The implied indemnity under the New York Produce form, if there is one, is a general indemnity against consequences. In the case of an express indemnity, the type of indemnity given (general or specific) will be a question of construction of the language used. It is suggested the express indemnity under the NYPE 93 form (paragraph 21.70, above) and that under the Baltime form are, or include, general indemnities.

The *Caroline P* was chartered on the New York Produce form, Clause 8 being amended to make the charterers responsible for discharge as well as loading and stowage. Bills of lading were presented, and signed on behalf of the master, which made the owners responsible for these operations to their endorsees. The owners were held liable in proceedings before the Iraqi courts, at the suit of the endorsees, for loss and damage to cargo caused in these operations. The question arose whether, on a claim by the owners against the charterers for an indemnity, time ran from the discharge of the cargo, when the liability was first incurred, or from the date of the first judgment of the Iraqi court, when the liability was first ascertained. It was common ground between the parties that in the circumstances some indemnity in favour of the owners was to be implied under the charter.

It was held by Neill, J., that the indemnity to be implied was against the consequences of the master signing the bills of lading and that such an indemnity, being a general indemnity, did not become enforceable until the liability had been ascertained by the first judgment of the Iraqi court.

The Caroline P [1984] 2 Lloyd's Rep. 446.

(For the express indemnity under Clause 9 of the Baltime form, see paragraphs 19.11 to 19.14.)

Charterers' bills

21.72 Charterers' bills are, self-evidently, contracts of carriage between the holder and the charterers as carrier. Any contractual claim on the bill of lading should therefore be brought by cargo interests against the charterers. The cargo interests may well, however, claim also (or only) against the owners, as bailees or sub-bailees, or for negligence, especially because of the availability of proceedings against the ship to enforce such claims even if brought after the time charter has ended (assuming she is still in the same ownership).

21.73 The fact that the time charterers, not the owners, are the bill of lading carriers will not necessarily mean that the bill of lading terms will be inapplicable as between the shipowners and the cargo owners if such a claim is indeed made.

The *Grelwen*, owned by Griffiths Lewis, was chartered in by the Elder, Dempster Line to supplement their own ships on the West African trade. Bills of lading were issued for palm oil bearing the names "African Steamship Company and the British and African Steam Navigation Company. Managers, Elder Dempster & Company" and were signed by the master "P. Bedford, Agent". The casks of palm oil were crushed by bags of palm kernels stowed over them. The bills protected the carrier against liability for bad stowage, but not against liability for unseaworthiness. The owners of the goods (Paterson, Zochonis) sued the owners, the time charterers and the two companies they managed.

Rowlatt, J., held, (1922) 12 Ll.L.Rep. 69, that the contract was not with the owners but with the African Steamship Company and this part of his decision was not challenged on appeal.

The House of Lords held, reversing Rowlatt, J., and the Court of Appeal, that the damage to the goods was attributable to bad stowage rather than unseaworthiness and that both the African Steamship Company and the owners of the ship were entitled to rely upon the exceptions in the bill of lading. The owners were so entitled despite not being parties to the contract.

Elder, Dempster v. *Paterson*, *Zochonis* [1924] A.C. 522 (H.L.).

It will be noted that the master had signed the bills of lading upon which the cargo owners sued. The correctness of the decision that the owners were entitled to rely upon the exceptions in those bills of lading, given that the master had signed as agent for the time charterers and the owners were not a contracting party under them, was subsequently much discussed. It was held by the House of Lords in *Midland Silicones* v. *Scruttons* [1961] 2 Lloyd's Rep. 365 that the decision could be supported only on the ground that, the master having signed the bill of lading, it must be inferred that the owners received the goods as bailees on the terms of the bill: see *Morris* v. *Martin* [1965] 2 Lloyd's Rep. 63 (C.A.); *The Eurymedon* [1974] 1 Lloyd's Rep. 534 (C.A.); and *The New York Star* [1980] 2 Lloyd's Rep. 317 (P.C.).

Bailment on terms

21.74 More commonly, the owners may issue bills of lading to the charterers, or to sub-charterers in the chain, who then issue their own bills of lading to, or which pass to, the cargo interests who sue the owners. The owners may then wish to rely upon the terms of the bills of lading they issued, to which they, but not the cargo interests, are party, in defence to the cargo interests' claim. The leading authority for that case is the decision of the Privy Council in *The Pioneer Container* [1994] 2 A.C. 324 (*sub nom*. *The K. H. Enterprise* [1994] 1 Lloyd's Rep. 593). It was held that where goods were shipped under bills of lading issued by the original contracting carriers giving them authority to sub-contract the whole or any part of the carriage "on any terms", the owners of the goods were bound by the terms of other bills of lading issued by the actual carriers as sub-bailees, even though they were not parties to those bills. An exclusive jurisdiction clause relied upon by the actual carriers was not so unreasonable or unusual as to be regarded as falling outside the wide authority given by the owners of the goods to the original contracting carriers. The authority to sub-contract was express in that case, but it may be implied or ostensible: see page 602 of the Lloyd's Report. See also Bell [1995] LMCLQ 177.

'Himalaya' clauses

21.75 Conversely, the owners may seek to rely on exclusion clauses or other terms in the charterers' (or sub-charterers') bills, to which the cargo interest claimants are party, but they (the owners) are not, in defence of the cargo interests' claim. Outside the unusual circumstances of *Elder*, *Dempster* v. *Paterson*, *Zochonis*, above, the courts have enabled owners to do so through the contractual device of the 'Himalaya' clause, a provision of a bill of lading by which the contracting carrier purports to contract, on behalf of those (such as the owners and stevedores) by whom the

carriers' obligations under the bill are in fact carried out, that they are to have the benefit of some or all of the bill of lading terms. The effectiveness of this device at common law was confirmed by *The Eurymedon* and *The New York Star*, above. If the bill of lading is governed by English law, the Contracts (Rights of Third Parties) Act 1999 will now typically give effect to a Himalaya clause. The owners will normally be within a class of persons identified in the clause as intended to benefit from it, so as to satisfy Section 1(3) of the Act. A third party's right to avail himself of the benefit of an exclusion or limitation clause is identified as an enforcement of the contract to which the Act entitles the third party; see Section 1(6). The Act applies to bills of lading, sea waybills and ship's delivery orders, but only as regards taking advantage of exclusion or limitation clauses, see Section 6(5) to 6(7).

21.76 What benefits the owners will enjoy under an effective Himalaya clause are determined by the clause itself. Thus, in *The Mahkutai* [1996] 2 Lloyd's Rep. 1, it was held by the Privy Council that head owners, who had time chartered their ship, could not rely on a jurisdiction clause in a bill of lading issued to cargo interests by the charterers, which also contained a Himalaya clause, as the jurisdiction clause did not fall within the scope of the Himalaya clause from which the owners claimed to benefit (contrast the position under a sub-bailment on terms, paragraph 21.74, above). In *The Starsin* [2004] 1 A.C. 715 (H.L.), one of the questions that arose was whether the owners were entitled to take the benefit of an exemption from liability for negligence in a Himalaya clause contained in bills of lading issued under a time charter. As the House of Lords held, the bills in question were charterers' bills (see paragraph 21.7, above, where this aspect of the case is dealt with). The goods in respect of which the bills were issued were delivered by the ship damaged, mainly due to negligent stowage. The goods owners claimed that if the shipowners were not liable under the bills of lading in contract, they were liable in tort. The House of Lords held on this issue (Lord Steyn dissenting) that the shipowners did in principle have a liability in tort and that they were not protected by the exemption provision. As owners of the ship and actual carriers of the goods, they were "independent contractors" within the meaning of the Himalaya clause, but the exemption provision was invalidated by Article III, rule 8 of the Hague Rules, to which the bills were expressly made subject. The scope of Article III, rule 8, was perhaps stretched somewhat by their Lordships in order to reach that result, but their decision is of course definitive.

Inter-Club Agreement

21.77 Where the time charter incorporates the Inter-Club Agreement, or provides that cargo claims are to be settled, as between the owners and the charterers, in accordance with that Agreement, it is suggested that will not defeat a claim, for damages or indemnity, in respect of the consequences of the charterers having issued or procured the master to issue bills of lading inconsistent with the requirements of the charter (although comments by Morison, J., *obiter*, in *The Elpa* [2001] 2 Lloyd's Rep. 596 cast some doubt on that in relation to the 1984 Inter-Club Agreement). (See generally paragraphs 20.63 to 20.65, above.)

U.S. Law

Mate's receipts

21A.1 A mate's receipt, which is usually issued by the chief mate after the cargo has been loaded, serves to acknowledge receipt of the goods on board, thus shifting responsibility for their care and custody to the carrier. See *Continental Grain Co*. v. *American Commercial Barge Line Co*., 332 F.2d 26 (7th Cir. 1964); *E.T. Barwick Mills Inc*. v. *Hellenic Lines Ltd*., 331 F. Supp. 161 (S.D.Ga. 1971), *aff'd*, 472 F.2d 1406 (5th Cir. 1973).

See cases below which discuss the consequences of the issuance of bills of lading that are at variance from mate's receipts.

Bills of lading

21A.2 A bill of lading may serve multiple functions with respect to the carriage of goods by sea, including (*a*) document of title, (*b*) receipt for the goods, and (*c*) contract of carriage. Where cargo is owned by the charterer, the charter operates as the contract of affreightment and the bill of lading will serve only as a document of title and a receipt. *The Fri*, 154 F. 333 (2d Cir. 1907). Where the cargo owner is a third party, however, the bill also operates as evidence of the contract of carriage.

Signing of bills of lading

21A.3 Under the general maritime law, the master has authority to issue and sign bills of lading on behalf of the owner. This basic principle was stated by the Supreme Court in *The Schooner Freeman*, 59 U.S. 182 (1856):

> We are of the opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts.

21A.4 The master's authority to sign bills of lading derives from his right to bind the owner in matters relating to the employment and business of the ship. *Pope* v. *Nickerson*, F. Cas. No. 11, 273 (C.C.D.Mass. 1844). See generally *The Flash*, F. Cas. No. 4, 857 (S.D.N.Y. 1847); *The Aurora*, 14 U.S. (Wheat. 1) 96 (1816); *Bulkley* v. *Naumkeag Steam Cotton Co*., 65 U.S. 386 (1860); *Instituto Cubano de Est. Del Azucar* v. *The Golden West*, 246 F.2d 802, 1957 AMC 1481 (2d Cir. 1957), *cert. denied*, 355 U.S. 844 (1957); *Gans S.S. Line* v. *Wilhelmsen*, 275 F. 254, 262 (2d Cir. 1921), *cert. denied sub nom, Barber & Co*. v. *Wilhelmsen*, 257 U.S. 655 (1921).

21A.5 Absent unusual express instructions, however, the master's authority is not unlimited. He is, for example, not authorized to bind the owner to a fraud by wilfully signing false bills of lading. *The Schooner Freeman*, above; *Pope* v. *Nickerson*, above. As the court noted in *The Schooner Freeman*, above, the party taking a bill of lading issued and signed by a ship's master "assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading." As in the case of any party acting on the basis of another's apparent authority, the party receiving a bill of lading from the master is under a duty to ascertain the facts upon which his authority depends. See *Yeramex Int'l* v. *The Tendo*, 595 F.2d 943, 944, 1979 AMC 1282, 1283 (4th Cir. 1979); *The Senicoli Sierra*, SMA 2966 (Arb. at N.Y. 1993).

Bills signed by the master personally

21A.6 Bills of lading signed by the master on behalf of the owner will, of course, evidence a contract between the latter and the holder of the bill. As stated in *Aljassim* v. *The South Star*, 323 F. Supp. 918, 922, 1971 AMC 1703, 1707 (S.D.N.Y. 1971):

> The contract evidenced by the bill of lading issued by the master of the ship chartered but not demised is the contract of the ship, the charterer who caused their issue, and that of the owner whose master as authorized agent issued them.

21A.7 See also *Gans S.S. Line* v. *Wilhelmsen*, 275 F. 254, 262–263 (2d Cir. 1921), *cert. denied sub nom*, *Barber & Co.* v. *Wilhelmsen*, 257 U.S. 655 (1921).

Bills signed by the charterer or his agents

21A.8 A charterer may be liable as a carrier of goods under bills of lading issued on its behalf. *Mente & Co.* v. *Isthmian S.S. Co.* (*The Quarrington Court*), 36 F. Supp. 278, 1940 AMC 1546 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266, 1941 AMC 1234 (2d. Cir 1941). See also *Glynwed Steels Ltd.* v. *Great Lakes and European Lines Inc.*, 1979 AMC 1290 (N.D. Ill. 1978).

21A.9 The shipowner is not personally liable on bills of lading issued by a charterer and not signed by the master, however, where the owner's name does not appear thereon. See *United Nations Children's Fund* v. *The Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1965); *Tube Products of India* v. *The Rio Grande*, 334 F. Supp. 1039, 1971 AMC 1629 (S.D.N.Y 1971). Even a bill of lading signed by the charterer "for the master" is a charterer's bill of lading on which the owner will not be personally liable, *unless* the master or owner actually authorized the signature by the charterer, or clothed the charterer with the apparent authority to bind the owner to the bill of lading as a contracting party. *Yeramex Int'l* v. *The Tendo*, above; see *Demsey & Associates* v. *The Sea Star*, 461 F.2d 1009 (2d Cir. 1972); *Ross Industries Inc.* v. *The Gretke Oldendorff*, 483 F. Supp. 195, 1980 AMC 1397 (E.D. Tex. 1980); *Excel Shipping Corp.* v. *Seatrain Int'l*, 584 F. Supp. 734, 1986 AMC 1587 (E.D.N.Y. 1984); *Pacific Employers Ins. Co.* v. *The Gloria*, 767 F.2d 229 (5th Cir. 1985); *Commercial Metals* v. *The Luckyman*, 1994 AMC 673 (E.D. Pa. 1993).

21A.10 The New York Produce form expressly grants the charterer the right to issue bills of lading and requires that the master sign them "as presented." Under American law, in signing bills presented by the charterer the master may do so strictly as agent for the charterer, rather than as agent of the owner as was traditionally the case under the general maritime law. Thus, the master's signature on the charterer's bill of lading cannot only bind the charterer, but in certain circumstances may be binding solely on the charterer.

21A.11 In *Yeramex Int'l* v. *The Tendo*, above, it was held that the owner was not liable *in personam* as a contracting party where the charterer had no actual authority to bind the owner to the bill of lading and no apparent authority existed to bind the owner because neither the handling of the cargo nor the terms of the bill of lading could reasonably have misled the shipper or other third parties to believe that the owner was a party to the charterer's bill of lading which was issued "for the master."

21A.12 The court based its ruling on the concept discussed above at paragraphs 20A.14 *et seq*. of the master "wearing two hats" in performance of his duties under the charter. Compare *Thyssen Steel Co.* v. *M/V Kavo Yerokas*, 50 F.3d 1349 (5th Cir. 1995), holding that the charter authorized the charterer to bind owner to its bills of lading, but remanding for a trial on whether the master in fact gave charterer permission to sign the bills on his behalf, and *Pacific Employers Ins. Co.* v.

M/V Gloria, 767 F.2d 229 (5th Cir. 1985), holding that owner was bound by the charterer's bills of lading.

21A.13 In *Centennial Insurance Co*. v. *Constellation Enterprise*, 1987 AMC 1155 (S.D.N.Y. 1986), the court dismissed a cargo damage claim against the shipowner on the grounds that the owner was not a "carrier" under the bill of lading. The bill of lading was printed on a form prepared by charterer which expressly provided that the contracting carrier under the bill was the charterer. Although the bill stated that the charterer acted as agent "for the master" in issuing it, there was no evidence that the charterer had authority to bind the owner of the ship as a carrier. Accord, *Sail America* v. *The Prosperity*, 778 F. Supp. 1282, 1992 AMC 1617 (S.D.N.Y. 1991).

21A.14 Similarly, in *Mahroos* v. *The Tatiana L*, 1988 AMC 757 (S.D.N.Y. 1986), it was held that the shipowner was not a carrier subject to *in personam* liability under the bill of lading issued by charterer where the charterer issued bills that were entirely inconsistent with the mate's receipts for the goods. Whereas the mate's receipts indicated that much of the cargo was damaged prior to loading, the bills of lading did not note that the cargo was damaged prior to loading and stated that the cargo was "loaded clean on board." Although the charter included a special clause which specifically stated that the charterer was authorized to issue bills of lading on owner's behalf, that clause restricted this authority to bills issued "according to the mate's receipts." The court held that charterer was without authority to sign the bills on behalf of the owner in the manner that they did and that the owner, therefore, was not a carrier suable under the United States Carriage of Goods By Sea Act (COGSA). Accord, *Tuscaloosa Steel Corp*. v. *The Naimo*, 1993 AMC 622 (S.D.N.Y. 1992).

21A.15 In *The Tulsa*, SMA 2794 (Arb. at N.Y. 1991), the panel held the charterer responsible for improperly stowed and lashed cargo which washed overboard. The charterer was required to indemnify the owner for all cargo claims because it breached the charter by issuing clean bills of lading which were not in conformity with mate's receipts. The bills of lading (*a*) did not incorporate notations contained in the mate's receipts which described the true condition of the goods, and (*b*) did not reflect that the cargo was stowed "on deck."

21A.16 In *Procter & Gamble* v. *The Fraser*, 1992 AMC 1575 (E.D. La. 1991), the court found that owner was not a carrier under COGSA because it was not bound by a bill of lading signed on behalf of the master, where the charter did not authorize the charterer's agents to sign bills of lading on the master's behalf. Because the owner breached its warranty of seaworthiness to charterer, however, the court nonetheless allowed the cargo owner to recover damages for its contaminated cargo directly from the owner.

21A.17 In *QT Trading, L.P*. v. *Saga Morus*, 641 F.3d 105 (5th Cir. 2011), the charter party provided "the Charterers are to load, stow, trim, secure and discharge the cargo at their expense under the supervision of the Captain, who if requested to do so by Charterers, is to sign Bills of Lading for cargo as presented, in conformity with Mate's and Tally Clerk's receipts." The bills of lading signed by charterer's agent failed to incorporate or mention either the Mate's Receipts or Pre-shipment Report, which noted damage to the cargo. Instead, the agent noted the goods were "clean on board" and signed the bills of lading "As Agent For The Carrier [Charterer]." The court held the cargo owner failed to present any evidence that the owner was a party to the bills of lading because the charterer's agent did not sign the bills of lading on behalf of the master; instead, it signed on behalf of the charterer. In addition, the charterer's agent exceeded its authority granted to it by the charter by failing to sign the bills of lading in conformity with the Mate's Receipts. When the signing party exceeds its authority in signing bills of lading not in accordance with the Mate's instructions, the owner cannot be held liable as a COGSA carrier.

21A.18 In *S. A. Cockerill* v. *The Kyung Ju*, 1983 AMC 1517 (M.D. Fla. 1982), the court

held that a head charter which authorizes the charterer to issue bills of lading on behalf of the owner does not also extend such authorization to a sub-charterer absent specific language to that effect.

Intermediate charterers

21A.19 What of an "intermediate" time charterer, however, who does not book cargo or issue its own bill of lading form? Can it be held liable as a carrier for cargo loss or damage? In *Thyssen Steel Corp*. v. *The Adonis*, 364 F. Supp. 1332, 1974 AMC 389 (S.D.N.Y. 1973), the ship was time chartered by Adonis to Teseo, and Teseo entered into a sub-voyage charter with Atlantic. Thyssen brought an action against Teseo for cargo damage. It was held that since Teseo had not issued bills of lading for the cargo, it was not liable for the loss. The court stated:

> Under COGSA, only a carrier who has entered into a contract of carriage with the shipper has a duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. . . The bills of lading. . . were issued by agents of Atlantic on its own form. No evidence was presented at trial to show that Teseo authorized Atlantic or its agents to sign or issue the bills of lading on Teseo's behalf. Though the Voyage Charter authorized the master to sign bills of lading, the record indicates that the master did not sign the bills of lading and no evidence was presented to show that he authorized Atlantic or its agents to sign on his behalf. Accordingly, as Teseo did not enter into a contract of carriage with Thyssen, Teseo is not a carrier under COGSA. . . [1974 AMC at 393].

21A.20 The court also rejected the contention that the cargo owner could recover from Teseo as a third party beneficiary of the charter between Adonis and Teseo, which provided that Teseo was responsible for the loading and stowage. According to the court, there was no evidence that Clause 8 of the time charter between Adonis and Teseo "was inserted for the benefit of the shipping public, including Thyssen." *Id*.

21A.21 *Thyssen* was followed by the court in *Yasuda Fire and Marine Ins. Co. Ltd*. v. *The Indian City*, 1981 AMC 1451 (M.D. Fla. 1980). See *Hyundai Corp. USA* v. *Hull Ins. Proceeds of The Vulca*, 800 F. Supp. 124, 1993 AMC 434 (D.N.J. 1992), *aff'd*, 54 F.3d 768, 1995 U.S. App. Lexis 11714, (3d Cir., 11 April 1995), holding that the court should consider not only who issues the bill of lading, but also who performed carrier's duties. Accord, *Joo Seng Hong Kong Co*. v. *The Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979).

21A.22 In *Glynwed Steels Ltd*. v. *Great Lakes and European Lines Inc*., 1979 AMC 1290 (N.D. Ill. 1978), the court also rejected a third party beneficiary claim of the shipper, declaring that this theory of liability conflicts with the clear intent of COGSA. The court held that since the charterer, and not the owner, was the carrier, and since the Act provides that the carrier is the party bound to exercise due diligence to make the ship seaworthy, COGSA precluded the application of any third party beneficiary theory treating the shipper as the beneficiary of the owner's warranty of seaworthiness to the charterer.

21A.23 See also *United Nations Children's Fund* v. *The Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1965); *The Muskegon*, 10 F.2d 817 (S.D.N.Y. 1924); *The Blandon*, 287 F. 722 (S.D.N.Y. 1922); *The Poznan*, 276 F. 418 (S.D.N.Y. 1921). But see *Procter & Gamble* v. *The Fraser*, discussed above.

Ratification of bills of lading

21A.24 In certain circumstances, bills of lading may become valid even though they are not signed by the master or his authorized agent. In *The Blandon*, 287 F. 722, 723–724 (S.D.N.Y. 1922), the court held that the master will be deemed to have ratified bills of lading issued by the charterer once he sets sail with cargo on board. As the court stated, once the ship breaks ground

". . . the bill of lading, though signed by the charterer only, is the measure of the ship's duty and the cargo's privilege."

21A.25 In *British West Indies Produce Inc*. v. *The Atlantic Clipper*, 353 F. Supp. 548, 1973 AMC 163 (S.D.N.Y. 1973), the ship loaded a cargo of yams which were damaged during a voyage from the West Indies to New York. Bills of lading were issued by the charterer, and were *not* signed by the master. The court held the ship liable *in rem* for the cargo damage, saying:

> That the vessel was operated under a charter to Atlantic Lines, Ltd. does not affect the liability of the vessel; and neither is it of consequence that the master did not sign the bills of lading. Once the S.S. Atlantic Clipper sailed with the consignee's cargo on board, it constituted ratification of the bills of lading. [1973 AMC at 170.]

21A.26 The ship, however, was held entitled to full indemnity, including attorneys' fees, from the charterer, who had controlled the loading and stowage of the cargo.

21A.27 The ship is liable *in rem* once the cargo is on board with knowledge of the master. It is at this moment that the unity of ship and cargo comes into existence. Moreover, the ship may be liable *in rem* even if the master does not know the terms of the charterer's bill of lading, as he is presumed to have knowledge of its terms. *The G.A. Tomlinson*, 293 F. 51, 52 (W.D.N.Y. 1923). See also *Demsey*, above, and *Cactus Pipe & Supply Co*. v. *The Montmartre*, 756 F.2d 1103, 1113, 1985 AMC 2150, 2161–2163 (5th Cir. 1985); *Cavcar Company* v. *The Suzdal*, 723 F.2d 1096, 1984 AMC 609 (3d Cir. 1983).

21A.28 In cases involving NVOCCs, however, some courts have distinguished between charterers and NVOCCs, and held that the ratification doctrine discussed above is not applicable when the unauthorized bill of lading was issued by an NVOCC. See *Ultimo Cabinet Corp*. v. *The Mason Lykes*, 1991 AMC 1343 (S.D.N.Y. 1991), dismissing cargo damage claims made against owner and the ship *in rem*, finding that the bill of lading was issued without owner's knowledge or consent.

21A.29 In *Insurance Company of North America* v. *The American Argosy*, 732 F.2d 299, 1984 AMC 1547 (2d Cir. 1984), the court ruled that a ship could not be held liable *in rem* under a bill of lading issued by a non-vessel operating common carrier ("NVOCC") without the authorization of the ship's owner or charterer. The court noted that the owner had issued its own bill of lading for the voyage and that the cargo damage occurred during on-carriage by a different carrier after the defendant ship had delivered the cargo in good condition.

Owner's direct liability to cargo owner for unseaworthiness or in tort

21A.30 In some cases, cargo owners have succeeded in establishing liability on the part of the owner for claims sounding in tort where the owner was not a party to the contract of carriage. In *The Poznan*, 276 F. 418 (S.D.N.Y. 1921), the court held that while the owner was not liable under bills of lading signed by the charterer, it was liable in tort when it ordered the ship to deviate and thereby interfered with the charterer's performance of its contract. See also *Sunil Industries* v. *The Ogden Fraser*, 1981 AMC 2670 (S.D.N.Y. 1981).

21A.31 In *Siderius* v. *The Amilla*, 880 F.2d 662, 1989 AMC 2533 (2d Cir. 1989), the court, referring to "well established rules of admiralty law" embodied in case law, held that a cargo owner could recover directly from a shipowner when a shipowner has breached its warranty of seaworthiness to the charterer. Accord, *Procter & Gamble* v. *The Fraser*, 1992 AMC 1575, 1582 (E.D. La. 1991), and see *New York Cent. R.R*. v. *New York*, *N.H. & H.R.R*., 275 F.2d 865, 866 (2d. Cir. 1960); *S.C. Loveland Co*. v. *Eastern States Farmer's Exch*., 92 F.2d 180, 181 (3d. Cir. 1937), *cert. denied*, 302 U.S. 762 (1937); and *Davis* v. *Dittmar*, 6 F.2d 141, 142 (2d. Cir. 1925).

21A.32 Where the owner is not a party to the contract of carriage for the cargo, it will not

be entitled to the benefit of exceptions from or limitations of liability which may be available thereunder. For example, the defenses to liability provided for in COGSA are not available unless the owner is a "carrier." In *Toho Bussan Kaisha Ltd*. v. *American President Lines*, 265 F.2d 418, 1959 AMC 1114 (2d Cir. 1959), it was held that the one-year time bar applicable under Section 3(6) of COGSA operates only as to claims arising out of the contract of carriage. Similarly, in *Sunil Industries* v. *The Ogden Fraser*, above the court held that the one-year COGSA limitation period did not apply with respect to a claim against the owner since it was not a party to the contract of carriage for the goods. See also *Bunge Edible Oil Corp*. v. *The Torm Rask*, 756 F. Supp. 261, 266, 1991 AMC 1102, 1109 (E.D. La. 1991), *aff'd*, 949 F.2d 786, 1992 AMC 2227 (5th Cir. 1992), *cert. denied*, 505 U.S. 1207 (1992). Even if it is not a COGSA "carrier," the owner would have the benefit of defenses recognized under the general maritime law and may have the right to limit its liability under the Limitation of Liability Act. 46 U.S.C. §§ 183 *et seq*.

As presented

21A.33 The master is under a duty to the charterer to sign bills of lading "as presented" to him. As the court observed in *Field Line* (*Cardiff*) *Ltd*. v. *South Atlantic S.S. Line*, 201 F. 301, 304 (5th Cir. 1912), "the provision in the charter party that the master shall sign bills of lading is not a mere authority for him to do so, but an agreement that he shall do so, for a breach of which the owner is liable." See also *The Misphah*, F. Cas. No. 9648 (D. Del. 1878) (a voyage charter case).

21A.34 In *The Pacbaron*, SMA 2660 (Arb. at N.Y. 1990), the panel held that the master had an obligation to sign the bill of lading as presented. The panel ruled that the owner was not justified in detaining the ship for approximately four days while it insisted that references to the Merchant Shipping Code of the U.S.S.R. be deleted because it felt that it could lose its insurance coverage if there was not reference to the Hague Rules in the bill of lading. According to the panel, owner had a duty to promptly ascertain information about the Code or sign the bill of lading with a separate letter of protest.

Bills imposing on owner greater liabilities than imposed by charter

21A.35 The master's obligation to sign bills as presented by the charterer applies even if they conflict with the charter or expose the owner to liabilities other than those imposed by the charter. In this situation, however, the owner will have a right of indemnity against the charterer for any losses sustained, whether or not the charter expressly provides that bills of lading shall be without prejudice to the charter. See, e.g., *Field Line* (*Cardiff*) *Ltd*. v. *South Atlantic S.S. Line*, above; *Kennedy* v. *Weston & Co*., 136 F. 166 (5th Cir. 1905).

21A.36 This is not to say, however, that the charterer has the absolute right to require the master to sign any bills of lading it might present. For example, the master is not obliged to sign bills of lading for cargo which has not in fact been loaded, or which name a discharge port outside the allowed trading limits. See *The Alonzo*, F. Cas. No. 257 (D. Me. 1869); *The Loch Rannoch*, 192 F. 219 (D. Me. 1911), *aff'd*, 208 F. 884 (1st Cir. 1913). The master may also refuse to sign a "clean" bill of lading when he knows that the goods were not in good order and condition when received. *Kennedy* v. *Weston & Co*., above. Moreover, the master may decline to sign a bill of lading if it purports to bind third persons he knows are not parties to the contract of affreightment. See *Ramsay Scarlett & Co. Inc*. v. *The Koh Eun*, 462 F. Supp. 277, 286–287 (E.D. Va. 1978). The master also has no authority to sign blank bills of lading. *The Joseph Grant*, Fed. Cas. No. 7538 (D. Wis. 1857).

21A.37 In *The Ocean Dove*, SMA 2750 (Arb. at N.Y. 1991), the panel held that it was not

unreasonable for the master to refuse to sign bills of lading which were inconsistent with mate's receipts, even though the inconsistencies were small. Therefore, the charterer's claim for off-hire during the period of delay was denied.

21A.38 In *The Hans Leonhardt*, SMA 2820 (Arb. at N.Y. 1991), a sole arbitrator ruled that the master was justified in refusing to sign clean bills of lading because he observed pieces of plastic foil and paper being loaded on board as part of the cargo.

21A.39 In *The Exi*, SMA 2709 (Arb. at N.Y. 1990), the panel held that the master could not be compelled to issue clean bills of lading which did not note the presence of insects in or on cargo.

21A.40 In *The Phassa*, SMA 2650 (Arb. at N.Y. 1990), the panel held that the owner's refusal to issue clean bills of lading based upon suspected shoreside measurement was proper since there was ample reason for the owner to conclude that such measurements did not accurately reflect the quantity of crude oil which was loaded on the ship.

Bills signed "without prejudice" to the charter

21A.41 Where the charter provides that bills of lading shall be signed "without prejudice to this charter," the rights and liabilities of the owner and charterer as between themselves will not be affected by the bill. The rule was recognized by the Supreme Court in *Crossman* v. *Burrill*, 179 U.S. 100, 109 (1900), where the court stated:

> . . . The provision of the charter party which requires "the bills of lading to be signed as presented, without prejudice to this charter," while it obliges the master to sign bills of lading upon request of the charterers, does not mean that the bills of lading, or the consignee holding them, shall be subject to all the provisions of the charter, but only that the obligations of the charterers to the ship and her owners are not to be affected by the bill of lading so signed.

21A.42 See also *Field Line* (*Cardiff*) *Ltd*. v. *South Atlantic S.S. Line*, above. There, the master protested against the contents of bills of lading presented for his signature, but signed them on demand of the charterer. The bills covered a shipment of lumber and timber, and provided:

> General average payable according to York-Antwerp rules, 1890, excepting that jettison of deck cargo (and freight thereon) for the common safety should be allowable as general average.

21A.43 This provision was in direct conflict with the charter, which provided that "no jettison of deck cargo shall be made good as general average." On the voyage, it was necessary to jettison the lumber and timber. When the general average was stated, the owner was compelled to incur the cost of the jettisoned lumber, but, because the bills of lading for all the other cargo shipped on the voyage were in conformity with the charter, the owner could not look to the other cargo interests for contribution. The court held that, in these circumstances, the owner had a valid cause of action against the charterer for indemnity since the charterer had caused the master to issue bills of lading which conflicted with the charter and which subjected the owner to a loss.

21A.44 In *Asoma Corp*. v. *SK Shipping Co*., 467 F.3d 817, 820, 2006 AMC 2475 (2d Cir. 2006), the time charterer entered into a voyage charter that required all bills of lading to be issued without prejudice to the charterparty. The time charterer then issued its own bills of lading to the shipper, who was not a party to the charter, and the bills of lading contained a forum clause at odds with the one set forth in the voyage charter. The voyage charterer brought suit for alleged damage to the cargo of steel coils in the forum indicated by the voyage charter. However, the time charterer contended that the forum clause set forth in its bills of lading controlled. The court concluded that the voyage charter's forum clause governed. The bills of lading did not apply to the claims between the voyage charterer and the time charterer simply because they had been issued to a shipper who was not a party to the charterparty. The court further reasoned that one party (the time-chartered

owner) could not unilaterally change the forum provision agreed to in the voyage charter by issuing a bill of lading that set forth a different term.

Express restrictions on issuance of bills of lading

21A.45 The owner and charterer are, of course, free to impose restrictions on the issuance of bills of lading if they wish. For example, in *The Scan Venture*, SMA 1627 (Arb. at N.Y. 1982), the charter was on the New York Produce form, but contained an additional clause which stated in part:

> Bills of lading to be signed without prejudice to the charter party and in accordance with mate's and/or tally clerk's receipts. In the event charterers wish issuance of liner bills of lading, then authority at each time to be requested from owners.

21A.46 The arbitrators ruled unanimously that this clause placed a restriction on the charterer's right to require the master to sign liner bills of lading, and that liner bills issued by the charterer without the owner's advance approval were improper.

Shipper's right to demand bill of lading

21A.47 Under the general maritime law, the shipper of cargo is entitled to demand the issuance of a bill of lading for goods loaded on board the ship, for which purpose the bill will serve as a receipt. See, e.g., *The Delaware*, 81 U.S. 579 (1872); *Watt* v. *Cargo of Lumber*, 161 F. 104 (2d Cir. 1908); *Akt. Brunsgaard* v. *Standard Oil of N.J.*, 283 F. 106 (2d Cir. 1922); *The Alonzo*, F.Cas. No. 257 (D. Me. 1869).

21A.48 In the case of shipments to or from ports of the United States in foreign trade under bills of lading governed by COGSA, the shipper's right to demand the issuance of a bill is governed by Section 3(3).

21A.49 The Harter Act contains a similar provision in Section 4, and provides for a fine not exceeding $2,000 against an owner who refuses to issue on demand a bill of lading demanded in accordance with the Act. Other United States legislation which governs bills of lading includes the Pomerene Act, 49 U.S.C. §§ 81–124, which governs only bills issued by common carriers engaged in transporting goods between places in the United States or from United States ports to foreign countries.

Master's right to demand production of bill of lading before delivery of cargo

21A.50 The master is entitled to require the production of original bills of lading prior to the commencement of discharge. In *The Bless River*, SMA 1889 (Arb. at N.Y. 1983), owner was excused from responsibility for a delay in the commencement of discharge and the cost of guaranteed stevedore labor where the charterer failed to provide the master with either original bills of lading or an indemnity agreement.

Identity of carrier or "demise" clause

21A.51 Many bills of lading contain "identity of carrier" or "demise" clauses which provide as follows:

> The contract evidenced by this bill of lading is between the merchant and the owner of the vessel named herein (or substitute) and it is therefore agreed that said shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not

relating to the vessel's seaworthiness. . . It is further understood and agreed that as the line, company or agent who has executed this bill of lading for and on behalf of the master is not a principal in the transaction, said line, company or agent shall not be under any liability arising out of the contract of carriage, nor is carrier nor bailee of the goods.

21A.52 Such demise clauses are void as a matter of law when used by a charterer to attempt to shift its potential liability for cargo loss to the shipowner. *Epstein* v. *United States*, 86 F. Supp. 740 (S.D.N.Y. 1949); *Blanchard Lumber Co*. v. *The Anthony II*, 259 F. Supp. 857, 865–866, 1967 AMC 103, 120–121 (S.D.N.Y. 1966). The courts have held that such clauses are invalid as a matter of public policy since they represent an effort by the time charterer to transfer its liability to the owner.

21A.53 While a charterer cannot rely on a demise clause to shift liability to the owner, it has been held that the cargo interest may rely on the clause. In *Recovery Services International* v. *The Tatiana L*, 1988 AMC 788 (S.D.N.Y. 1986), the court held that since the shipper was not responsible for the inclusion of the identity of carrier clause in the bill of lading, it was entitled to rely on it for purposes of imposing liability on the shipowner.

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CHAPTER 22

Conduct of Officers; Supercargo; Sailing Directions; Log; Ventilation of Cargo

"9. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the vessel and see that voyages are prosecuted with the utmost despatch. He is to be furnished with free accommodation, and same fare as provided for Captain's table, Charterers paying at the rate of $1.00 per day. Owners to victual Pilots and Customs Officers, and also, when authorized by Charterers or their Agents, to victual Tally Clerks, Stevedore's Foreman, etc., Charterers paying at the current rate per meal, for all such victualling.

11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charterers, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

12. That the Captain shall use diligence in caring for the ventilation of the cargo."

22.1 Clauses 9 to 12 of the New York Produce form deal with a variety of particular topics. They are largely self-explanatory and have not given rise to difficulty or controversy.

Supercargo

22.2 The charterers' right to appoint a supercargo is not often exercised nowadays. The charterers are responsible, towards the owners, for their supercargo's conduct. *The Imvros* [1999] 1 Lloyd's Rep. 848 is a recent example of a case involving a supercargo's negligence in relation to stowage. So, if a supercargo involves himself in directing stowage operations and through his negligence in that regard causes damage to ship or cargo, the charterers will responsible to the owners for that damage including any resulting liability of the owners to cargo interests, even if "and responsibility" had been added in Clause 8 (see paragraph 20.27, above).

Requisite instructions

22.3 The charterers' obligation to furnish the master with "all requisite instructions" may have particular importance in dangerous cargo cases (see paragraphs 9.28 to 9.32, above). For example, had *The Agios Nicolas* [1968] 2 Lloyd's Rep. 57 concerned the New York Produce form, rather than the Baltime form, breach of Clause 11 might have been a straightforward basis for the owners' claim.

Sailing directions

22.4 For a discussion of the scope and effect of the charterers' right, under Line 86 and under Clause 8, to direct the ship to sail between ports by a particular route, see *The Hill Harmony* [2001] 1 Lloyd's Rep. 147 and paragraphs 18.2 *et seq*., 19.24 and 19.25, above.

U.S. Law

Charterer's voyage instructions

22A.1 In *The Andros Mentor*, SMA 2125 (Arb. at N.Y. 1985), the ship was chartered for a trip from Vancouver to the Philippine Islands. The charterer presented the master with voyage orders to follow the instructions of a weather routing service. The master declined to follow these instructions, however, and instead took a more southerly route recommended by a service retained by the owner. Although the route recommended by the owner's company added about 688 miles to the length of the voyage, the master decided to follow it because, based on prior experience in trans-Pacific crossings, he believed the more southerly route would be safer and more economical. The charterer later deducted hire for the additional time required to complete the voyage.

22A.2 The panel's decision illustrates the interplay between Clauses 11 and 24 of the New York Produce form. The panel stated that whereas Clause 11 confers a duty upon the charterer to provide the master with written instructions and sailing directions, it also implies a duty upon the master to follow them. Because under a time charter the risk of delay due to bad weather rests with the charterer, Clause 11 permits charterer to use a weather routing service of its choice and for its own account. At the same time, the responsibility for safe navigation remains with the master:

> The Master is not under an absolute obligation to follow the advice of any routing service; he is the sole judge when it comes to deciding upon the best and safest course to take from point of origin to destination, having in mind the best interests of both Owner and Charterer and the safety of his vessel, cargo and crew.

22A.3 The panel found that the master's announcement at the outset of the voyage that he would not follow the routing proposed by the charterer's routing service was a technical breach of Clause 11. Based upon all the evidence, however, the panel concluded that the master was justified in following the course recommended by the owner's routing service.

22A.4 The panel stated that the phrase "sailing directions" in Clause 11 "only entitles a charterer to give general instructions" rather than specific routing orders. Examples given by the panel were "via Panama Canal" or "via Cape Town," but stopping short of any interference with the navigation of the ship.

> Preservation of a Master's right to exercise his judgment and prerogatives in matters of navigation at sea are of paramount importance, and only in matters where the evidence shows such judgment to be severely flawed, or negligent will he be subject to criticism or claim.

22A.5 The panel further ruled that the charterer may *not* order the ship to violate Institute Warranty Limits without the owner's assent.

22A.6 In *The Agia Skepi*, SMA 2891 (Arb. at N.Y. 1992), the charterer maintained that it was entitled to place the ship off-hire for 12 hours for time lost when the ship proceeded to the wrong port. The owner alleged that the master was obeying the charterer's oral instructions to proceed to a port other than the one originally designated in its written orders and denied that the ship was off hire. Because the charter included a clause which stated that all of the charterer's sailing instructions had to be in writing, the panel found the charterer's written voyage instructions to be more persuasive of its orders than its alleged oral instructions to the master to change course. Thus, the charterer was allowed off-hire for the time lost due to the diversion. See also *The White Manta*, SMA 3257 (Arb. at N.Y. 1996), discussed at paragraph 19A.4.

Log of the voyage

22A.7 For a number of reasons, it is important that the master maintain a full and accurate logbook which, at charterer's request, is to be made available for its review. Correct log entries are particularly important to the charterer with respect to speed or performance claims. These claims depend in large measure on weather conditions encountered by the ship and a reliable logbook will often be the only acceptable evidence of weather encountered on the voyage.

22A.8 *The Largo*, SMA 1230 (Arb. at N.Y. 1978), illustrates the problems which may arise when the logbook is found to be unreliable. The ship was chartered by the disponent owner to the charterer for a time charter trip. The charterer made a speed claim which the disponent owner defended on the grounds that the logbook indicated unfavorable winds, seas and fog. The panel found, however, that the log was not sufficiently complete to assist it in evaluating the ship's performance. The disponent owner argued that it had no control over the employees of the registered owner and was not responsible for the deficiencies in the logbook. The panel rejected this argument, however, and stated:

> The defense of Owner that as Disponent Owner it had no control over the employees of the Owner and logbooks is without merit. The Charter Party clearly stipulates in Clause 11 that the Master shall maintain a full and correct log of the voyages, and furnish Charterer *when required* (emphasis added) with a true copy of the logs. It was incumbent upon Disponent Owner, in its relationship as primary Charterer of the vessel, to request, obtain and see to it that accurate logs were submitted to Owner.

22A.9 In *The Punica*, SMA 3513 (Arb. at N.Y. 1999), the panel majority gave considerable weight to the ship's logbook entries which described the ship as rolling moderately and rejected the charterer's contention based on expert testimony that the ship must have been rolling violently.

22A.10 In *The Bertina*, SMA 3144 (Arb. at N.Y. 1995), the charterer claimed damages from the owner based on allegations of fraud and/or concealment of main engine problems. The lube oil filtration system malfunctioned because of improper maintenance and caused the ship to continually stop at sea, often putting the ship in dangerous straits. The panel found that the logbooks, which the charterer alleged had over 500 entries that were whited out or erased, were "completely discredited" and placed absolutely no reliance on them. The panel also drew certain inferences from the inadequacies of the log keeping, which it found were ". . . far beyond mere irregularities" that were permitted to be perpetuated over a long period of time because of inadequate management. The panel held that the charterer had "proven a serious case of unseaworthiness" and negligence, although the charterer's claim for fraud was rejected for lack of evidence.

22A.11 In *The Golden Shimizu*, SMA 2991 (Arb. at N.Y. 1993), the panel rejected the charterer's argument that the ship's logs were unreliable in a case where the charterer claimed the ship had breached her speed and consumption warranties. The panel stated that the charterer's claim was *de minimis* and "not worthy of recognition in view of the vessel's substantial compliance with the charterparty." In making its findings, the panel articulated its agreement with other arbitral precedents which hold that "the Master's logs are to be considered an accurate and reliable representation of the weather experienced on the voyage, unless they can be impugned by positive evidence of obvious or willful inaccuracies."

22A.12 In *The Konkar Kinos*, SMA 2631 (Arb. at N.Y. 1990), the panel found that the ship's logs and log abstracts of weather and speed were sufficiently accurate, and denied the charterer's claim that the panel should not rely on them. The panel made it clear that if the charterer wanted the abstracts prepared in a certain way, it should have given specific instructions to the ship's officers. At the same time, the panel found that the ship's records contained insufficient data in order to calculate fuel consumption and it completed its own study in order to assess actual consumption.

22A.13 *The United Bounty*, SMA 2040 (Arb. at N.Y. 1984), provides another illustration of the importance of maintaining an accurate logbook. The case involved the charterer's claim for a speed deficiency and the owner's counterclaim for credit for the value of bunkers under-consumed. The charterer's claim was based upon an analysis of the voyage prepared by a weather routing service. The ship's logs and the routing service's voyage analysis did not differ in so far as distance travelled and time used were concerned. There were major differences between the two, however, as to the reported weather conditions. The panel noted that, ordinarily, arbitrators would accept the reports of the ship because the master and officers "are deemed to be the best judges on the spot of actual conditions." There is a heavy burden on charterer to prove that the logs are not reliable. The panel carefully scrutinized the logs and found that there was a clear pattern of reporting adverse currents and winds consistently for almost the entire time at sea. The panel stated that it determined that "weather patterns reported by the ship were often at direct odds in terms of wind direction to a degree that is most unusual." Based upon its review, the panel concluded that the logs were not reliable and based its decision instead on the weather routing service's voyage analysis.

22A.14 Similarly, in *The Mangalia*, SMA 2839 (Arb. at N.Y. 1991), the sole arbitrator ruled that due to various discrepancies and omissions in the ship's logbook, the ship did not adhere to the requirements of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. The arbitrator, therefore, relied on the analysis of an independent company hired by the charterer for reports of weather conditions.

22A.15 There are statutory requirements under American law for keeping a logbook and making entries therein on United States flagships. 46 U.S.C. §§ 11301–11303. Among other things, it is required that logbook entries shall be made as soon as possible after the occurrence and be signed. Violation of the statutes gives rise to a civil penalty.

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CHAPTER 23

Options to Extend the Charter

"91. 13. That the Charterers shall have the option of continuing this charter for a further period of .....
92. .....
93. on giving written notice thereof to the Owners or their Agents ..... days previous to the expiration of the first-named term, or any declared option."

Exercise of the option to extend the charter period

23.1 In order to exercise an option of this kind, the charterers must give a clearly worded notice to the owners. In *The Trado* [1982] 1 Lloyd's Rep. 157, Parker, J., said: "Those who have options in their favour must, if they wish to exercise them, exercise them in words which are not really capable of doubt."

23.2 Once the charterers have given notice that they exercise their option, their decision cannot be revoked; the same is true of notice by the charterers that they do not exercise the option: see *The Trado*, above.

23.3 If the charterers fail to exercise their option by the time stipulated by the contract, the option is lost. In *Empresa Cubana de Fletes* v. *Aviation & Shipping* [1969] 2 Lloyd's Rep. 257, at page 261, Roskill, J., said, "It is axiomatic contract law that. . . if one party has a right which he can exercise unilaterally in his absolute discretion, then he must exercise that right either, if no time limit is provided, within a reasonable time, or, if a time limit is provided, then within the time limit so provided. . . [In this case,] the charterers failed timeously to exercise [their] rights and accordingly lost them." (But, as to whether a right must be exercised within a reasonable time where no express limit is stipulated, see the contrary view expressed by Gloster, J., in *CDV* v. *Gamecock Media* [2009] EWHC 2965, at [74] *et seq*.)

23.4 Where an option is to be declared "at" a particular date, the option must be declared not later than that date: see *Empresa Cubana de Fletes* v. *Aviation & Shipping*, above, *per* Roskill, J., at page 261. However, it seems that such an option can be declared at any time prior to the stated date. This seems to have been assumed in *The Aspa Maria* [1976] 2 Lloyd's Rep. 643 (C.A.), below.

Where the primary and option periods are both subject to a tolerance

23.5 Commonly, the basic period of the charter in Line 14 of the New York Produce form (see chapter 4) includes an express allowance or tolerance of so many days more or less at the charterers' option: see paragraphs 4.11 *et seq*. It is sometimes the case that the option given to the charterers under Clause 13 also contains a tolerance. Where both clauses contain a tolerance, the tolerance in Line 14 is to be disregarded in calculating the maximum charter period. It is presumed that the charterers are not intended to have the benefit of two tolerances.

The *Aspa Maria* was chartered for a period of "6 months 30 days more or less at Charterers' option". By Clause 13 the charterers were given 'the option of continuing this Charter for a further period of further 6

months 30 days more or less at Charterers' option declarable at the end of fourth month". The charterers exercised the option under Clause 13 and the question arose whether the resulting total maximum charter period was 12 months and 30 days or 12 months and 60 days.

Mocatta, J., and the Court of Appeal held that the former was correct. The first 30-day provision did not turn this into a charter for five or seven months at the option of the charterers: it was merely a margin of tolerance to deal with the uncertainty as to the exact date upon which the charterers could arrange for redelivery (which tolerance would have been implied if not expressed). Only one such margin was needed for this purpose and thus the first fell away once the charterers exercised their option under Clause 13.

Gulf Shipping Lines v. *Compania Naviera Alanje* (*The Aspa Maria*) [1976] 1 Lloyd's Rep. 542 and [1976] 2 Lloyd's Rep. 643 (C.A.).

(But contrast an *obiter* remark of Atkinson, J., in *Hector Steamship* v. *Sovfracht* (1944/45) 78 Ll.L.Rep. 275, at page 281, where a charter for "about" three months, "about" defined to mean an allowance of 10 days, gave the charterers an option to extend the charter for "about" one month.)

Options as to the duration of the charter

23.6 Some time charters, instead of giving the charterers an option to extend the charter period, give them instead an option to select a longer primary charter period; for example, the period of the charter may be described as "6 or 10 months in charterers' option". For a discussion of such clauses, see paragraphs 4.22 *et seq*.

Effect of exercising the option

23.7 Where a charter is extended, the terms and conditions of the charter apply to the extension period, unless the charter provides otherwise: see *The Channel Alliance* [2008] 1 Lloyd's Rep. 428, at page 432.

U.S. Law

Continuation of charter

23A.1 Under Clause 13, the parties may provide that the charterer shall have the option of extending the charter for whatever further period is agreed. Great care must be exercised in specifying the additional period allowed, as well as when notice must be given. See *The Cielo Rosso*, 1980 AMC 2088 (Arb. at N.Y. 1980), for an example of the difficulties that may arise where care is not exercised in drafting provisions relating to continuation of the charter. See also *The Gulf Pacific*, SMA 2854 (Arb. at N.Y. 1991) and SMA 3036 (Arb. at N.Y. 1993), a bareboat charter case.

23A.2 *The Santa Katerina*, 1974 AMC 1383 (Arb. at N.Y. 1974), involved the application of an addendum modelled on Clause 13 of the New York Produce form which permitted the charterer to extend the charter for a further period of "three (3) consecutive calendar months, three weeks more or less, at Charterers' option on giving written notice thereof to the Owners. . . ." The owner contended that the charterer was not permitted to undertake a voyage at the end of the extended period which would have required redelivery after 25 August, the date the fixed three-month extension was to expire. The arbitrators decided the charterer was entitled to "not only the fixed period of three months, but the three weeks more or less flexible period." Since the ship was redelivered within the three-week period, there was no overlap.

23A.3 In *The Jagat Padmini*, SMA 1097 (Arb. at N.Y. 1977), the ship was chartered "for about minimum 6 months, Charterers' option 15 days more or less—Charterers' option additional 6 months to be declared within 4 months of delivery." The panel held that the charterer was entitled to keep the ship for exactly 12 months and 15 days. Although the redelivery clause contained the word "about," it was held that the leeway intended was "15 days, more or less."

23A.4 It has been held that if the charter period is extended by the addition of time the ship is off hire, the time in which the charterer may exercise an option to continue the charter for a further period is also extended. *The Tropigas Far East*, SMA 1594 (Arb. at N.Y. 1981). The charter was for an initial period of three years, and gave the charterer an option to extend for further periods of one year provided that the option was exercised at least six months in advance of the charter termination date. During the initial three-year term, the ship went off-hire and it was agreed by the owner and charterer that the expiration date of October 15, 1979, would be extended to 24 October. Subsequently, the charterer twice exercised its option to extend, in each case giving notice before April 15, or six months before the original October 15 deadline. Charterer later elected to exercise its option to extend a third time, but gave notice on April 22. The owner contended that the charterer's exercise of the option was untimely. The arbitrators ruled for the charterer, holding that since the termination date of the original hire period and each extension thereof had been changed to October 24 from October 15, the option declaration deadline was similarly extended.

23A.5 In *The Narnia Sea*, 1991 AMC 274 (Arb. at N.Y. 1990), the panel held that the charterer's remedy for the period in which the ship was out of service for repairs was limited to off-hire and that the charterer could not extend the charter unilaterally based upon its own interpretation of its legal rights under the charter. Since the charterer failed to exercise its option to extend as provided for in the charter, its claim for wrongful withdrawal of the ship was denied.

23A.6 In *The Pergamos*, SMA 3260 (Arb. at N.Y. 1996), the charterer failed to timely exercise its option to extend the charter period.

23A.7 Change of a charter termination date is an important modification and must be clearly stated. *The Galahad*, SMA 3057 (Arb. at N.Y. 1994).

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CHAPTER 24

Cancelling Clauses

"94. 14. That, if required by Charterers, time not to commence before ..... and should vessel
95. not have given written notice of readiness on or before. ..... but not later than 4 p.m. Charterers or
96. their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness."

General

24.1 Clause 14 of the New York Produce form gives the charterers an option to cancel the charter if the ship has not been delivered by the cancelling date. In *The Democritos* [1976] 2 Lloyd's Rep. 149, Lord Denning, M.R., said, at page 152, that the effect of the cancelling clause "is that, although there may have been no breach by the owners nevertheless the charterers are, for their own protection, entitled to cancel if the vessel is not delivered in a proper condition by the cancelling date." Similarly, A.L. Smith, J., in *Smith* v. *Dart* (1884) 14 Q.B.D. 105, said at page 110: "The shipowner does not contract to get there by a certain day, but says, 'If I do not get there you may cancel'."

24.2 A cancelling clause gives some protection to both owners and charterers in the event that the ship is delayed. The charterers can terminate the charter and find an alternative ship, but the owners do not incur the liability which they would have incurred by promising delivery at a specific time: see the comments of Bridge, L.J., in *The Democritos* [1976] 2 Lloyd's Rep. 149, at page 154. See further the discussion in paragraphs 7.5 *et seq*., above.

24.3 However, a cancelling clause does give rise to an implied obligation on the owners for breach of which they may be liable in damages to exercise due diligence to tender the ship for delivery by the cancelling date: see *The Democritos* [1976] 2 Lloyd's Rep. 149 (C.A.), *per* Lord Denning, M.R., at page 152, and paragraph 7.6, above.

24.4 Unless the charterers exercise their option to cancel, the passing of the cancelling date has no effect on the parties' obligations under the charter. The owners remain obliged to tender the ship for delivery with reasonable despatch: see *Moel Tryvan* v. *Weir* [1910] 2 K.B. 844, *per* Kennedy, L.J., at page 856, and paragraph 7.7, above.

24.5 The charterers' right to cancel under the cancelling clause does not in any way depend upon the owners having committed a breach of charter. Fault or lack of it on the part of the owners is not relevant. In *The Madeleine* [1967] 2 Lloyd's Rep. 224, Roskill, J., said, at page 239: "It is important to emphasise that that which the charterers are claiming to exercise is an express contractual right given by Clause 22 [of the Baltime form, now Clause 21]. Their right to cancel does not in any way depend upon any breach of the charter-party by the owners."

24.6 Where it is disputed, the charterers bear the burden of proving that they had the right to cancel: see *The Madeleine* [1967] 2 Lloyd's Rep. 224, *per* Roskill, J., at page 237.

24.7 The charterers' right to cancel may arise in circumstances which would also give them a right to treat the charter as discharged by the owners' breach. But the latter right is quite separate

from the former. For consideration of the circumstances in which a time charter may be terminated by the charterers for breach by the owners at or about the time of the delivery of the ship into the charter service, see paragraphs 7.50, 7.52 and 8.43 *et seq*., above.

When does the right to cancel arise?

24.8 Under Clause 14 of the New York Produce form, the charterers' option to cancel accrues if the owners have not given notice of readiness in writing by 4 p.m. on the cancelling date. "Readiness" in this context means readiness for delivery. The requirements of a notice of readiness are discussed at paragraphs 7.35 *et seq*., above. In short, the ship is ready for delivery only when she is in the condition required by the contract and in the place stipulated for delivery: see paragraph 7.35. It is thought that, whether or not the charter incorporates the United States Carriage of Goods by Sea Act or any other version of the Hague Rules, the ship is not ready unless she complies strictly with the requirements of Lines 21 to 24: see paragraphs 7.36, 8.25 and 8.34 above. The requirement that the ship be in the place stipulated for delivery before notice of readiness can be served, will not mean that that place must have been identified before the charterers can be entitled to cancel, even if it is for the charterers to select it (see *The Ailsa Craig*, below). However if it is for the charterers to select the place of delivery and if by failure to do so, or lateness in doing so, they cause the ship to miss her cancelling date, then it is submitted they could not cancel, on the general principle that a party is not permitted to take advantage of his own breach of contract: see, generally, *Alghussein* v. *Eton College* [1988] 1 W.L.R. 587.

The *Ailsa Craig* was chartered on an amended Shelltime 4 form for 24 months +/- 30 days. She was to be delivered at a port in West Africa, Ghana–Nigeria range, in charterers' option, and the charterers had the option of cancelling if the ship was not ready and at their disposal on or before 31 October 2007, which was extended by agreement to 15 November 2007. On 16 November 2007, with the ship still in dry-dock in Piraeus, the charterers gave notice cancelling the charter.

On a preliminary issue to determine whether the charterers were under an obligation to nominate a delivery port and, if so, when that obligation arose and whether its fulfilment was a condition precedent to the right to cancel, Christopher Clarke, J., held, and the Court of Appeal agreed, that the time for the charterers to nominate the place of delivery had not arisen, as their only obligation was to nominate within a reasonable time, which meant in time not to cause delay to the ship. In the Court of Appeal, the primary ground for decision was that in any event, the selection of the port of delivery by the charterers was not a condition precedent to their right to cancel. Longmore, L.J., with whom Richards and Waller, L.JJ., agreed, said at [12], that the owners were seeking to imply a term restricting the right to cancel for which there was no possible justification.

The Ailsa Craig [2008] 2 Lloyd's Rep. 384 and [2009] 2 Lloyd's Rep. 371 (C.A.)

In his judgment at [13], Waller, L.J., expressed the charterers' obligation to nominate within a reasonable time as a two-part obligation, but this was, we suggest, an unnecessary complication.

24.9 Under Clause 21 of the Baltime form, the charterers' right to cancel accrues if the ship has not been delivered by the cancelling date. In *The Madeleine* [1967] 2 Lloyd's Rep. 224, at page 239, Roskill, J., held, "plainly as a matter of construction, Clause 22 [now clause 21] is looking back to Clause 1 and it is the owners' failure to deliver in accordance with the provisions of Clause 1 which gives the charterers the right to cancel under Clause 22". The owners cannot prevent the charterers from cancelling by tendering the ship for delivery before she is ready to be delivered, since such a tender of delivery may be rejected by the charterers: see paragraphs 7.47 to 7.52, above. The requirements of delivery in accordance with Clause 1 are discussed in detail in chapters 7 and 8.

NYPE 93

24.10 Under Clause 16 of the NPYE 93 form, the charterers' option to cancel accrues if the ship is not "ready for delivery" by the agreed date and time. It is thought that the ship is 'ready for delivery' only when she is in the condition and place stipulated in Clause 2: see paragraphs 8.34, 24.8 and 24.9, above.

No right or obligation to cancel before the cancelling date

24.11 The charterers are not entitled to cancel before the cancelling date, even though it may seem inevitable that the ship will arrive after that date. In *The Madeleine* [1967] 2 Lloyd's Rep. 224, at page 241, Roskill, J., said, with reference to the cancelling clause in the Baltime form: ". . . if there were what I will call an anticipatory right to cancel under the clause, it could only arise by necessary implication. . . For my part, I have great difficulty in seeing how, where there is an express right given to cancel if the vessel is not delivered by May 10 [the cancelling date], an implied right can concurrently exist to cancel at some earlier point of time, namely, when it becomes inevitable that the stated cancelling date will not be able to be attained by the ship." This statement was approved by a majority of the Court of Appeal in *The Mihalis Angelos* [1970] 2 Lloyd's Rep. 43, a voyage charter case in which it was held that the right to cancel did not arise before the cancelling date.

24.12 Likewise, the owners cannot require the charterers to declare in advance of delivery whether or not they will exercise their option to cancel, even after the cancelling date has passed: see *Moel Tryvan* v. *Weir* [1910] 2 K.B. 844. This is true even where the ship is at the place of delivery, if she is not ready. In *The Democritos* [1975] 1 Lloyd's Rep. 386, at page 397, Kerr, J., said: "It is clear from the facts found that [the repair of 'tween deck damage] could not have been done by the cancelling date of Dec. 20. The charterers, on the other hand, were not obliged to do anything until the vessel was tendered to them in readiness under the charter. Once Dec. 20 had passed they could cancel if they wished; alternatively they could continue to do nothing and wait until the vessel was tendered. Under cl. 14 they then retained their option to cancel until the vessel was tendered in readiness after Dec. 20." For a special provision to improve the owners' position in this situation, see paragraph 24.14, below.

24.13 However, the rule that the charterers may not exercise their option to cancel before the cancelling date does not affect any other rights the charterers may have under the charter. So if the owners are in repudiatory breach of the charter prior to the cancelling date, the charterers will have the right to terminate and that right may be exercised immediately. Roskill, J., said in *The Madeleine* [1967] 2 Lloyd's Rep. 224, at page 244: ". . . the fact that there is no contractual right to cancel in advance does not prevent a charterer seeking to claim the right to rescind in advance of the cancelling date . . .Where the charterer seeks to say that the contract has been frustrated or that there has been an anticipatory breach which entitles him to rescind then he has such rights as are given to him at common law." See also the part of Scrutton, L.J.'s unreported judgment from *Bank Line* v. *Capel* [1919] A.C. 435, which is set out in the judgment of Roskill, J., at [1967] 2 Lloyd's Rep. 224, at page 243.

NYPE 93 and Baltime

24.14 The NYPE 93 form seeks to remedy the potentially harsh rule described in paragraph 24.12 above through its "Extension of Cancelling" provision, part of Clause 16. Subject to stated provisos, this gives the owners of a ship that is expected to miss her cancelling date the right to

call upon the charterers to state in advance whether they will or will not cancel upon the ship's late arrival at the delivery port; see Lines 210 to 218. Clause 21 of the Baltime form provides that if the ship "cannot be delivered by the cancelling date", the charterers, if required, must declare whether they cancel or will take delivery "within 48 hours after receiving notice thereof". This has been interpreted to mean within 48 hours of receiving notice that the cancelling date has been missed, so that it does not create any obligation on the charterers to declare prospectively whether they cancel and the potential harshness of the *Moel Tryvan* decision remains: see the judgment of Pearson, J., in *The Helvetia-S* [1960] 1 Lloyd's Rep. 540, at page 552.

Exercise of the right to cancel

24.15 The charterers must exercise the right to cancel by notifying the owners that that is what they are doing. The notice may be written or oral.

When does the right to cancel lapse?

24.16 Express provision may be made by the parties requiring the right to cancel to be exercised, if at all, within some fixed period after the cancelling date. Under the New York Produce form, the option to cancel is expressly exercisable at any time up to the day that the ship becomes ready. However, it is thought that the charterer loses the right to cancel if he elects to accept the delivery of an unready ship.

24.17 Where the charter does not expressly state when the option lapses, it is thought that it does so when the ship is delivered. In *Moel Tryvan* v. *Weir* [1910] 2 K.B. 844, a voyage charter case, the Court of Appeal refused to imply a term requiring the charterers to excise their option to terminate within a reasonable time; see particularly the comments of Kennedy, L.J., at page 857. In the same case, however, it was said that the option to cancel lapsed once the charterers came under a duty to load the ship: see Farwell, L.J., in the Court of Appeal at page 855 and Bray, J., at first instance at page 848. Under a time charter, the equivalent point in the performance of the contract is delivery, which is the point at which the ship starts to perform the charterers' orders. In principle, the charterers may also waive, or become estopped from exercising, their right.

The effects of cancelling on the charterers' right to damages

24.18 The exercise by the charterers of their right to cancel does not deprive them of the right to claim damages if the owners have breached any of their obligations under the charter. In a Scottish voyage charter case, *Nelson & Sons* v. *Dundee East Coast Shipping*, 1907 S.C. 927, the owners had failed to provide their ship with all convenient speed, as they were required to do under the charter. It was held that the charterers were entitled to damages even though they had exercised the right to cancel. Lord M'Laren said, at page 934: ". . . it was submitted by the [owners] that no damages were due, [because] the insertion of the clause giving an option to cancel came in place of the common law obligation to provide a ship or pay compensation. I do not think the clause was inserted for any such purpose."

24.19 However, it is less clear whether the charterers can claim damages for losses that result from the cancellation, where the owners are in breach of charter, but not in a way which would entitle the charterers to terminate for breach. The charterers probably cannot recover damages that result from their exercise of the option to cancel: see the comments of Denning, L.J., in *Financings* v. *Baldock* [1963] 2 Q.B. 104, at pages 111 and 112. However, the result may be different if the

charterers can show that their decision to cancel amounted to reasonable mitigation of the losses that would otherwise have been caused by the owners' breach.

War cancellation clauses

24.20 The New York Produce form is unusual in not having a clause providing either party with the right to cancel the charter if specified nations go to war. Such clauses are found in Shelltime 4 (Clause 33), NYPE 93 (Clause 32), Asbatime (optional Clause 31) and in the pre-2001 version of the Baltime (Clause 21(E)). Such a clause was considered by the Court of Appeal in *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212. This case concerned charters on the Asbatime form for four German flag ships. The main question for decision was whether leave to appeal against an award of arbitrators had been properly refused by the Commercial Court judge. The clause provided: "In the event of the outbreak of war (whether there be a declaration of war or not) between any two or more of the following countries: The United States of America, the United Kingdom, France, Russia, the People's Republic of China, Federal Republic of Germany and any country of the EEC or in the event of the nation under whose flag the vessel sails becoming involved in war either the Owners or the Charterers may cancel this Charter. . . ." From 24 March 1999 Germany, as a member of NATO, participated in the military operations in Kosovo, its participation involving the deployment of a number of aircraft of the German Air Force. On 29 April 1999 the charterers purported to cancel each of the charters on the ground that Germany, under whose flag the ships sailed, had become involved in war with Kosovo and Yugoslavia. The arbitrators decided by a majority (Adrian Hamilton, Q.C., and Kenneth Rokison, Q.C.) that: (*a*) "war" was to be construed in a common sense way (following *Kawasaki* v. *Bantham Steamship* (1939) 63 Ll.L.Rep. 155 (C.A.)); (*b*) "war" was to be distinguished from "warlike activities and hostilities short of war", dealt with in Clause 23(a) of the Asbatime, and meant a war between nation states; (*c*) a businessman applying common sense in the context of the war cancellation clause would not regard the NATO operation in Kosovo as a war; (*d*) members of NATO participating in a NATO operation are not "involved in the operation" as a nation. The minority arbitrator (Sir Christopher Staughton) considered that if a businessman had been asked whether there was a war in Kosovo in March and April 1999 he would have said "yes" and that Germany was "involved" in the conflict. However, the arbitrators were unanimous in holding (following *Kawasaki* v. *Belships* (1939) 63 Ll.L.Rep. 175, see paragraph 5.42, above) that an option to cancel a charter under a war cancellation clause had to be exercised within a reasonable time and the charterers had not done so. The Court of Appeal, in dealing with the issues under the Arbitration Act 1996, were in no doubt that the arbitrators were correct on the last-mentioned point. It mattered not that the arbitrators had approached the matter on the basis of implied term rather than on the principle of election, waiver and estoppel. The result would have been the same. As for the other questions, it was not necessary for the Court of Appeal to determine them.

U.S. Law

Cancelling date

24A.1 A late tender of the ship gives the charterer an option to cancel, which it may or may not choose to exercise. Unless there is modifying language in the charter, the charterer's right to cancel for late delivery is absolute and may be exercised regardless of the cause of the delay. See *Karran* v. *Peabody*, 145 F. 166 (2d Cir. 1906).

24A.2 The owner, on the other hand, is under an absolute duty to tender the ship, and must offer to make delivery even if the cancelling date has expired. See *The Progreso*, 50 F. 835 (3d Cir. 1892); *The Samuel W. Hall*, 49 F. 281 (S.D.N.Y. 1892); *The Orient Point*, SMA 246 (Arb. at N.Y. 1961).

24A.3 Unless the charterparty provides otherwise, the charterer may not cancel the charter before the ship arrives at the delivery port, and the owner may not demand a decision from the charterer before the ship tenders notice of delivery. *Sanday* v. *United States Shipping Bd. Emergency Fleet Corp*., 1 F.2d 390, 391 (2d Cir. 1925).

24A.4 Although a late tender by owner generally gives the charterer an option to cancel, this will not create a right to recover damages from the owner. See *Sanday* v. *United States Shipping Board Emergency Fleet Corp*., 6 F. 2d 384 (2d Cir. 1925), *cert. denied*, 269 U.S. 556 (1925); *The Michael L*, SMA 1301 (Arb. at N.Y. 1979); *The Lucerna*, SMA 2579 (Arb. at N.Y. 1988).

24A.5 In *Sanday*, the charter was for a voyage from Galveston to Rio de Janeiro, and gave the charterer the right to cancel if the ship nominated to perform was not ready to load at Galveston on or before 15 November 1920. The ship was at Norfolk on 11 November, and, it being obvious she could not make Galveston by the cancelling date, the charterer rejected the tender and made arrangements for another ship. The ship arrived in Galveston three days late, and was apparently tendered at that time. The charterer meanwhile commenced an action against the shipowner for damages it claimed arose from the late tender, on the theory that the charter bound the owner to tender a ship on or before the cancellation date. The court dismissed the action, holding that the very purpose of a cancelling clause was to preclude an action for damages resulting from a late tender, and stating:

> When no delivery date is named in a charter, the promise of the owner is to tender with reasonable dispatch, and for a breach of that promise of course the charterer may sue. If he does, he undertakes to show that the owner has not used reasonable dispatch in tendering the ship. We entirely agree that his promise is not affected by the presence of a cancellation clause, and so it appears to have been held in *Nelson & Sons* v. *Dundee East Coast Shipping Co. Limited*, 44 *Scottish Law Reporter* 661 (1907, Court of Session).
>
> But that is quite different from saying that the cancellation date *ipso facto* establishes a promise of the owner to tender the ship on or before the cancellation day or at any other definite time. It seems to us very clear that the language is expressly chosen to avoid such a result, and that, although the owner accepts the hazard of tendering the ship after the cancellation date only to have her refused. . . he does not undertake anything else beyond reasonable dispatch. Such an undertaking must be expressed in a promise to tender by the cancellation date, and that the charterer's option to cancel does not in any sense imply. [6 F.2d at 385]

24A.6 A right to recover damages exists if the owner has materially misrepresented the ship's position, or her readiness for delivery, in the charter. See *Davison* v. *Von Lingen*, 113 U.S. 40, 49–50 (1885); *The Michael L*, above; *The Tropez Comfort*, SMA 2616 (Arb. at N.Y. 1989). In addition, if the owner breaches his duty to proceed with "reasonable dispatch" in making delivery of the ship, the charterer may have a right to damages. Such a right could arise where, for example, owner makes an unreasonable intermediate voyage, or delays the ship to carry out repairs. See *The*

Gilia, 1972 AMC 1738 (Arb. at N.Y. 1972); *The Caribbean Wave*, SMA 278 (Arb. at N.Y. 1961); *The Noto*, 1979 AMC 116 (Arb. at N.Y. 1976); and *The Federal Fraser*, SMA 1804 (Arb. at N.Y. 1983).

24A.7 In *The Marta Z*, SMA 2602 (Arb. at N.Y. 1989), the owner was held to have breached the charter by scheduling calls to other ports in order to make engine repairs and load another charterer's cargo before calling on the loading port. The owner was also held in breach of its duty to exercise due diligence to make the ship's engines seaworthy, promptly make necessary repairs to the engine, and prosecute the voyage, which was delayed 57 days and ordinarily would have taken 12 days to complete. Although the charter called for prepaid freight to be irrevocable under all circumstances, the panel held that the owner could not retain the prepaid freight since it was at fault. In addition, because the owner could not have had reasonable grounds to believe that the ship would have been delivered to the charterer by the dates established in the charter, the charterer was also awarded extension penalties which it paid to its customers because of the delay.

24A.8 In the *M/V Ashley*, SMA 2936 (Arb. at N.Y. 1993), the ship sustained damage in heavy weather on the way to the delivery port, and required a substantial deviation and a long period of time for repairs. It appeared to the owner that the charterer had obtained a substitute ship to perform the same voyage with the same cargo; therefore, the owner did not send the ship to the delivery port after the repairs were finished. In the arbitration, the charterer argued that if the owner had tendered the ship, the charterer would have negotiated a different voyage for the other ship. The arbitrators held the owner was in breach for failing to tender the ship after the repairs.

24A.9 A charterer who elects to exercise its right of cancellation must do so promptly and without acting in a manner that is inconsistent with this intent. In the absence of an express provision, if the charterer intends to cancel, that should be communicated to the owner within a reasonable time after tender of notice of readiness or it will be waived. See *Bonanno* v. *Tweedie Trading Co*., 117 F. 991, 996 (S.D.N.Y. 1902), *aff'd*, 130 F. 448 (2d Cir. 1904). In *Dilmun Shipping Co*. v. *Blystad Shipping & Trading, Inc*., 2003 AMC 788, 802 (Arb. at N.Y. 2003), the charterer could not invoke the cancellation clause when it had given voyage orders to the ship immediately after it went back on hire. The Shelltime 4 form permitted the charterer to cancel if the ship was off hire for 20 or more days, and while the panel found that the charterer could exercise its right of cancellation at any time that the vessel was off hire more than 20 days, it also found that the charterer's provision of voyage orders to the ship had been an election to proceed with the charter. See *id*. at 798. The charterer's attempt to invoke the cancellation clause after providing voyage orders was ineffective. See *id*. at 802.

Condition on delivery

24A.10 See discussion at paragraphs 3A.1 *et seq* and 8A.1 *et seq*.

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CHAPTER 25

Off-hire Clause

"97. 15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment,
98. grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause
99. preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by
100. defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence
101. thereof, and all extra expenses shall be deducted from the hire."

25.1 Clause 15 of the New York Produce form contains two provisions qualifying the charterers' obligation to pay hire throughout the charter period. The first of these, in Lines 97 to 99, is an off-hire provision dealing with interruptions to the charter service. The second, in Lines 99 to 101, is a provision allowing deduction from hire in the event that the ship's speed at sea is reduced by mechanical problems. This chapter deals with each of these in turn.

Interruptions to the charter service: general principles

25.2 Most, if not all, time charters contain an off-hire clause, excusing the charterers from having to pay hire while the ship is prevented from performing the charter service. Commenting on Clause 15 of the New York Produce form, Kerr, J., said in *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368, at page 381: "[T]he object is clear. The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost."

25.3 Two general principles apply to such clauses.

25.4 First, the burden is on the charterers to show that the off-hire clause operates in the relevant circumstances. Bucknill, L.J., said in *Royal Greek Government* v. *Minister of Transport* (1948) 82 Ll.L.Rep. 196, at page 199: "the cardinal rule. . . in interpreting such a charter-party as this, is that the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owners' right to hire." Similarly, Rix, L.J., in *The Doric Pride* [2006] 2 Lloyd's Rep. 175, at page 179, said, "under a time charter the risk of delay is fundamentally on a time charterer, who remains liable to pay hire in all circumstances unless the charterer can bring himself within the plain words of an off-hire provision".

25.5 Second, the off-hire clause does not depend on any breach of contract by the owners. In the words of Staughton, J., in *The Ioanna* [1985] 2 Lloyd's Rep. 164, at page 167: "Off-hire events are not necessarily a breach of contract at all. So one should not be too surprised if one finds that [the

off-hire clause] leads to a different answer than would ensue in the case of a claim for damages for breach of contract."

The components of off-hire

25.6 Under Lines 97 to 99 of Clause 15 of the New York Produce form, dealing with interruption to service, there are three matters that the charterers must establish in order to put the ship off-hire: first, the full working of the ship must have been prevented; second, it must have been prevented by one of the causes or events listed in the clause; and third, there must have been a loss of time from that cause or event. These matters are discussed in turn below.

Preventing the full working of the ship

The first question to be addressed

25.7 In every case, the charterers have to show that the full working of the ship has been prevented. The phrase "preventing the full working of the vessel" qualifies not only the immediately preceding words "any other cause" but all of the other causes listed in Lines 97 and 98 of the New York Produce form, i.e. "deficiency of men" and so on. Kerr, J., said in *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368, at page 382: "The word 'other' in the phrase 'or by any other cause preventing the full working of the vessel' in my view shows that the various events referred to in the foregoing provisions were also only intended to take effect if the full working of the vessel. . . was thereby prevented."

25.8 So one must start by asking whether the full working of the ship has been prevented. In *The Aquacharm* [1982] 1 Lloyd's Rep. 7, Lord Denning, M.R., said at page 9: "We are to inquire first whether the 'full working of the vessel' has been prevented. Only if it has, do we consider the 'cause'." See also Rix, J., in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 141: "It has therefore been said that the first question to be answered in any dispute under the clause is whether the full working of the vessel has been prevented; for if it has not, there is no need to go on to ask whether the vessel has suffered from the operation of any named cause. . . ."

Preventing the working of the ship

25.9 A ship is prevented from working when she is prevented from performing the next operation that the charter service requires of her: see *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), *per* Staughton, L.J., at page 459 and *The TS Singapore* [2009] 2 Lloyd's Rep. 54, at page 57 rhc*, per* Burton, J.. So if the next operation that the ship needs to undertake is to sail to the discharge port, but she is unable to do so, then the ship is being prevented from working. On the other hand, if the situation is that the ship is unable to sail, but the next operation required of her is to remain at berth and discharge, the full working of the ship has not been prevented.

The *Westfalia* was time chartered for trading between West African and European ports. The charter contained an off-hire clause which read, "In the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the ship is stopped for more than forty-eight consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service". The ship had a compound steam engine, with a high-pressure cylinder and a low-pressure cylinder. In the course of a voyage from West Africa to Harburg, on the Elbe, the high-pressure cylinder broke down and she was obliged to put into Las Palmas. Repairs could not be effected there. She was towed to Harburg by a tug, although some assistance was given by the ship's low-pressure cylinder. Once at Harburg, she was discharged normally, although her engine remained unrepaired. The charterers claimed the ship was off hire both during the voyage to Harburg and during discharge.

The House of Lords unanimously held that the ship was off hire during the tow from Las Palmas to Harburg. But a majority of the House of Lords held that the ship was on hire during discharge at Harburg.

Lord Halsbury, L.C., in the majority, held at pages 56 and 57: "I should read the contract as meaning this. . . that [the ship] should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if what was required of her was to lie at anchor, . . . [and] if she was efficient to do it at that time she would then become, in the language of the contract, . . . 'efficient', reading it with the other words, 'for the working of the vessel'. How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. . . of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time."

Hogarth v. *Miller* [1891] A.C. 48 (H.L.).

(Similarly a ship is not prevented from performing the next service required of her if she has defective hatch covers whilst proceeding on a ballast voyage: see *The Hermosa* [1980] 1 Lloyd's Rep. 638, appealed on other grounds [1982] 1 Lloyd's Rep. 570 (C.A.)**.)**

25.10 In deciding whether the ship is prevented from performing the next operation that the charter service requires, the following principles must be borne in mind**.**

25.11 A ship is not prevented from working merely because she cannot perform the next operation that the charterers would wish, or were expecting, her to undertake. The relevant question is whether she is prevented from carrying out the next operation that the performance of the charterers' orders makes necessary. "The question is not what the charterers hoped or expected their orders would be, but what service they actually required": *per* Staughton, L.J., in *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), at page 460.

The off-hire clause in the time charter for *The Berge Sund* included the phrase "or any other cause preventing the efficient working of the vessel". After carrying a defective cargo of butane, the crew cleaned the ship's tanks on the ballast voyage. Although the crew were not negligent, their efforts proved inadequate and time was spent in further extensive cleaning at the loading port. The arbitrators and Steyn, J., held that the ship was off-hire during this further cleaning as she was not in an efficient state to provide the service required, namely the loading of her next cargo. The Court of Appeal came to the opposite conclusion on the basis that the service required was not the loading of cargo but further cleaning. Staughton, L.J., said, at page 461: "In my opinion the critical question is, what was the service required of the vessel on Dec. 20, 1982? What were the charterers' orders? They were not to load cargo; as I have said, that was the last thing that the charterers would have ordered, since the copper strip test had been failed. The orders were, in part expressly and at all relevant times by implication, to carry out further cleaning. That was the service required, and the vessel was fully fit to carry it out."

The Berge Sund [1992] 1 Lloyd's Rep. 460 and [1993] 2 Lloyd's Rep. 453 (C.A.).

(For a fuller account of this case see paragraphs 37.111 and 37.112, below**.)**

25.12 Generally a ship is not prevented from working if, with a view to performing the charterers' orders, she is carrying out an operation which is "in the ordinary way an activity required by a time charterer": *per* Staughton, L.J., in *The Berge Sund*, above, at page 461 of the Court of Appeal report. Obviously, a ship is performing the charter service when on a carrying voyage or loading or unloading the charterers' cargo. However, as Staughton, L.J., pointed out at page 460, she is also performing the charter service when bunkering, ballasting, lightening (as in *The Aquacharm*, below) and hold-clean*ing.*

The Aquacharm was time chartered for a trip on the New York Produce form. Having been ordered to load to maximum draft for passage through the Panama Canal, the master negligently failed to take into account that in passing through a fresh water lake which forms part of the Canal the ship's forward draft would increase. The ship was consequently refused entry to the Canal. After considerable delay part of the cargo had to be discharged, carried through the Canal in another ship and then reloaded. It was argued by the charterers that

the ship was off hire. Lloyd, J., and then the Court of Appeal both held that she was not. Lord Denning, M.R., said, at page 9, "I do not think the lightening of cargo does 'prevent the full working of the vessel'. Often enough cargo has to be unloaded into a lighter – for one reason or another – to get her off a sandbank – or into a basin. The vessel is still working fully, but she is delayed by the need to unload part of the cargo."

The Aquacharm [1980] 2 Lloyd's Rep. 237 and [1982] 1 Lloyd's Rep. 7 (C.A.).

25.13 Where she is carrying out an ordinary operation of this kind, the ship is not prevented from working merely because the operation is more than usually difficult or time-consuming to perform. In the case that follows, a ship was not prevented from working because damage to her cargo had extended the time required for discharging.

The *Mareva A.S.* was chartered on the New York Produce form and carried grain from the U.S. Gulf to Algiers. The cargo was wet damaged owing to leakage through defective hatch covers. Because of the damage, discharge at Algiers took 15 days longer than it otherwise would have done; but at all times the ship was fully capable of performing every service required of her and, in particular, fully capable of discharging cargo from all her holds. The ship was not therefore prevented from working and so was not off-hire.

The Mareva A.S. [1977] 1 Lloyd's Rep. 368.

Likewise, a ship is not prevented from working merely because she encounters an obstacle to navigation. "A vessel is not off hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency of water, blocking her path": *per* Rix, J., in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 147. (See also *Court Line* v. *Dant & Russell* (1939) 44 Com. Cas. 345, summarised at paragraph 25.40, which deals with an obstacle to navigation, although not in terms of whether the working of the ship was prevented.)

25.14 By contrast, a ship is likely to be prevented from working if she is having to do something that is not in the ordinary way an activity required by a time charterer. So the ship may be prevented from working while she undertakes repairs on a broken engine or if she is engaged in fighting a fire in her holds or if she is obliged to put back on a voyage.

The *Clipper Sao Luis* was period time chartered for trading between West Africa and South America. The ship loaded a part cargo of baled cotton at Cotonou, in Benin, then proceeded to, and loaded further cargo at, Rio de Janeiro. Just after loading at Rio had been completed, the cargo caught fire, as a result of a stevedore negligently discarding his cigarette. The ship was delayed for a number of weeks, fighting the fire. The charterers treated the ship as off-hire. The owners denied that the full working of the ship had been prevented at any time, arguing that the ship was performing the service then required of her by remaining at the quayside fighting the fire. David Steel, J., rejected that submission, calling it "wholly unreal": see page 651.

The Clipper Sao Luis [2000] 1 Lloyd's Rep. 645.

25.15 The working of a ship may also be prevented by third party interference, for example legal or administrative action or piracy. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 150, Rix, J., held, "In my judgment therefore, the qualifying phrase 'preventing the full working of the vessel' does not *require* the vessel to be inefficient in herself. A vessel's working may be prevented by legal as well as physical means, and by outside as well as internal causes." So, on the facts of that case, the full working of the ship was prevented by the actions of the Bangladeshi port authorities, which prevented the ship from sailing; see the summary of the facts at paragraph 25.40, below. Or again, in *The Mastro Giorgis* [1983] 2 Lloyd's Rep. 66, where the full working of the ship was prevented by her arrest and in *The Saldanha* [2011] 1 Lloyd's Rep. 187, where the arbitrators concluded that the full working of the ship was prevented during the ship's captivity at the hands of Somali pirates. Such cases, where the cause, whilst 'external', is directed at or relates to the specific ship, should be distinguished from cases of external obstructions or impediments affecting shipping generally, such as the boom across the Yangtze in *Court Line* v. *Dant & Russell* (1939) 44 Com. Cas. 345 (summarised at paragraph 25.40 below), which will generally not prevent

the full working of the ship, though they may interrupt or delay her progress. (It is suggested that Rix, J.'s approach, above, is to be preferred to Webster, J.'s view in *The Roachbank* [1987] 2 Lloyd's Rep. 498. In that case, Webster, J., said at page 507 that, by dint of a judicial gloss on the language of the charter, the words "preventing the full working of the vessel" apply only where the ship is prevented from working by an internal cause, that is to say, one which renders the ship not fully efficient in herself. Rix, J., expressly refused to follow that view, saying, at page 150, "An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think that there is any authority binding on me that prevents me from saying so.")

25.16 The ship is not performing the service next required of her merely because she is operating in a manner that is consistent with performing that service. Thus, in *The TS Singapore* [2009] 2 Lloyd's Rep. 54, the ship was damaged in an accident in Japan and, following the accident, sailed to Guangzhou (via Hong Kong) for repairs. The first part of her route to Guangzhou happened to coincide with the route she would have taken to Shanghai, the next port ordered by charterers. But, even while the two routes overlapped, she was not performing the next service required of her.

25.17 The full working of the ship is prevented only where the charterers lose the use of her against their will. For this reason, an agreement between disponent owners and their time charterers to take the ship "off hire" to allow her head owners to perform a short voyage for their own account did not engage Clause 15: *The Fu Ning Hai* [2007] 2 Lloyd's Rep. 223, at [14].

Preventing the "full" working of the ship

25.18 Under Clause 15, the question is whether the full working of the ship has been prevented, not whether the working of the ship has been wholly prevented. Therefore, if an event within Clause 15 causes some part of the working of the ship to be prevented, or merely impairs the working of the ship that is sufficient in principle to give rise to off-hire.

The *Horden* was chartered under an earlier version of the Baltime form. The off-hire clause provided that: "In the event of loss of time caused by dry-docking or by other necessary measures to maintain the efficiency of steamer or by. . . damage to hull or other accident preventing the working of the steamer and lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service . . . ." As a result of the shifting of the ship's deckload of timber on a voyage from Archangel to Liverpool, her foremast was badly damaged. This did not affect the remainder of the voyage to Liverpool but at Liverpool she could only discharge her aft part by her own means. She could not discharge from the forward part because of the broken mast, and floating derricks had to be employed. The charterers contended that the ship was off hire for the whole period of discharge because she was inefficient throughout. The owners argued that as long as the ship could discharge, however slowly, she was efficient and hire continued.

It was held by the Court of Appeal that the full working of the ship was prevented by the partial inefficiency of the ship's discharging gear and that the ship was off hire for the whole period of discharge. Lord Roche said: "The mast being damaged did not prevent or hinder her steaming, but it did hinder or prevent her discharging in the sense in which prevention was construed in the House of Lords in *Hogarth* v. *Miller* as preventing discharge or the working of the ship happening in accordance with the contract."

Tynedale v. *Anglo-Soviet* (1936) 41 Com. Cas. 206 (C.A.).

(Similarly, in *Hogarth* v. *Miller* (see paragraph 25.9, above) the full working of the ship was prevented during the tow to Harburg, even though the ship was conveying the cargo to Harburg and the low-pressure cylinder of its compound engine was operating.)

25.19 The potential harshness of this rule is mitigated under Clause 15 of the New York Produce form by the fact that the charterers are only entitled to deduct hire equivalent to the amount of time lost during the period when the ship is not working fully: see below, paragraph 25.56. It is, in other

words, a 'net loss of time' provision. That is also true of the off-hire clauses in most modern time charter forms.

25.20 It has been suggested that the general rule stated in paragraph 25.18, above, is also subject to this further qualification, that if the charter contains express words dealing with the case where the ship is partly prevented from working while at sea, so that her speed is reduced (such as, for example, Lines 99 to 101 of the New York Produce form), the presence of an express provision of this kind may prevent the charterers treating the ship as off-hire under the primary off-hire clause (Lines 97 to 99 in the case of the New York Produce form). This unresolved issue is dealt with at paragraph 25.78, below.

Preventing "the efficient working of the vessel"

25.21 Whilst the New York Produce form refers to "the *full* working of the vessel", some other charters, notably, the Shelltime 3 and 4 forms, refer to "the *efficient* working of the vessel". In *The Manhattan Prince* [1985] 1 Lloyd's Rep. 140, at page 146, Leggatt, J., said, "the phrase 'efficient working' must enjoy the connotation of efficient physical working". Therefore, where the clause refers to the efficient working of the vessel, this is prevented by a legal or administrative constraint only if the constraint in question results from the physical condition, or the suspected physical condition, of the ship.

The *Bridgestone Maru No. 3* was period time chartered on the Shelltime 3 form. The ship loaded a cargo of liquid petroleum gas in Saudi Arabia for discharge in Livorno, Italy. When the ship berthed at Livorno, she was inspected by the harbour authorities. It was found that the condition of the ship's booster pump did not comply with local regulations. The harbour authorities refused to allow the ship to discharge and she was ordered off the berth. Hirst, J., held that the ship was off hire, saying, at page 83, "The cause of refusal to allow the vessel to discharge was the failure of the pump to comply with the RINA regulations [safety regulations applicable at that port] . . . This allegation was a potential challenge to the efficiency of part of the ship's equipment, namely, the portable pump. . . . [T]he incapacity of the ship to discharge was attributable to the suspected condition of the ship itself, and as a result the crew could not use the relevant part of the machinery, namely, the pump."

The Bridgestone Maru No. 3 [1985] 2 Lloyd's Rep. 62.

(See also the comments on this case and on "efficient working" by Rix, J., in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at pages 149 and 150.)

And continuing for more than twenty-four consecutive hours

25.22 This phrase appears in Lines 147 and 148 of the off-hire clause of the Baltime form, Clause 11(A). Once the 24 hours have been exceeded, they are counted in with the rest of the delay: *Meade-King, Robinson* v. *Jacobs* [1915] 2 K.B. 640.

The off-hire causes or events

25.23 Once it has been established that the full working of the ship has been prevented, it is then necessary to ask whether that state of affairs has been caused by an event within the wording of the clause.

Deficiency of men

25.24 The expression "deficiency of men" does not apply to the situation in which there is on board a full complement of officers and men able to work but some or all of them refuse to do so.

In December 1943 the officers and crew of *The Ilissos* refused for over six days to sail from Newcastle, New South Wales, except in a convoy. The Court of Appeal held that, as there was no numerical insufficiency, the expression "deficiency of men" did not apply.

Royal Greek Government v. *Minister of Transport* (1948) 82 Ll.L.Rep. 196 **(**C**.**A**.)**.

25.25 It is this decision which led to the widespread practice of inserting the words "or default" after "deficiency" in charters made on the New York Produce form. However, it should be noted that the off-hire clause in the *Royal Greek Government* case was unusual in that, unlike Clause 15 of the New York Produce form, it did not contain the words "or any other cause preventing the full working of the vessel" or any similar sweeping-up phrase. Where a charter does have such wording, it is probably the case that any event affecting the efficiency of the crew – whether deficiency, default or illness – that causes the full working of the ship to be interrupted would come within the sweep-up.

25.26 A deficiency of men refers to a deficiency of officers and crew. The word "men" does not include gunners employed to man guns which used to protect against enemy submarines: see *Radcliffe* v. *Compagnie Général Transatlantique* (1918) 24 Com. *Cas. 40.* Likewise presumably 'men' would not include armed anti-piracy security.

Default of men

25.27 There is a "default of men" (where that has been added to Clause 15) only if the ship's crew refuses to perform their duties or deliberately withhold their services. Negligence in the performance of those services, or other inadvertent errors or omissions, may well cause time to be lost, but does not amount to a "default of men": see *The Saldanha* [2011] 1 Lloyd's Rep. 187, at pages 191 and 192. In that case, Gross, J., accepted that the word "default" could embrace negligence but concluded that, in context of clause 15, it had to be read more restrictively. In *The Pearl C* [2012] 2 Lloyd's Rep. 533, the amendments to Clause 15 included the frequently added words "default of Master, Officers or crew", and these were accepted as apt to cover a decision to steam at reduced speed. (For the separate question of whether Lines 99 to 101 provide exclusively for delays from such a cause, see paragraph 25.78, below.)

NYPE 93

25.28 Line 220 of the 1993 revision of the New York Produce form replaces "deficiency of men" in the 1946 version with "deficiency and/or default and/or strike of officers or crew".

Breakdown to hull, machinery or equipment

25.29 The meaning of the word "breakdown" was considered by the Court of Appeal in a voyage charter case, *The Afrapearl* [2004] 2 Lloyd's Rep. 305 (C.A.), where the question was whether a discharge pipe at a shore facility had suffered "a breakdown". At page 313, Clarke, L.J., held that a distinction must be made between a breakdown and its cause: "As I see it a breakdown of equipment such as the discharge pipe occurs when it no longer functions as a pipe." On the other hand, the cause of the breakdown may be something that predates the breakdown and may be either an internal defect or some external event. Nonetheless, Clarke, L.J.'s simple functional test may not meet every case, as for example damage or destruction by collision, is more than, and different form, a breakdown, although it might be caused by a breakdown: see *The Ladytramp* [2014] 1 Lloyd's Rep. 412 *per* Tomlinson, L.J., *obiter*, at [14]–[15], citing Robert Goff, J.'s decision in *The Thanassis A* (1982) LMLN 68.

25.30 Where the condition of the ship's machinery becomes progressively worse, it has been held that a "breakdown" occurs when it becomes reasonably necessary to interrupt the charter service for repairs: see *Giertsen* v. *Turnbull*, 1908 S.C. 1101, *per* Lord Ardwell at page 1110.

The *Bauta* was time chartered for a period of six months. The charter included a clause providing "that in the event of loss of time from. . . breakdown of machinery. . . the payment of hire shall cease from the time the breakdown occurred until" the ship "be again in an efficient state to resume her service". On a voyage to Jaffa, an unusual noise was heard in the engine room. However the ship was able to maintain normal speed on the rest of the voyage to Jaffa, although from time to time the ship's engineer heard other strange noises in the ship's engine room. At Jaffa, the ship was inspected as thoroughly as was reasonably possible. However, the problem could not be identified and there was no reason to apprehend that the problem would interfere with the working of the ship. Having completed loading a cargo of oranges, the ship left Jaffa for Valencia. Over the next several days, as the ship was sailing towards Valencia, the engine continued to produce strange noises, which became progressively worse. Eight days into the voyage, the engineer concluded that the propeller must be loose in the shaft. That same day, the master decided to divert towards the nearest port, Bona, at slow speed in order to undertake repairs.

Lord Ardwell in the Court of Session held, at page 1110; "the words 'a breakdown of machinery' must be construed in a popular and reasonable sense, and. . . in such sense the vessel broke down when a defect was discovered which rendered it necessary in the opinion of a prudent navigator that she should proceed to a harbour for repairs."

Giertsen v. Turnbull, 1908 S.C. 1101

Damages to hull, machinery or equipment

25.31 Any such damage must be fortuitous rather than the natural result of the use that the charterers make of the ship: see *The Rijn* [1981] 2 Lloyd's Rep. 267, discussed further below at paragraph 25.45.

Detention by average accidents to ship or cargo

25.32 "Detention", in this context, means something more than mere delay. There must, in the words of Kerr, J., in the *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368 be "some physical or geographical constraint upon the vessel's movements in relation to her service under the charter". This definition was considered and approved by the Court of Appeal in *The Jalagouri* [2000] 1 Lloyd's Rep. 515, a case in which an issue arose as to the meaning of "detention" in an additional clause which required the owners to provide security in the event that the ship was detained by any cause; see *per* Tuckey, L.J., at page 519. In *The Mareva A.S.*, above, it was held, by Kerr, J., at page 382, that damage to cargo which caused the discharging operation to be protracted had not caused the ship to be detained.

25.33 An "average accident" means an accident which causes damage: see *The Saldanha* [2011] 1 Lloyd's Rep. 187, at page 189, adopting what was said by Kerr, J., in *The Mareva A.S.*, above, at page 381. The use of the word "average" to mean "causing damage" probably comes from the language of insurance, where "average" may mean damage which is less than a constructive total loss: *The Saldanha*, at [15]. At all events, an 'average accident' does not mean a 'general average accident': see *The Mareva A.S.*, at page 381.

25.34 The word "accident" means a fortuitous occurrence: see *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, *per* Rix, J., at page 144. In that case, at the end of discharging a cargo of rice, there was a quantity of just under 16 tonnes of residues in the ship's holds, representing around 0.16 per cent of the total mass of the cargo. The charterers argued that this indicated that there had been an average accident to cargo. Rix, J., rejected that argument, saying the arbitrators had been entitled to conclude that such a small quantity of residue was normal. But not every event

which might be seen as a fortuity from the owners' perspective is an "accident" within Clause 15. The word here connotes a lack of intent by all protagonists. For that reason, an attack on the ship by pirates is not an accident: see *The Saldanha*, above, at [12]. In *Royal Greek Government* v. *Minister of Transport (The Illisos)* (1949) 82 Ll.L.Rep.196, the Court of Appeal held that the refusal of a crew to sail save in a convoy did not come within the word.

NYPE 93

25.35 The 1993 revision of the New York Produce form adds after "cargo" the words "unless resulting from inherent vice, quality or defect of the cargo": see Lines 223 and 224. It also introduces a separate new cause, namely "detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible)": see Lines 221 and 223.

Under that provision, the reference to "subcontractors" means, it is suggested, that detention caused by the actions of, for example, sub-charterers, whether immediate or more remote, shippers or receivers, will not put the ship off hire, whether or not they were actions in the course of carrying out a task the charterers have undertaken to carry out, so as to make them actions of charterers' "agents" in the sense normally used in a time charter (see paragraph 20.14 above). In *The Global Santosh*, below, the Court of Appeal held that to be the case even for an off hire proviso limited to acts of "the Charterers or their agents", which gives "agents" in this context (off hire) a wider meaning.

The *Global Santosh* was chartered in September 2008 in the ASBATIME form, a 1981 revision of the New York Produce form, by Clause 8 of which the charterers undertook "all cargo handling". An additional clause, Clause 49, put the ship off hire until her release if she was "captured or seizured [*sic*.] or detained or arrested by any authority or by any legal process. . ., unless such capture or seizure or detention or arrest [was] occasioned by any personal act or omission or default of the Charterers or their agents." The ship was wrongfully arrested, by mistake, in proceedings brought by sub-sub-voyage charterers Transclear S.A. to secure a demurrage claim against their buyers, the receivers, IBG Investments Ltd. Having arrived at Port Harcourt, Nigeria, on 15 October 2008 to discharge a cargo of cement, congestion caused at least in part by the breakdown of IBG's offloader kept her waiting for a berth until 18 December 2008, resulting in the demurrage claimed by Transclear. She was arrested, in error, on 17 December 2008, and remained under arrest until 15 January 2009.

Arbitrators held, by a majority, that the ship was off hire whilst under arrest. The acts of Transclear and IBG were not acts of "the Charterers or their agents".

Field, J., allowed, in part, an appeal by the owners. He agreed with the charterers that acts of Transclear or IBG would only be acts of "the Charterers or their agents" if they were acts in the course of carrying out the task of cargo handling undertaken by the charterers under Clause 8. He held that the acts of Transclear in connection with the arrest of the ship were not such acts, but that the acts of IBG, in failing to procure that discharge occurred within the sale contract laytime and in failing thereafter to pay or secure Transclear's demurrage claim, were acts of cargo handling within Clause 8. He remitted the award to the arbitrators to consider causation, that is to say whether the (erroneous and wrongful) arrest was "occasioned by" those acts of IBG.

The Court of Appeal dismissed the charterers' further appeal, and allowed a cross-appeal by the owners. They held that Field, J., was wrong to say that IBG's acts were acts of cargo handling within Clause 8, but held that acts of "the Charterers or their agents" within the proviso to Clause 49 were not limited to acts in carrying out tasks, for example cargo handling, that the charterers had undertaken by the time charter to perform. Any act of any sub-contractor of the charterers (direct or indirect) was an act of their "agents" for that proviso. The remission to the arbitrators on causation was therefore widened so as to relate to Transclear's conduct as well as IBG's.

The Global Santosh [2013] 1 Lloyd's Rep. 455 (Field, J.), [2014] 2 Lloyd's Rep. 103 (C.A.). (At the time of writing, an application to the Supreme Court for permission to appeal is pending.)

25.36 The 1993 revision also incorporates part of Clause 11(B) of the Baltime charter as follows: "In the event of the Vessel being driven into port or to anchorage through stress of weather, trading

to shallow harbors or to rivers or ports with bars, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers' account": see Lines 231 to 233.

Or by any other cause preventing the full working of the vessel

25.37 The phrase "any other cause" means 'any other cause of the same type as those previously mentioned'. This is an application of the *ejusdem generis* rule, a rule of construction to the effect that a sweep-up provision at the end of a list must be taken to refer to the same kind of things as those specifically mentioned. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, Rix, J., said at page 150: "In my judgment it is well established that [the words 'any other cause'], in the absence of 'whatsoever', should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause."

25.38 Applying this rule requires one to identify the general type of cause of which the named causes are all examples. That is not obvious. However, it seems that the type of cause in question is causes relating to the condition of the ship or her crew. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139 said, at page 150, Rix, J., said: "A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context, emphasized for instance by Mr Justice Kerr in *The Mareva AS* (at page 382) that it is for the owners to provide an efficient ship and crew."

25.39 The causes covered by "any other cause" are not restricted to physical or tangible causes. The causes covered include legal action or administrative acts by a port or other lawful authority, provided that they relate to the physical condition or efficiency of the ship or her crew or to the suspected condition of the ship or crew. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 151, Rix, J., said *obiter*, "where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel, any time lost may well be off hire even in the absence of the word 'whatsoever'." Another example of such a case might be where local legal authorities take action against a ship because of an infraction of local law by the crew; *ibid*.

25.40 However, the phrase "any other cause" does not cover causes unrelated to the physical condition or efficiency of the vessel and her crew or cargo. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, Rix, J., said, at page 151, ". . . the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo".

The *Errington Court* was time chartered on the New York Produce form in March 1937. In the course of the charter she was ordered to Wu-hu, 750 miles up the Yangtze River. After her arrival there, war broke out between Japan and China and the Chinese sank ships in the river to form a boom to prevent Japanese ships coming up it. The *Errington Court* was trapped in consequence. Branson, J., held that the charter was frustrated, but he considered, *obiter*, the alternative argument that the ship was off-hire. He said, at page 352: "The charterers rely on Clause 15 for this. The argument depends upon the delay caused by the boom coming within the words 'any other cause preventing the full working of the vessel'. In my opinion, it does not."

Court Line v. *Dant & Russell* (1939) 44 Com. Cas. 345.

(It is thought that this case might equally well be analysed as one in which the full working of the ship was not prevented: see paragraph 25.13, above. The ship was delayed by a navigational obstacle created deliberately, and affecting all shipping in the area, and there is no warrant in the language of Clause 15 to distinguish such an obstacle from natural phenomena such as tides or weather.)

The *Laconian Confidence* was chartered on the New York Produce form for a trip to Bangladesh. After discharging her cargo of bagged rice at Chittagong she was delayed for 18 days by the bureaucratic attitude of the port authorities to permitting disposal of around 16 tonnes of residual sweepings. Rix, J., held that the ship remained on hire. The actions of the authorities in this case fell outside the ambit of "any other cause". At page 151, he said, "Prima facie it does not seem to me that it can be intended by a standard off-hire clause

that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause."

The Laconian Confidence [1997] 1 Lloyd's Rep. 139.

The *Saldanha* was time chartered on the New York Produce form in June 2008. In February 2009, she was hijacked by Somali pirates in the Gulf of Aden. She was held hostage at the port of Eyl and finally released in April 2009. The arbitrators held that the ship was not off-hire whilst being held hostage. Gross, J., held that seizure by pirates did not come within the phrase "any other cause". At [33], he said, "Intuitively, as a matter of indelible impression and in agreement with the tribunal, I think that seizure by pirates is a 'classic example' of a totally extraneous cause."

The Saldanha [2011] 1 Lloyd's Rep. 187.

(In contrast to *The Errington Court*, above, in *The Laconian Confidence* and *The Saldanha*, the interference was specific to the chartered ship and so was rightly regarded as having prevented her full working (as it was in *The Mastro Giorgis*, paragraph 25.43, below): see paragraph 25.13, *above.)*

NYPE 93; Shelltime 4; Baltime

25.41 The off-hire clause of the 1993 revision of the New York Produce form makes clear that only *ejusdem generis* causes are to be effective, by adding the word "similar" before the word "cause" in the 1946 wording: see Line 225. The same is true of the Shelltime 4 charter: see paragraph 37.104, below. By contrast, the sweep-up words of the Baltime form ("or other accident") have been held not to be subject to the *ejusdem generis* rule; they therefore have their full natural meaning and embrace, for example, grounding in a river (see *Magnhild* v. *McIntyre* [1920] 3 K.B. 321 and [1921] 2 K.B. 97 (C.*A.) and Court Line* v. *Finelvet* [1966] 1 Lloyd's Rep. 683), and encrustation of a ship's bottom by molluscs in waters where this could not have been expected to happen (*The Apollonius* [1978] 1 Lloyd's Rep. 53; but see *The Rijn* [1981] 2 Lloyd's Rep. 267 and paragraph 25.45, below).

Any other cause whatsoever

25.42 The *ejusdem generis* rule is disapplied by the insertion of the word "whatsoever" after "any other cause". Thus the relevant causes do not have to be of the same kind as those listed in Lines 97 and 98: see the judgment of Lloyd, J., in *The Mastro Giorgis* [1983] 2 Lloyd's Rep. 66, at page 68. The full working of the ship must still have been prevented, of course, so that whatever the cause it must still entail a loss of use of the ship against the will of the charterers (see *The Fu Ning Hai*, paragraph 25.17, above, in which "whatsoever" had been added).

25.43 What causes, therefore, are covered by the phrase "any other cause *whatsoever*"? In *The Mastro Giorgis* [1983] 2 Lloyd's Rep. 66, Lloyd, J., held the phrase covered an arrest of the ship by cargo interests. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, Rix, J., suggested *obiter* at page 151 that the capricious actions of local authorities might come within the same wording. In *The Saldanha* [2011] 1 Lloyd's Rep. 187, Gross, J., indicated *obiter* at [36] that the ship would have been off hire during her captivity at the hands of pirates had "whatsoever" been added.

The *Mastro Giorgis* was chartered for a trip from South America to Italy on the New York Produce form with the word "whatsoever" added to Line 98. She loaded a cargo of grain in the Argentine, part of it for discharge in Barletta. When she arrived there, the receivers alleged the cargo had been damaged during the voyage and they arrested her. As a result, the ship was prevented from leaving Barletta for several days. Lloyd, J., held the ship was off hire while under arrest, saying at pages 68 and 69; "Where, as here, the word 'whatsoever' is added, *any* cause may suffice to put the vessel off-hire, whether physical or legal; the question in each [case] is whether it prevents the full working of the vessel for the service immediately required. . . no responsible person could use the vessel in the present case, so long as she was under arrest*."*

The Mastro Giorgis [1983] 2 Lloyd's *Rep. 66.*

Implied limits on the causes covered by Clause 15

25.44 There are two implied limitations upon the causes embraced by the list set out in Clause 15. First, it is probably only a fortuitous cause or event (in the sense, in this context, of a cause or event that is not simply a natural result of compliance with the charterers' orders) that can give rise to off-hire under Clause 15; and second, a ship is probably not off hire if the off-hire event is caused by the charterers or arises from something for which the charterers are responsible. It is thought that these limitations apply even where the list of causes has been amended by the addition of the word "whatsoever". These points are discussed further below.

Fortuitous causes

25.45 It seems that an event which is the natural result of compliance with the charterers' orders does not give rise to off-hire.

During the service of the *Rijn* under the New York Produce form, her hull became fouled by marine growth during a protracted period of waiting for and then loading cargo. The charterers claimed that the ship was off hire because the fouling was "any other cause preventing the full working of the vessel", and also that a deduction from hire should be made under the second part of Clause 15, Lines 99 to 101, because speed had been reduced "by defect in. . . her hull". Mustill, J., rejected both these claims. He said: "The draftsman cannot possibly have intended that hire should cease in every circumstance where the full working of the vessel is prevented. This reading would be commercial nonsense, and would make the second half of the clause redundant. In my judgment, only those causes qualify for consideration which are fortuitous, and are not the natural result of the ship complying with the charterers' orders."

The Rijn [1981] 2 Lloyd's Rep. 267.

Incident caused by a matter for which the charterers are responsible

25.46 What is the position if an event that prevents the full working of the ship is itself caused by the charterers or by something for which they are responsible? Sometimes an off-hire clause expressly excludes such events: see, for example, *The Berge Sund* [1993] 2 Lloyd's Rep. 453, *per* Staughton, L.J., at page 462. What, however, is the position where there is no express stipulation dealing with charterers' fault? There is no decision squarely in point, but there are a number of persuasive authorities which suggest that the charterers are not entitled to treat the ship as off hire.

25.47 It seems to have been assumed by the Court of Appeal in *Board of Trade* v. *Temperley* (1927) 27 Ll.L.Rep. 230 that, if the charterers' breach of an express or implied term of the contract had caused the loss of time, they could not have relied on the off-hire clause; see particularly the judgment of Scrutton, L.J., at page 232. However, on the facts, no breach was established.

25.48 In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 151, Rix, J., discussed a hypothetical case in which the port authorities discover contraband on board the ship, which the charterers are responsible for putting there. He said, "If. . . the charterers were responsible, it would seem to be absurd to hold the vessel off hire: [but] how would that square under an amended clause [including the word 'whatsoever'] with my construction, seeing that the detention by the authorities under my construction would be 'any other cause whatsoever preventing the full working of the vessel'? It seems to me that there would be an implicit exclusion of causes for which the charterers were responsible."

25.49 In the case which follows there is clear support for the somewhat narrower proposition that the charterers may not rely on an off-hire clause when the working of the ship has been prevented by something which, under the charter, it was the charterers' duty to supply.

Delay was caused to the *Megna* by faulty bunker coal, supplied by the charterers, heating dangerously. The off-hire clause provided: "That in the event of loss of time from. . . breakdown of machinery or damage to hull preventing the working of the steamer for more than 24 consecutive hours, the hire shall cease until she be again in an efficient state to resume her service; or if breakdown or damage occurs at sea, not resulting from the cargo, necessitating putting back, hire shall cease until steamer is again in the same position. . . ."

It was held that both parts of the clause were limited to breakdown of machinery or damage to hull, and as neither had happened the clause did not operate. Greer, J., also said that the hire should not cease where the loss of time had been caused by "anything for which the charterer is responsible", in this case their bunkers.

Nourse v. *Elder Dempster* (1922) 13 Ll.L.Rep. 197.

25.50 Similarly in *Lensen* v. *Anglo-Soviet* (1935) 52 Ll.L.Rep. 141, the Court of Appeal held that a ship remained on hire under the Baltime form during repairs to her hull caused by a breach by the charterers of their obligation to order her to a safe berth. The leading judgment, of Greer, L.J., is based in part upon the charterers being unable to rely on the off-hire clause while employing the ship outside the limits agreed in the charter and partly on the indemnity clause.

25.51 If it is generally right to say that a ship is not off hire when an event for which the charterers are responsible prevents her from working, that leads one to ask: what does it mean in this context to say that the charterers are 'responsible' for an event? In *The Berge Sund* [1993] 2 Lloyd's Rep. 453, the Court of Appeal considered an off-hire clause that excluded from off-hire loss of time "caused by the charterers' fault". Staughton, L.J., said *obiter*, at page 462, that the owners had argued "that 'fault' here only refers to a causal connection between the time lost and something done or omitted by the charterers, as in the phrase, 'it was your (his) (my) fault'. I find that a plausible argument; and as ambiguity is to be resolved in favour of the owners, I should be inclined to adopt it." However, at first instance, [1992] 1 Lloyd's Rep. 460, Steyn, J., had taken the opposite view, holding that 'fault' meant conscious wrongdoing or negligence. See further paragraphs 37.108 to 37.112**,** below.

25.52 If, contrary to what is suggested above, a ship is off hire when prevented from working by circumstances for which the charterers are responsible, then there is an alternative analysis that may be applied: the law may treat the ship as off-hire but then allow the owners to claim hire back from the charterers as damages. This possibility is discussed below, at paragraph 25.75.

Issues of causation

25.53 Sometimes it is not easy to determine what exactly has prevented the full working of the ship. It may be that a number of circumstances have affected the ship and that it is difficult to say which of them has been the effective cause of the interruption to the service. In dealing with such questions, the court has to look at how the off-hire clause has allocated different risks and then assess, from the facts, what kind of risk has materialised in the particular case.

The *Doric Pride* was time chartered for a trip from the U.S. Gulf to Korea. There was an off-hire clause amongst the additional clauses in the charter which provided that the ship was to be off hire when detained by any authority, but then expressly excluded from off-hire: (a) detention caused by the "act or default of the charterers or their agents"; and (b) detention caused "by reason of. . . calling port of trading under this charter [sic]". The ship was delayed sailing into New Orleans because it was the first time she had called at a United States port and, as such, she was liable to be inspected by the coastguard under U.S. anti-terrorism legislation. The issue arose whether the delay was caused "by reason of. . . calling port of trading under this charter".

The Court of Appeal held it was not. Rix, L.J., said, at page 181: "Lord Hoffmann. . . in effect has said that when you have a problem of causation you ought to begin by asking: why do you want to know the answer to this question? For what purpose are you asking a question of causation?" In the particular case in question, the question of causation posed by the off-hire clause was designed to reflect a basic distinction in the charter between matters for which the owners are responsible and matters for which the charterers are responsible.

It was designed to ensure that the charterers were not relieved from the obligation to pay hire as a result of matters for which they were responsible. Seen from that perspective, the court concluded that the effective cause of the detention was the status of the ship; that was a matter for which the owners were responsible; accordingly the detention was not within the exception to off-hire.

The Doric Pride [2006] 2 Lloyd's Rep. 175 (C.A.).

Event occurring before the beginning of the charter period

25.54 If time is lost during the charter period as a result of one of the named causes, it does not matter that the cause in question resulted from something that occurred before the beginning of the charter period. Thus, if the ship drydocks during the charter period in order to repair damage caused by grounding before that period began, the ship will be off hire: see *The Essex Envoy* (1929) 35 Com. Cas. 61; and see *The Apollonius* [1978] 1 Lloyd's Rep. 53. The same is true of a reduction in speed under Lines 99 to 101 of the New York Produce form. Deduction from hire may be made in respect of time lost by a defect in the ship's hull that existed at the time of delivery under the charter: see *The Ioanna* [1985] 2 Lloyd's Rep. 164, summarised at paragraph 25.83, below.

Loss of time

25.55 Under most off-hire clauses, a ship is off hire only if there has been a "loss of time". (That is not always the case. For example, off-hire provisions dealing with capture, seizure or arrest often do not refer to loss of time: see *The Doric Pride* [2006] 2 Lloyd's Rep. 175 and *The Global Santosh* [2013] 1 Lloyd's Rep. 455.) In this context, "loss of time" means interruption or delay in the performance of the service immediately required. That is the sense in which that phrase is used in Clause 15 and in Clause 21 of the Shelltime 4 form (where indeed that meaning is spelt out). As Tomlinson, L.J., put it in *The Athena*, below, at [27], ". . . when one is considering whether and to what extent there has been, in this context, a loss of time, it is by reference to the service immediately required of the vessel that the enquiry is to be conducted. Whether the same amount of time would have been lost for other reasons at another stage in the chartered service is not a relevant consideration."

'Net loss of time' clauses

25.56 Line 99 of New York Produce form provides that where there is loss of time from an off-hire event, the payment of hire shall cease "for the time thereby lost". Therefore, in order to claim off-hire under Clause 15 of the New York Produce form, the charterers have to show not only that there has been a loss of time in the sense identified above, but also the amount thereof. Clauses of this kind, which allow the charterers to deduct hire equivalent to the amount of time lost, rather than for the whole of a defined period, are called 'net loss of time' clauses. The Baltime form also contains a net of loss of time clause. So, too, does the Shelltime 4 form (although it defines the off-hire period during which the net loss of time is off-hire more generously to the charterers than under the New York Produce or Baltime clause).

25.57 Clause 15 is concerned only with loss of time during a period when the full working of the ship is prevented by an off-hire cause. It follows that: (i) the obligation to pay hire is suspended only during that period, and as soon as the full working of the ship is no longer being prevented, the owners will start earning hire in full again (see *Vogemann* v. *Zanzibar* (1901) 6 Com. Cas. 253 and (1902) 7 Com. Cas. 254 (C.A.) and *The Pythia* [1982] 2 Lloyd's Rep. 160, although the position appears to be different under American law (see paragraphs 25A.7 *et seq.*, below)); (ii) what

happens after the full working of the ship is restored is irrelevant – neither subsequent delays, nor time being 'made up', can affect the calculation of off-hire (see *The Athena*, below). It also follows that, in a case of total, rather than partial, prevention of working, the amount of off-hire will be the same as if Clause 15 were a 'period' clause putting the ship off-hire for the period during which working was prevented.

The *Athena* was time chartered on the New York Produce form. The parties had added "default of master" to the off-hire causes under Clause 15 and the owners accepted arbitrators' decision that there was such a default when the ship, on the owners' instruction, interrupted the laden voyage to Libya that had been ordered by the charterers and drifted in international waters for about 11 days. The charterers claimed damages and off-hire. In considering the charterers' claim for damages for failure to comply with the charterers' employment orders and/or failure to prosecute the voyage with utmost despatch, in breach of Clause 8, the arbitrators held that damages were nominal, because had the ship sailed directly to the discharge port, she would not have berthed any sooner (so that, if the ship had remained on hire during the drifting period, that had not made the charter more expensive for the charterers). On the other hand, what happened or would have happened at the discharge port was irrelevant to the claim for off-hire under Clause 15, and the ship was off-hire for the full 11 days.

On appeal by the owners, Paul Walker, J., reversed the arbitrators on off-hire, reasoning that quantifying "the time thereby lost" under Clause 15 required a wider enquiry than how much time was lost during the period when full working was prevented, extending to whether there was ultimately any delay to "the chartered service" or "the chartered service overall". The arbitrators' conclusion that the ship berthed in Libya no later than she would have done without the master's default meant, in his judgment, that there was no "time thereby lost" and no off-hire.

The Court of Appeal allowed the charterers' further appeal, and restored the arbitrators' decision. The ship had indeed been off hire for the full 11 days. Tomlinson, L.J., said at [21] that the "key to a proper understanding of the off-hire clause is . . . that it is triggered by a cause preventing the full working of the vessel", and at [24] that the speech of Lord Halsbury, L.C., in *Hogarth* v. *Miller* (see paragraph 25.9 above) showed that "an off-hire clause in the terms [of Clause 15] is concerned with the service immediately required of the vessel, and not with 'the chartered service' as a whole or the entire maritime adventure or adventures which may be undertaken in the course of the chartered service. The clause concentrates on the period during which the full working of the vessel is prevented. . . . The question is then what time has been lost during that period." This also followed from *Vogemann* v. *Zanzibar*, *The Pythia*, and *The Berge Sund*, and was in any event the natural meaning of the language of Clause 15.

The Athena [2012] 1 Lloyd's Rep. 145 and [2013] 2 Lloyd's Rep. 673 (C.A.).

25.58 It may not be an easy task to calculate the amount of time lost during an off-hire period. In *The H.R. Macmillan* [1974] 1 Lloyd's Rep. 311 (C.A.), Lord Denning, M.R., said at page 314: "Taking that clause [Clause 15 of the New York Produce form] by itself, it would mean that, if one crane broke down, there would have to be an inquiry as to the time lost thereby. That would be a most difficult inquiry to undertake. For instance, if one broke down and the other two cranes were able to do, and did do, all the work that was required, there would be no 'time lost thereby'; and there would be no cessation of hire. But if there was work for three cranes, and there was some loss of time owing to the one crane breaking down, there would have to be an assessment of the amount of time lost. In that event, as the Judge pointed out, the question would have to be asked: 'How much earlier would the vessel have been away from her port of loading or discharge if three cranes, instead of two, had been available throughout?'" Taking that notion too far, however, may lead to erroneous reasoning, as in *The Ira*, below.

The *Ira* was time chartered on the New York Produce form, so the main off hire clause provided *inter alia* that "In the event of loss of time from drydocking preventing the full working of the vessel the payment of hire shall cease for the time thereby lost". After completing the discharge of cargo in Ravenna, by mutual agreement, the ship sailed for dry dock in Piraeus pursuant to Clause 21 of the form. While she was in dry dock, the charterers fixed her for a voyage starting in Novorossiysk. The question arose whether the ship was off hire under Clause 15 for the time that it took her to sail from Ravenna to Piraeus, the charterers accepting

that Clause 21 did not apply to that voyage. The owners argued that the ship was on hire because Piraeus was on the way to Novorossiysk, and therefore the time spent sailing to Piraeus had not delayed the progress of the charter service. But that meant that the question whether the ship was off hire whilst she was sailing to Piraeus depended on what service was required of her by the charterers weeks later, after the drydocking was completed. Nevertheless the arbitrator, and subsequently Tuckey, J., accepted that argument and the judge commented, at page 106, "It is obvious that in certain circumstances it is not possible to determine what loss of time has occurred until the end of the off-hire event."

The Ira [1995] 1 Lloyd's Rep. 103, disapproved by the Court of Appeal in *The Athena* [2013] 2 Lloyd's Rep. 681

Tickey, J.'s analysis above was disapproved by Tomlinson, L.J., in *The Athena*, above, who said, at page 683, "The ultimate conclusion of the judge that the vessel was not during the voyage off-hire is I think right for the reason that the full working of the vessel was not prevented whilst she proceeded from Ravenna to Piraeus, that being the service immediately required of her. The decision is not however justified by the fortuity of the orders which the charterers gave for the employment which was to be undertaken once the vessel had completed drydocking, orders which were given some 13 days after, on Tuckey J's approach, the vessel had already been affected by the relevant off-hire event. With respect, Tuckey J's reasoning. . . failed to focus on the service immediately required of the vessel during the voyage from Ravenna to Piraeus. . . I agree with Tuckey J that in certain circumstances it is not possible to determine what loss of time has occurred until the end of the off-hire event. The corollary is however that since the clause is concerned with the service immediately required of the vessel, it must be possible at the conclusion of the off-hire event to determine what net time has been lost in consequence of the event.'

Baltime; NYPE 93

25.59 In the Baltime form, clause 11(A) provides that "no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required". That makes it clear that full hire again becomes payable as soon as (full) efficiency is resumed; see, for example, *Court Line* v. *Finelvet (The Jevington Court)* [1966] 1 Lloyd's Rep. 683 at paragraph 25.66, below. It also means, it is submitted, that the enquiry is only as to the extent to which (if at all) the service immediately required was interrupted or delayed, and *The Athena*, above, would be decided the same way under the Baltime form.

25.60 A sentence within the off-hire clause of the 1993 revision of the New York Produce form delays the resumption of hire in the circumstances it describes: "Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom": see Lines 226 to 230. The requirements for the resumption of hire are, on that wording, cumulative, so that a deviating ship will be off hire for the entire period of deviation even if she resumes her voyage to the port or place ordered by the charterers from a position closer to that destination than the deviation point.

'Period' clauses

25.61 In some cases, the right to deduct from hire is not for the amount of time lost, but for a defined period. Such clauses may still require there to be "loss of time", i.e. some interruption or delay in the performance of the service immediately required; however, the amount of the hire

deduction is measured by the full length of the period during which it occurs rather than by the amount of time lost during that period. This is a point explained by Lord Halsbury, L.C., in *Hogarth* v. *Miller* [1891] A.C. 48 (H.L.). There the charter provided "In the event of loss of time from deficiency of men [etc.] . . . the payment of hire shall cease until she be again in an efficient state to resume her service." At page 54, the Lord Chancellor explained this wording as meaning, "the hirer of the ship. . . is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates".

25.62 Under a 'period' off-hire clause of this kind, the ship goes off hire when the full working of the ship is first prevented and comes back on hire as soon as the full working of the ship starts again: *Smailes* v. *Evans* [1917] 2 K.B. 54.

A time charter of the *Carisbrook* provided that, "In the event of loss of time from damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service". The ship went aground and had to discharge her cargo. She was then repaired. The question arose whether hire was payable from the completion of repairs on 18 October or only from the completion of reloading on 30 October. It was held that after completing repairs the ship was again in an efficient state and hire became payable.

Smailes v. *Evans* [1917] 2 K.B. 54.

25.63 It has been said that the courts have a preference for construing off-hire clauses as period off-hire clauses when they can. In *The Bridgestone Maru No.3* [1985] 2 Lloyd's Rep. 62, Hirst, J., held that the off-hire clause in the Shelltime 3 form of tanker time charter was a 'period' clause and not a 'net loss of time' clause, saying at page 84, "The Courts have always leaned strongly in favour of construing these clauses [as period off-hire clauses], to avoid the complexities of calculating the minutiae of lost time [as required by a net loss of time clause]." The commercial world, on the other hand, has shown a persistent preference in the other direction: when the Shelltime 4 replaced the Shelltime 3, the new form modified the 'period' wording so as to create a 'net loss of time' clause; similarly in 1939, in response to the decision in *Tynedale* v. *Anglo-Soviet* a few years earlier (above, paragraph 25.18), the wording of the Baltime form was revised to a 'net loss of time' wording (see above, paragraph 25.59).

Baltime off-hire clause

25.64 Clause 11(A) of the Baltime form sets out the events in which the ship is to be off hire. Clause 11(B) is to the opposite effect and lists events in which the ship is to remain on hire, regardless of the negligence of the owners' servants. To the extent that Clause 11(B) overlaps in subject matter with Clause 11(A) it operates in effect as an exception clause upon an exception clause.

25.65 Situations may arise in which an event mentioned in 11(A) causes or is caused by one mentioned in Clause 11(B). For instance, an "accident to her cargo" may result in "damage to hull". Where detention is in fact caused by damage to the hull, which is itself the result of an accident to cargo, the ship will be off hire. Where, on the other hand, the detention is caused by the damage to the cargo then the ship will remain on hire, as where the ship puts into port to discharge the cargo which has shifted or heated as a result of the accident to it.

Following the explosion in the coal cargo of *The Ann Stathatos*, see paragraph 19.30, above, her hull and superstructure were damaged and took some time to repair. There was, however, no material damage to the coal itself. Thus, the detention of the ship was caused by repairs to hull damage, but the hull damage arose out of an accident to the cargo. Devlin, J., held that, as the detention was caused by the repairs to the hull damage, Clause 11(A) applied and the ship was off-hire under that part of the clause.

Royal Greek Government v. *Minister of Transport* (1949) 83 Ll.L.Rep. 228.

(See also *Burrell* v. *Green* [1914] 1 K.B. 293 (shifted deck cargo damaging ship).)

25.66 To bring themselves within Clause 11(B) the owners must show that the effective (or "proximate") cause of the relevant detention or expense was one of the events described in that part of the clause. It is not enough to show that at the time the ship was, for example, trading to a river with a bar.

The *Jevington Court* was outward bound from Rosario with a part cargo of cereals when, as a result of negligence by the compulsory pilot and defects in the marking of a channel, she grounded in the area known as the Martin Garcia Bar. After nearly six weeks she was refloated. She was then fit to continue her voyage but further delay was caused by the necessity to discharge, cool and reload the heated cargo at Buenos Aires. At the time the ship was under time charter on the Baltime form. The owners claimed that hire (and certain expenses) were payable by the charterers during the grounding period, relying on Clause 11(B).

Roskill, J., held (1) that the words "with bars" applied both to "ports" and to "rivers", and (2) that it was necessary for the owners to prove that the proximate cause of the detention (and expenses) was the trading of the ship to a river with a bar, which they could not do in the present case. With regard to the time at Buenos Aires he held (3) that the ship was on hire again because although there had been an "accident" under Clause 11(A) the ship was at all relevant times able "to perform the service immediately required", namely to unload and later reload the heated cargo.

Court Line v. *Finelvet* [1966] 1 Lloyd's Rep. 683.

25.67 It was decided in *Court Line* v. *Finelvet*, above, that the words "with bars" in Line 155 of Clause 11(B) apply both to "ports" and to "rivers". In the earlier version of the clause which was in use at the time of *Magnhild* v. *McIntyre* [1921] 2 K.B. 97 ("shallow harbours, rivers, or ports where there are bars") this was not so and the words applied to "ports" only and not to "rivers". Roskill, J., in the *Court Line* case remarked: "The Court must be careful, when construing a clause in a standard form of charter, not to have too much regard to other decisions on a clause which, although similar in some respects, is in crucial respects differently worded."

25.68 It appears from the judgment of Roskill, J., in the *Court Line* case that a "bar" is a natural underwater bank of sand or silt, with deep water on either side, which ships cross on limited draught rather than sail around: it does not have to be at the mouth of a river and it does not necessarily cease to be a bar because it has a dredged channel or channels through it.

Payment of hire shall cease

25.69 In *The Lutetian* [1982] 2 Lloyd's Rep. 140, Bingham, J., held that under the New York Produce form the charterers were not obliged to pay an instalment of hire on the due date if the ship was off hire at that time, as Clause 15 provided that when time was lost from the listed causes "the payment of hire shall cease". He accepted the contention that in such circumstances the charterers' obligation to make payment of the next monthly instalment of hire in advance was suspended until immediately before the ship was again at the service of the charterers. It is suggested that this decision be treated with caution pending consideration by the higher courts**.**

Adjustment of hire

25.70 Where a ship is off hire during a period for which the charterers have already paid hire in advance, the charterers are entitled to be paid an adjustment of hire, in respect of the hire that the ship has not earned: see paragraph 16.8, above.

25.71 Under both the New York Produce and the Baltime forms, off-hire can be deducted from subsequent monthly payments of hire and, where the amount has not yet been agreed or determined by arbitration, the deduction can probably be made on the basis of a reasonable estimate made by the charterers in good faith: see paragraphs 16.49 to 16.52 and 16.57, above.

Bunkers and other obligations during off-hire periods

25.72 The mere fact that hire is not payable by operation of the off-hire clause does not curtail the other obligations of the charterers during the relevant period. Thus, unless express provision has been made to the contrary, the charterers remain responsible for providing and paying for bunkers while the ship is off hire: see, for example, *Arild* v. *Hovrani* [1923] 2 K.B. 141. In the New York Produce form, there is express provision in Clause 20 relieving the charterers from liability to pay for bunkers consumed when the ship is off-hire, but this clause does not cover other obligations and if relief in respect of these is required appropriate words must be inserted. There is no such express provision in the Baltime form: see *Arild* v. *Hovrani*, above, and *The Bridgestone Maru No. 3* [1985] 2 Lloyd's Rep. 62. It is, therefore, common to amend Clause 4 of the Baltime form and Clause 2 of the New York Produce form by the addition of the words "While on hire" at the very beginning of the clause: see paragraphs 12.26 and 12.27, above.

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25.73 The off-hire clause in the 1993 revision of the New York Produce form provides that bunkers consumed while the ship is off hire shall be for the owners' account: see Lines 230 and 231. So far as concerns the other items that are to be provided by the charterers, Line 84 makes the charterers' obligation conditional on the ship being **on hire.**

Effect on other remedies of the owners and the charterers

Claims by the charterers

25.74 The off-hire clause does not cut down any right that the charterers might have to claim damages from the owners if an off-hire event has been caused by the owners' breach of charter. In such a case, if the charterers can prove that they have suffered loss in excess of or in addition to the loss of the use of the ship, then they are entitled to damages in respect of that loss. In *The Democritos* [1975] 1 Lloyd's Rep. 386 Kerr, J., said, at page 401: "since this point appears rarely to have arisen in practice, it is right to repeat that it was common ground that if a period of off-hire results from a breach of the charter on the part of the owners, then the charterers would in law be entitled to damages quite apart from not being liable for hire, or being able to recoup any hire paid in respect of this period, if they can establish that they have thereby suffered additional loss." So if, for example, serious delay were caused by a breakdown of ship's gear due to a breach of the owners' obligations of fitness on delivery, and if the delay deprived the charterers of a profitable voyage, the charterers would not be restricted to a claim for repayment of hire under the off-hire clause, but, subject to any questions of remoteness, could also claim damages for their lost profit. See *The H.R. Macmillan* [1973] 1 Lloyd's Rep. 27, [1974] 1 Lloyd's Rep. 311 (C.A.), concerning delay caused by breakdowns of the ship's specially fitted gantry cranes; see also *Sea & Land Securities* v. *Dickinson* (1942) 72 Ll.L.Rep. 159 (C.A.), and, by analogy, *Leslie Shipping v. Welstead* [1921] 3 K.B. 420, where it was held by Greer, J., that an owner's right to damages was not cut down by the withdrawal clause in the charter.

Claims by the owners

25.75 At paragraphs 25.46 *et seq.*, above, it was suggested that the ship cannot be placed off hire if it is prevented from working by the charterers' breach of contract. However, if that were

wrong, the owners would be able to claim the hire lost from the charterers, as damages for the charterers' breach of charter.

The *Dodecanese* was time chartered on the Baltime form for employment "in lawful trades for the conveyance of lawful merchandise". The charterers loaded her with ammunition and other explosives for the British Forces in Egypt, although they knew that this was prohibited by the Egyptian authorities. The ship was blacklisted by the authorities in consequence and when, subsequently, the ship suffered a machinery breakdown, the authorities delayed her repairs so that they took 30 days instead of four days. The charterers put the ship off hire for the whole 30 days under the off-hire clause, but it was held by Pilcher, J., that the owners were entitled to recover the hire for the 26 days which they had lost under the off-hire clause as damages for breach of the charterers' obligation to ship only "lawful merchandise".

Leolga v. *Glynn* [1953] 2 Lloyd's Rep. 47.

25.76 The owners may also recover hire lost by operation of the off-hire clause if they can show an unbroken chain of causation between the loss of time and their obedience to the orders of the charterers and so benefit from the implied indemnity discussed at paragraphs 19.15 *et seq.*, particularly paragraphs 19.20 and 19.21.

25.77 In *The Berge Sund* [1993] 2 Lloyd's Rep. 453, Staughton, L.J., in the Court of Appeal expressed the view that as the off-hire clause of the Mobiltime 2 form referred to loss of time "not caused by Charterer's fault", this excluded the implication of an indemnity where there was no fault on the part of the charterers: see paragraph 37.74. But in *The Marie H* [1998] 2 Lloyd's Rep. 71 and paragraph 19.20, above, Timothy Walker, J., held that the owners were entitled to be indemnified in respect of off-hire caused by the ship loading, at the charterers' risk, a dangerous cargo. The off-hire clause read: "Should the vessel put back whilst on voyage by reason of an accident or breakdown, for which Charterers are not responsible. . . ."

Reduction in speed under Lines 99 to 101 of the New York Produce form

25.78 Lines 99 to 101 of the New York Produce form make additional provision for a deduction from hire covering time lost, extra fuel consumed and all extra expenses arising from reduction of the ship's speed on a voyage by reason of "defect in or breakdown of any part of her hull, machinery or equipment". It is not decided whether these Lines provide exhaustively for speed deficiencies on the voyage or whether Lines 97 to 99 can also be applied to them.

25.79 It was said by Staughton, J., in *The Ioanna* [1985] 2 Lloyd's Rep. 164, at page 167, that the addition of an express provision such as that in Lines 99 to 101 suggests that reduction in speed at sea is not covered under the primary off-hire provision, Lines 97 to 99 in the case of the New York Produce form. But in *The Ioanna* the wording of the primary off-hire provision clearly restricted it to cases of total interruption of the charter service and consequent total cessation of charter hire, thus excluding a mere reduction of speed at sea, such as had occurred in that case as a result of bottom fouling.

25.80 In *The Pearl C* [2012] 2 Lloyd's Rep. 533, the charterers argued that Lines 97 to 99 could be applied to a reduction in speed. They relied on the fact that the list of causes in Lines 97 to 99 (but not those in Lines 99 to 101) had been amended to include "default of Master" and they founded their claim on his wrongful decision to slow steam. Popplewell, J., said, at pages 545 to 546, that, since the *un*amended words of Lines 97 to 99 covered partial interruption to the service (relying on *The H.R. Macmillan*, see paragraph 25.58, above), it was difficult to see why they should not cover a speed deficiency. At [71], he said, "The first part of clause 15 is a net loss of time clause and is apposite to extend to periods of partial interruption of the service in the sense of events interfering with the full working of the vessel sufficient to delay the service".

25.81 However, Staughton, J., in *The Ioanna* had relied not only on the distinction between

total and partial interruption to the service, but also upon the duplication resulting from both the primary and additional provisions being triggered by the same facts, as was the situation in that case but not in *The Pearl C*. There is force in his comment, applicable to Lines 97 to 99 and Lines 99 to 101, that the express reference to reduction in speed in the additional provision "very much suggests that it has not been dealt with in the first part of the clause", but, as that case was decided under a differently worded clause and as Popplewell, J.'s comments above were *obiter* (*The Pearl C* being decided on the basis of a breach of Clause 8, see paragraph 18.2, above), the issue of whether Lines 99 to 101 provide exclusively for cases of speed reduction remains undecided.

Bottom fouling

25.82 In *The Rijn* [1981] 2 Lloyd's Rep. 267, see paragraph 25.45, above, Mustill, J., held that loss of speed resulting from the accumulation of marine growth on the ship's hull during the course of the charter did not give rise to a right of deduction under Lines 99 to 101, so long as it arose as the natural consequence of the way in which the charterers chose to employ the ship. *(Compare The Apollonius* [1978] 1 Lloyd's Rep. 53, where marine growth was wholly unexpected and did give rise to a right of deduction from hire.) Mustill, J., also suggested that the growth was not a "defect". On this second point, Staughton, J., in *The Ioanna* [1985] 2 Lloyd's Rep. 164, declined to follow him, holding that where a ship's speed had been reduced during the charter service, due to the ship's bottom having been fouled prior to delivery, the fouling did constitute a 'defect' in the hull within the meaning of Line 100.

Saving in fuel

25.83 If, as a result of a reduction in speed, there is a reduction in the consumption of one of the types of fuel used, the saving may be set off against the cost of any extra consumption of another type of fuel used; but in a claim under the off-hire clause the owners will be entitled to no overall credit if the saving on one fuel exceeds the extra cost of another. Only if the charterers' claim must be put as a claim in damages will the owners be entitled to an overall credit in such circumstances.

The trip time charter of *The Ioanna* described the ship as having her "hull, machinery and equipment in a thoroughly efficient state and appearance" and the off-hire clause contained a provision that ". . . if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost and the cost of any extra fuel consumed in consequence thereof, and all extra expenses are to be for Owners' account and may be deducted from the hire". The ship was delivered with her bottom fouled and thus not in a "thoroughly efficient state". In consequence she failed to maintain her warranted speed. Her diesel oil consumption was increased, but her fuel oil consumption was reduced. On the charterers' claim to recover for the loss of time and the cost of excess diesel oil consumption, it was held by Staughton, J., that:

(1) if the charterers had to put their claim as a claim in damages for breach, the owners would be entitled to set off any overall saving in fuel consumption against the damages for loss of time;
(2) but the charterers could put their claim under the off-hire clause because a ship whose speed was reduced by her hull being foul on delivery could properly be described as having her speed reduced by "defect in. . . her hull";
(3) the reference to "any extra fuel consumed" did not refer only to fuel oil, but meant the net cost of extra fuel oil and diesel oil taken together;
(4) if the saving on fuel oil exceeded the extra cost of diesel oil, the charterers could claim nothing under head of "cost of any extra fuel", but equally they would not have to give credit for the net saving against their claim for lost time.

The Ioanna [1985] 2 Lloyd's Rep. 164.

U.S. Law

General principle

25A.1 The rule adopted by the United States courts is that if one of the causes listed in the off-hire clause results in a loss of time to the charterer, it automatically suspends the obligation to pay hire, without regard to fault. The rule was best summarized in the leading case of *Clyde Commercial S.S. Co.* v. *West India S.S. Co.*, 169 F. 275, 278 (2d Cir. 1909), *cert. denied*, 214 U.S. 523, where the court stated:

> [A]rticle 15 must be understood to state absolute categories in which the parties intended the hire to be suspended whether the Owner was at fault or **not. . .**

Loss of time

25A.2 The off-hire clause reflects the fact that what the charterer has bargained for in return for its hire payments is the right to use the ship. In *The Yaye Maru*, 274 F. 195 (4th Cir.)*, cert. denied*, 257 U.S. 638 (1921), a time chartered ship was at anchor at Baltimore waiting for an embargo on the intended cargo of coal to be lifted, when another ship collided with it. *The Yaye Maru* was damaged and repairs were required. Meanwhile, the embargo on coal continued until after the repairs had been completed. In the ensuing litigation, the owner contended that since the charterer would not have used the ship for any purpose other than to wait at anchor during the repair period, the ship was not off-hire. The court rejected this argument, however, and held that it was not important whether the charterer *would* actually have used the ship while it was under repair. Rather, since charterer *could* not have used the ship, it was entitled to off-hire. As stated by the court:

> Surely, the right to off-hire, otherwise existing, was not lost by nonuser. The injury impaired the power to use, by destroying to a degree the "thoroughly efficient state" in which the vessel was agreed to be kept, and when that happened, and for such time as it continued, the charterer became entitled to off-hire, whatever permissible use he was then making of the vessel, or whether he was using her at all. He could not be held for hire when the power to use was taken away. [274 F. at 197–198.]

25A.3 A breakdown of the ship's engines, hull, or machinery which does not impair the charterer's actual use of the ship does not put it off-hire. If the breakdown occurs while the ship is loading or unloading cargo, and it does not interfere with these activities, the charterer remains bound to pay hire.

25A.4 In *The Dzintari*, SMA 3771 (Arb. at N.Y. 2003), the Shelltime 4 charter provided the charterer with the option of declaring the ship off-hire in the event the owner failed to keep current the ship's certificate from the Chemical Distribution Institute (CDI). The charterer declared the ship off-hire, but sent voyage instructions to the ship the next day, followed by another notice that the ship was off-hire. The panel concluded the ship was not off-hire because the master had relied on the charterer's voyage orders and the ship was at the charterer's disposal. According to the panel, it was incumbent on the charterer to rescind its voyage orders if it deemed the ship to be off-hire.

25A.5 In some cases, arbitrators have allowed reductions in hire to compensate charterers for the partial loss of use of the ship. In *The Karen C*, SMA 3042 (Arb. at N.Y. 1994), the panel held that the charterer improperly put the ship off-hire because it failed to demonstrate that it lost time due to the breakdown of a submersion cargo pump for one of 15 tanks on the ship. The charterer was entitled only to a pro-rata reduction in hire for the period of time the tank was unavailable.

25A.6 In *The Shena and The Ave*, SMA 2893 (Arb. at N.Y. 1992), the panel allowed off-hire on a "net loss of time concept," which amounted to a pro-rata deduction of off-hire for the breakdown

time of two out of five cranes which were unavailable to load cargo. See discussion at paragraph 25A.22.

Resumption of hire

25A.7 American courts and arbitrators would probably follow the rule that the charterer should be allowed the net overall time lost to it as the result of any of the causes enumerated in the off-hire clause. In *The Chris*, SMA 199 (Arb. at N.Y. 1958), the panel held that the "universally followed" interpretation of Clause 15 is that where the ship has been forced to deviate from the voyage for repairs, the off-hire period extends beyond the time the ship is physically fit to proceed again, and includes the time required to return to the position at which hire was suspended. In *The Grace V*, SMA 1760 (Arb. at N.Y. 1982), off-hire was calculated not from the moment stowaways were discovered, but from the point of diversion of the ship back to the loadport until the ship regained a point equidistant to the initial diversion point. See also *The Chrysanthi G.L.*, SMA 1417 (Arb. at N.Y. 1980), and *The Shena and The Ave*, discussed above.

25A.8 The New York Produce off-hire clause is different from that at issue in *Dunlop S.S. Co.* v. *Tweedie Trading Co.*, 162 F. 490, 493 (S.D.N.Y. 1908), *aff'd*, 178 F. 673 (2d Cir. 1910). There, the off-hire clause provided that in the event of a breakdown, payment of hire was to cease until the ship was "again in an efficient state to resume her service." The court held that the charterer was relieved of its obligation to pay hire only until the ship was restored to a seaworthy condition. On the authority of that case, therefore, it appears a court would hold that where the charter provides for cessation of hire payments until the ship is again in an efficient state to resume her service, hire would recommence immediately after the breakdown was repaired, even if the ship had to deviate for the repairs. Under the New York Produce form, however, the result would be quite different, and the charterer should be awarded an allowance for off-hire reflecting the net amount of time lost. *The Chris,* above; *cf. National Transp. Corp.* v. *Texaco*, 1976 AMC 1549 (Arb. at N.Y**.** 1976).

25A.9 In *The Plod and The Voce,* SMA 2719 (Arb. at N.Y. 1990), the owner was held to be entitled to payment for the time and bunker costs which the charterer saved by putting the ship off-hire for repairs during the ballast leg of a voyage from Florida to Colombia.

Deficiency of men

Incapacity

25A.10 Under the American cases a ship will go off-hire due to the incapacity of a full complement of officers and crew to work. In *Clyde Commercial S.S. Co.*, above, the ship was first delayed at Colon because the second and third engineers had developed a fever and could not attend to their duties. The court held that this delay was caused by a deficiency of men, and, accordingly, the ship was off hire for the time lost.

25A.11 Similarly, in *The Robertina*, SMA 1151 (Arb. at N.Y. 1977), the ship was held to be "deficient in men" when the chief engineer was hospitalized. The panel held that the ship was off hire until a replacement engineer arrived on board.

25A.12 A "deficiency of men" may also be constructive, as distinguished from an actual deficiency. In *Tweedie Trading Co.* v. *George D. Emery Co.*, 154 F. 472 (2d Cir. 1907), the ship was held at quarantine in New York harbor for about two days. The members of the crew who were actually sick were physically removed from the ship. Substitute crewmen were engaged, but were not permitted aboard until an inspection had been completed. It was held that:

. . . from her arrival at quarantine until the new men were put aboard a deficiency of men prevented the working of the vessel within the meaning of [the off-hire] clause. [*Id*. at 473]

25A.13 Thus, while the owner had a full crew complement ready to work, there was a constructive deficiency of men resulting from their inability to work because of the quarantine. See also *Gow* v. *Gans S.S. Line*, 174 F. 215 (2d Cir. 19*09),* and *Noyes* v. *Munson S.S. Line*, 173 F. 814 (S.D.N.Y. 1909), holding that there was a constructive deficiency of men when the ship was quarantined; *The Canadia*, 241 F. 233 (3d Cir. 1917), where there was held to be a deficiency of men because the crew was drunk and unruly; and *Northern S.S. Co.* v. *Earn Line S.S. Co.*, 175 F. 529 (2d Cir. 1910), where there was a deficiency of men due to sickness.

25A.14 There was also a deficiency of men in *The Alcazar,* SMA 1512 (Arb. at N.Y. 1981). The ship was detained by the Coast Guard at Pensacola, Florida because there were eight Polish officers on board. Pensacola was considered by the United States to be a sensitive naval defense area and access was restricted under the U.S./U.S.S.R. Maritime Agreement. The panel held that the eight Polish officers were "deficient" because they were prohibited by law from entering the port of Pensacola, and that this condition was the cause of the delay so that the ship was off hire.

25A.15 A similar situation arose in *The Family Anthony*, SMA 1820 (Arb. at N.Y. 1983). The ship was to carry arms and ammunition from a number of United States ports to Saudi Arabia. The ship's crew, however, included six Russian engineers who were barred from entry to two of the loadports. Unlike *The Alcazar*, in which the barred crew members rejoined the ship after she departed the loadport, the Russians were not allowed to rejoin the ship until after the cargoes had been discharged. The reason for this was that a portion of the cargo was highly security sensitive, a fact of which charterers had not advised owner. The panel thus held that the owner was entitled to recover the cost of transporting the Russians from the United States to Moscow and, subsequently, the cost of returning them to Dubai where they rejoined the ship.

25A.16 In recent years, a number of so-called "flag of convenience" ships have been delayed as a result of strikes or boycotts organized by the International Transport Workers Federation ("ITF"). In the usual case, the delay occurs because shore workers will honor a picket line or boycott announced by the ITF when a ship calls at a port to load or discharge. It seems clear that such delays do not give rise to any off-hire unless the crew members of the ship are themselves withholding their labor. Rather, the boycott must be considered as equivalent to, say, a strike of longshoremen. Since it is the charterer who chooses the trading pattern, it is the charterer who takes the risk of strikes which preclude or delay the ship's operation. The fact that the chartered ship is singled out for union retaliation as a "flag of convenience" ship should not alter the position. The solution, of course, is for the charterer to require, by a special clause, that the owner will meet the requirements of the ITF. If by such a clause the owner warrants that he will conform to the requirements of the ITF, and he fails to do so, he is in breach of the charter and consequently should be liable for resulting delays.

25A.17 The owner cannot refuse to enter a port nominated by the charterer because he anticipates ITF problems unless the charter is drafted to exclude trade to ITF areas.

25A.18 In *The United Faith*, SMA 1409 (Arb. at N.Y. 1980), a sole arbitrator was presented with the question whether the owner could refuse to load the sub-charterer's cargo for discharge at a port within the Antwerp/Hamburg range because it anticipated an ITF boycott there. Both the head-charter and the sub-charter contained a typewritten clause which provided that the ship would be off hire for any time lost by reason of a boycott or blacklisting, provided such delays were not caused by actions of the ITF. The clause also stated that the ship did not have an ITF certificate. The arbitrator held that the owner could not refuse to perform the voyage. The arbitrator stated that "the proper and most acceptable means of limiting a ship's obligations to trade to ITF areas is to

specifically exclude the troublesome areas from the trading limits of the charterparty." Since this had not been done in the charter at issue, the owner was obliged to perform the voyage.

Unwillingness to work

25A.19 In *United States* v. *The Marilena P.*, 433 F.2d 164, 1969 AMC 1155 (4th Cir. 1969), Clause 17 of the charter contained the following language:

> In the event of loss of time from deficiency of men including but not limited to strikes . . . the payment of hire shall cease from the time thereby lost. . .

25A.20 Crew members went on strike to protest a voyage to a war zone. The court held that there was a deficiency of men under Clause 17, and that the ship was off hire until an adequate complement of men and officers went back to work. It is to be noted, however, that the New York Produce form does not contain an off-hire provision for crew strikes, and it is questionable whether a strike such as occurred in *The Marilena P.* would be deemed a "deficiency of men" under that form. See *Edison S.S. Corp.* v. *Eastern Minerals*, 167 F. Supp. 601 (D. Mass. 1958).

25A.21 In *The Thunderbird*, SMA 54 (Arb. at N.Y. 1964), the charterer ordered the ship to proceed to Camden despite its knowledge that there was a possibility of labor trouble. The ship berthed 35 minutes after shore laborers went on strike. The charterer ordered the ship to shift to Wilmington, but it was unable to move of its own power because her engineers were committed to observe the picket line. Tug assistance was also unavailable, and, consequently, the ship remained at Camden until the strike ended. The charterer contended that the engineers' refusal to man the engine room constituted a "deficiency of men" within the meaning of Clause 15, and that the ship was off hire for the time lost due to the strike. The panel held for the owner, however, and found that since the charterer ordered the ship to Camden with knowledge of possible labor difficulties, it could not "equitably claim that payment of hire for the time so lost should be excused."

25A.22 In *Montauk Oil Transportation Corp.* v. *Sonat Marine Inc.*, 871 F.2d 1169, 1989 AMC 1147 (2d Cir. 1989), the chartered barge experienced delays due to a strike in New York harbor. The charter did not contain any provision allocating the risk of delay due to strikes. The court held that in the absence of an allocation of risk by the express terms of the contract, it would follow the time-honored maritime doctrine which places the burden on the charterer for strike delays. Accordingly, the barge was held not to be off hire for time lost because of the strike. Because the court found that part of the delay was caused by the owner's fault, the court made an equitable apportionment of the time lost.

Detention by average accidents to ship or cargo

25A.23 In the leading case of *Barker* v. *Moore & McCormack Co.*, 40 F.2d 410, 1930 AMC 779 (2d Cir. 1930), the court held that an "average accident" occurs when there is an unexpected functional impairment of the ship which prevents her full use. In that case, it was held that heavy weather, which resulted in a substantial increase in the ship's fuel consumption and made a diversion to pick up additional bunkers necessary, was not an "average accident." As stated by Judge Chase:

> Whatever else may be thought, it surely is true that an accident of some kind is necessary to call into play the off-hire clause on account of "average accidents." It may be urged with some plausibility that bad weather in winter on the North Atlantic is an accident in the sense that whether or not it may be encountered on any voyage is somewhat a matter of chance. Yet, in a sea notorious for its severe weather at that time of year, the parties to this charter may well be said to have chosen words ill-suited to express their idea if by "average accidents" it was intended to cast upon the libelant whatever loss in time might be occasioned by rough,

though not disabling, weather on the voyage. This would be directly in conflict with the general purpose of a charter on time rather than on a voyage basis. Accident is one of those hard-worked words too well known to make definition very needful, and having too many shades of meaning to make attempted definition, apart from its particular setting, a reliable guide. The plain purpose of this charter was to give the respondent the benefit of a fast voyage and let it assume the risk of a slow one, provided always nothing happened to prevent the ship doing all it was designed to do in the face of whatever conditions were met. If the expression is construed *ejusdem generis*, it would have to mean something that prevented "the full working of the vessel." And we think it should be so construed. Not something preventing ground-gaining accomplishment, but some unexpected functional impairment making impossible the full use of the ship, with all the power and means of locomotion with adequate crew and equipment, to overcome the forces of nature and make time against the wind and waves. When taken in this sense, it is obvious that there was no accident of any kind. The ship at all times did all that could have been expected of it under the adverse conditions. [40 F.2d at 411–412]

25A.24 Average accidents to "cargo" will also result in the ship going off-hire under the New York Produce clause. This provision is frequently deleted, however, with the result that time lost due to accidents which affect only the cargo, and do not affect the operation of the ship, will be for the charterer's account.

25A.25 In *The Andros Oceania*, SMA 2012 (Arb. at N.Y. 1984), the collapse of the deck-stow of a cargo of logs was found to be an average accident. Because the accident resulted from the charterer's failure to properly load and secure cargo, however, the panel rejected the charterer's claim for return of hire.

Drydocking

25A.26 The ship is off hire while it is in drydock for the purposes stated in Line 98. *Munson S.S. Line* v. *Miramar S.S. Co*., 166 F. 722 (2d Cir. 1908), *modified on other grounds* 167 F. 960 (2d Cir. 1909), *cert. denied*, 214 U.S. 526 (1909); *Falls of Keltie S.S. Co.* v. *United States & Australasia S.S. Co.*, 108 F. 416 (S.D.N.Y. 1901). Delays encountered while waiting for a drydock to become available will not result in the ship going off-hire. *Albis Co.* v. *Munson*, 139 F. 234 (2d Cir. 1905). In *Noyes* v. *Munson S.S. Line*, 173 F. 814 (S.D.N.Y. 1909), however, the owner was held liable for time lost while awaiting drydocking. There, the charter had only two days to run when the ship was required to be drydocked in accordance with the charter terms. The owner declined to drydock it at that time, but immediately after the ship was redelivered, put it into drydock for repairs. On these facts, the charterer was held entitled to a return of hire for two days.

25A.27 In *The Halifax and The White Sea*, SMA 2984 (Arb. at N.Y. 1993), the panel found that because the charter allowed the ship to drydock during a one-year extension of the charter period without any restrictions as to employment en route to and from the drydock, the owner had a right to employ the ship during the voyage en route to the shipyard and the return voyage to the port where it was to resume its service to the charterer.

25A.28 In *The M/V Henry Oldendorff*, SMA 4116 (Arb. at N.Y. 2011)(Ring, Nergaard, Meehan), the owner negotiated for a term in the charter allowing it to withdraw the ship for approximately 20 days to undertake an intermediate survey, but it failed to similarly provide for the ship's special survey, which required drydocking for about 22 days. The panel rejected Owner's argument that Charterer should have realized the ship would also need the special survey and found that the owner's withdrawal of the vessel from the charterer's service for this period was a breach of the charter. The panel found, however, that the charterer waived its claim for this breach when it negotiated an extension of the charter without adequately preserving this claim.

Fire

25A.29 Only the loss of time directly attributable to fire is allowed as off-hire. In *The Canadia*, 241 F. 233 (3d Cir. 1917), hire was held to have been suspended from the moment the ship caught fire at the pier on 8 October until the fire was extinguished and it was again in a fit condition to begin discharging on 15 October. Owing to delays at the berth, however, it was not until 4 December that the discharging operation was actually completed, and the ship was declared unfit to carry cargo. Because it had had the full use of the ship from 15 October through 4 December, however, the charterer was held responsible for hire during that period.

25A.30 In *The Canaria*, SMA 3310 (Arb. at N.Y. 1996), the ship was towed to the nearest port due to a fire in the engine room which caused the ship to become a constructive total loss. Once the fire was extinguished, the shipper discharged its cargo using shoreside cranes because the ship's gear was inoperable. The owner submitted a statement for hire to charterer which counted as on-hire the period during which shipper removed its cargo. The panel ruled that time used for discharging was not on-hire because the ship was severely damaged and incapable of returning to service.

Breakdown or damages to hull, machinery or equipment

25A.31 Off-hire will not be allowed unless there is an actual loss of time resulting from one of these enumerated causes. The principle is illustrated by *Steamship Knutsford Co.* v. *Barber & Co.*, 261 F. 866 (2d Cir. 1919), *cert. denied*, 252 U.S. 586 (1920). There, the court held that the ship was not off hire following a fire while the cargo was removed for inspection:

> We think that the time necessary to examine and restow the sugar was not "loss of time" within the meaning of article 16, but that the charterer was using the ship at that time for a purpose which, though it necessarily delayed her, was still his own, and was not due to any damage to the ship. [261 F. at 868]

By the same token, the court recognized that time lost for inspection of damage to the holds and repairs did constitute a "loss of time" under the off-hire clause. *Id*.

25A.32 There must be a "complete breakdown" of the engines to put the ship off hire. *American Asiatic Co.* v. *Robert Dollar Co.*, 282 F. 743, 746 (9th Cir. 1922), *cert. denied*, 261 U.S. 615 (1922). Cosmetic damage suffered by a ship as a result of an accident does not allow the charterer to put the ship off-hire. *The Yu May*, SMA 3668 (Arb. at N.Y. 2001).

25A.33 The fact that the ship's winches were not of sufficient power for the charterer's purposes was held not to be a breakdown of machinery under the off-hire clause (although the court went on to hold that because of this deficiency the ship was not "in every way fitted for the service"). *Munson S.S. Line* v. *Miramar S.S. Co.*, above.

25A.34 In *Lake Steam Shipping Co.* v. *Bacon*, 129 F. 819 (S.D.N.Y. 1904), *aff'd on opinion below*, 145 F. 1022 (2d Cir. 1906), the ship stranded, and after being refloated, was forced to deviate for repairs. It eventually reached the intended discharge port, and there unloaded its cargo. The court held that the charterer was not liable for hire from the time of the stranding until the ship reached the discharge port.

25A.35 In *Temple Steamship Co.* v. *Mercator Marine Corp.*, 1959 AMC 641 (Arb. at N.Y. 1958), the ship's compasses froze as a result of contact by an electromagnet against its bulkheads during the loading of a cargo of scrap metal. The ship was delayed while a gyro compass was installed and the charterer was held entitled to a deduction from hire for the delay.

25A.36 In *The Anoula A*, SMA 307 (Arb. at N.Y. 1967), the panel held that heavy weather damages were a "breakdown or damages to hull" under Clause 15, and that the ship was off hire during the time repairs were effected.

25A.37 Arbitrators have often allowed partial off-hire deductions in situations where charterer has been deprived of the use of only part of the ship. In *The Lendoudis Kiki*, SMA 2323 (Arb. at N.Y. 1986), the arbitrators held that where one of five of the ship's winches was inoperative, but four of five hatches were working, the charterer was entitled to a 1/5th deduction from hire, plus stevedore standby time expenses. Similarly, in *The Maria Glyptis*, SMA 2223 (Arb. at N.Y. 1986), the charterer was entitled to a 1/6th deduction from hire because of a breakdown of one of the 12 winches on the ship, which prevented one of six hatches from working. The owner was held liable for 1/6th of the stevedore standby time expenses. *The Mandolyna*, SMA 1967 (Arb. at N.Y. 1984), is a further example. There, the arbitrators held that charterer could recover 1/5th off-hire because one of the ship's five cranes was inoperative, even though charterer failed to prove any loss of time due to the crane's breakdown.

25A.38 In *The Seaboard Horizon*, SMA 3740 (Arb. at N.Y. 2002), the panel concluded that the charterer was at fault for supplying off-specification bunkers to the ship, and accordingly, that charges the owner incurred to de-bunker the ship were for the charterer's account. However, the owner also had engine work performed on the ship while it was being de-bunkered. While the owner contended that the off-specification fuel had caused the engine problems that necessitated this work, the panel found no clear evidence that this was the case, and noted that engine problems had been present throughout the period of the charter. The panel accordingly ruled that the off-hire clause of the NYPE time charter applied to take the ship off hire, and that the owner was not entitled to place the ship back on hire because the time spent de-bunkering the ship had not interfered with the owner's work on the ship. Compare the result in this case with the result in *The Hoegh Mallard*, SMA 2679 (Arb. at N.Y. 1990), above.

Any other cause

25A.39 American cases follow the *ejusdem generis* principle of construction in interpreting this provision. In *Edison S.S. Corp.* v. *Eastern Minerals*, 167 F. Supp. 601, 605 (D. Mass. 1958), the court held that the crew's refusal to operate the ship's winches in sympathy with picketing by members of a labor union which was trying to organize the charterer's employees was not a cause which put the ship off-hire. As stated by Judge Wyzanski:

> The grounds for non-payment were clearly specified in paragraph 15 of the time charter. No reference was made to strikes or picket lines. The type of excuses listed were of an entirely different nature. And, although there was added to the listed grounds specified, a general phrase "loss of time. . . by any other cause preventing the full working of the vessel," that clause must be interpreted in the light of the familiar *ejusdem generis* canon of construction. However widely it may be stretched, the clause does not cover a loss of time attributable to labor activities directed solely at conditions in the charterer's enterprise. *Inclusio uniusexclusio alterius*.

25A.40 Accord, *The Sea Ranger*, SMA 1240 (Arb. at N.Y. 1978); *The London Confidence*, SMA 1257 (Arb. at N.Y. 1978); *The Binship*, SMA 1416 (Arb. at N.Y. 1980).

25A.41 In *The Andros Island*, SMA 1548 (Arb. at N.Y. 1980), however, the arbitrators adopted a broader test for determining whether the ship was off hire. As a result of the outbreak of hostilities between Greece and Turkey over Cyprus and the invasion of Cyprus by Turkish troops, the master of a Greek flagship refused the charterer's order to berth and load cargo for discharge in Romania. Since the voyage would have required that the ship cross through Turkish territorial waters, the owner instructed the master to refuse to load the cargo. The arbitrators ruled that the owner's actions were not justified. The panel found, however, that the ship was not off hire by reason of any of the specific clauses in the charter. Rather, according to the panel: ". . . even though a situation of off-hire in the conventional conception did not exist at any time, charterers were nevertheless

effectively deprived of the services of the ship and her crew, for which they had contracted with owners." Accordingly, the charterer was held entitled to a refund of hire for the time lost.

25A.42 In *The Hira II*, SMA 2246 (Arb. at N.Y. 1986), a dispute arose between the owner and charterer as a result of the master's refusal to berth the ship. The master contended that the ship was overdraft for entry into port. The majority of the panel ruled that the master's refusal to berth the ship did not put the ship off hire. The arbitrators noted that the ship remained ready and capable of following the charterer's orders, but the master was not obligated to berth in an overdraft condition. The alternatives available to the charterer included lightening the cargo and claiming damages; deviating to another port and claiming damages; or demanding that the master be replaced. The arbitrators further observed that if the charterer sustained its burden of proving that the master acted unreasonably in the circumstances, the charterer would be entitled to recover its provable damages. A mere claim of right to recover damages, however, did not justify charterer's refusal to pay hire. According to the panel: "revenue, be it in the form of freight or timecharter hire is the very essence of the shipping trade and therefore any attempt to disrupt, delay or default in an obligation to pay, must be narrowly viewed within the parameters of the exact terms, which the parties agree to."

25A.43 In *The Kitsa*, SMA 3119 (Arb. at N.Y. 1994), the arbitrators held that, based on the principle of *ejusdem generis*, a deviation to save the lives of third parties was not an event that put the ship off hire under the charter. As additional support for their award, the arbitrators referred to the charter's incorporation of COGSA which relieves an owner for any responsibility for deviations such as saving lives, and inclusion of a "liberty clause" which allowed the owner to deviate to save lives without penalty.

25A.44 In *The Caribbean Express I*, SMA 3500 (Arb. at N.Y. 1999), the panel found that the owner's failure to furnish the Panama Canal Commission with a current International Load Line Certificate in advance of the ship's transit through the Panama Canal did not justify the charterer's off-hire claim for the period that the ship was delayed. According to the panel, this did not fall within the scope of ". . . any other cause preventing the full working of the ship." The panel nonetheless awarded damages to charterer for the delay, because it found that owner breached the charterparty by failing to have the documentation in order.

Delays caused by charterer's fault

25A.45 Delays caused by the charterer's fault will not put the ship off hire. See *The Andros Oceania*, SMA 2012 (Arb. at N.Y. 1984). In *The Hoegh Mallard*, SMA 2679 (Arb. at N.Y. 1990), the charterer was awarded a refund of paid hire because of a combination of mechanical deficiencies, excessive engine wear and tear, problems with parts, poor maintenance and operation, and an unusual crewing policy which all contributed to the gradual deterioration and failure of the ship's main engine. The charterer was entitled to only 85 per cent of paid hire, however, because inferior quality bunkers it supplied contributed 15 per cent to the engine breakdown. In *The Gold Asia*, SMA 3265 (Arb. at N.Y. 1996), the charterer had withheld from hire a payment of despatch money to a sub-charterer and demurrage lost as a result of an off-hire event. The charterer claimed that these amounts constituted expenses incurred as a result of the ship going off hire. The arbitrator found that while the payment of despatch to a sub-charterer might be an expense incurred due to an off-hire event, the claim for lost demurrage could only be viewed as damages arising from the event. It was held that the charterer wrongfully withheld amounts from hire.

Arrest

25A.46 When the ship is placed under arrest, does it go off-hire? That question has arisen in a number of cases, and it appears that the answer is that if the arrest results from acts for which the owner is responsible, the ship will be off hire; if, on the other hand, the acts of the charterer or those for whom it is responsible cause the arrest, the ship remains on hire.

25A.47 In *The Wismar*, SMA 1454 (Arb. at N.Y. 1980), the ship was arrested by a sub-charterer who claimed that the owner had tortiously interfered with its rights under the sub-charter by refusing to load its cargo. The charterer under the head charter was not a party to the action in which the ship was arrested, and it declared the ship off hire from the time of the arrest until the owner took steps to free it. The arbitrators held that the charterer's action was justified. Since the arrest removed the ship from its service and did not result from its actions, the charterer was not required to pay hire for the period of the ship's non-availability.

25A.48 *The Mesis*, SMA 2167 (Arb. at N.Y. 1985), concerned the charterer's claim for a refund of hire for the period the ship was detained at Oran by the Algerian authorities pending owner's posting of security against oil pollution charges filed against the ship. The ship had carried a cargo of sugar from New Orleans to Oran, Algeria. Cargo operations went smoothly, but on the day before the ship was to complete discharging and depart, a harbor official boarded the ship and accused the master of having caused an oil spill. The next day, the ship was formally charged with polluting the harbor and a demand was made for a guaranty for 100,000 dinars pending a court investigation. The ship was delayed at Oran for five days during which the owner attempted to satisfy the Government's demand for security. Acceptable security was finally proffered and, after a short hearing, the ship was found guilty of the pollution charge. The assessed fine was paid and, a week after the oil spill, the ship was permitted to leave Oran. The charterer sought reimbursement for the hire paid during that period. The owner contended that the decision of the Algerian court lacked any credence. The panel found, however, that it lacked authority to review the matter and held that the parties were bound by the judgment of the Algerian court. In addition, the panel concluded that the matter of providing security for the fine was a direct result of the pollution incident and that the time lost was not for charterer's account.

25A.49 In *The Sea Ranger*, SMA 1240 (Arb. at N.Y. 1978), the charterer was held liable for hire during the period the ship was under arrest. The arrest was caused by cargo receivers in Bahrain whose claims were ultimately dismissed by the court. The panel noted that there was no doubt that a charterer remains liable for hire during those periods that the ship is under arrest or otherwise legally detained by reason of its own misconduct. That was not the situation in *The Sea Ranger*, however, since the charterer was held by the court in Bahrain to be blameless. The issue raised, therefore, was whether the charterer was bound to pay hire while the use of the ship was lost by reason of a wrongful arrest by a third-party cargo receiver.

25A.50 The panel held that the ship did not go off-hire during the period of the arrest and explained its reasons as follows:

> Generally speaking, the time charterer remains fully liable for the payment of hire unless this responsibility is terminated or interrupted by the fault of the shipowner or an express provision of the charter party. There is no charter party provision that we are aware of that suspends charterer's obligation to pay hire because of a third party attachment of the ship, based upon a cargo related activity or other responsibility of charterer, regardless of the merit or righteousness of the third-party claim. While it is true that charterer has been deprived of the use of a vessel for which it is being asked to pay, the contrary result would perhaps be more inequitable. Should an owner be forced to suspend its right to collect hire when his vessel is under arrest because of an unfounded claim arising out of a charterer related activity? Unless the charter party specifically says otherwise, the answer is obviously no.

25A.51 The panel also found that arrest and detention did not fit under the "any other cause" provision in Clause 15 since, applying the doctrine of *ejusdem generis*, they were not causes of the same kind as those specifically enumerated in Clause 15.

25A.52 *The Sea Ranger* was distinguished in *The Orient Horizon*, SMA 1709 (Arb. at N.Y. 1982). The panel held that the ship was off hire during the period of arrest and made the following comments regarding *The Sea Ranger* case:

> The panel's decision there was predicated on the fact that the charterer's loss of use of the ship was the result of an arrest related to its activity even though the underlying claim for that arrest was unfounded. In this case the arrest was clearly associated with an owner-related activity even though the facts reveal little semblance of the owner's fault. However small the owner's fault may have been, if any, certainly the charterer had no involvement in the circumstances giving rise to the vessel's arrest. Therefore, it would be improper and inequitable to require the charterer to continue to pay hire for the period of arrest during which it was deprived of the vessel's use and for which it bore no responsibility or blame.

25A.53 See also *The Phoenix Spirit*, SMA 3529 (Arb. at N.Y. 1999), where the panel held that the ship was off hire when the arrest was linked to a claim by the ship's previous cargo shipper and the panel also awarded the charterer consequential damages of lost income because the owner had failed to promptly arrange for the release of the ship; *The Thorsfreddy*, SMA 3527 (Arb. at N.Y. 1999), holding that the charterer was responsible for the payment of hire while the ship was detained in China following an arrest by the cargo receivers after the cargo was discharged in the wrong port.

25A.54 See also *The Athenian Horizon*, SMA 1197 (Arb. at N.Y. 1977), where the charterer was held liable to pay hire for time lost while the ship was under arrest in connection with the charterer's unsuccessful action against the owner for a wrongful withdrawal.

25A.55 In *The Mercandian Supplier II*, SMA 2509 (Arb. at N.Y. 1988), a sole arbitrator decided the vexing question whether the owner or charterer bears responsibility for delays caused by the arrest of the ship by the United States Customs Service following the discovery of about 10,500 lbs of marijuana in a container. The container was loaded in Jamaica and a container seal supplied by the charterer was intact upon the ship's arrival at Miami. The marijuana was discovered during an inspection of the container which took place during the discharging operation. The Customs authorities levied a fine of $1,380,800, which required a 10 per cent bond for the release of the ship. Neither owner or charterer came forward with the bond and the ship was delayed. The charterer declared the ship off hire during the period of the delay and withheld hire. The sole arbitrator ruled that the owner was entitled to hire for the entire period. The arbitrator found that the facts that the container was stuffed and loaded by the shipper and charterer and that the marijuana was smuggled aboard by the shipper established that, as between the owner and charterer, the latter bore responsibility for the lost time.

25A.56 Somewhat different facts were presented in *The Energy Ranger*, SMA 3817 (Arb. at N.Y. 2003), where Chilean Government authorities, acting on a tip from the U.S. Drug Enforcement Administration, detained the ship in order to search for cocaine that was allegedly being smuggled in a ballast tank. No illicit drugs were found, and further, no explanation was ever provided for the tip or the detention. The panel concluded that the off-hire clause of the NYPE time charter did not apply because it did not include "restraint of princes" or "government interference" as off-hire events. While the charterer was faultless, the off-hire clause serves to allocate risks among the parties and does not depend on whether one of the parties is at "fault." Because there was no off-hire event, the charterer was liable for hire during the period of detention.

25A.57 In *The Omina*, SMA 3116 (Arb. at N.Y. 1994), the owner placed a lien on sub-freights and claused the bills of lading because of outstanding charter hire. The shipper arrested the ship for failure to issue clean bills of lading and the charterer claimed the ship was off hire. The arbitrators

found that the owner had the right to place a lien on the cargo and to clause the bills of lading to reflect the lien. Therefore, the ship was held to be on hire during the period of arrest.

25A.58 In *The Bergen Bay*, SMA 3060 (Arb. at N.Y. 1993), the ship was arrested in Italy by receiver because its cargo was damaged during the voyage. The cause of the damage was a broken stow. Under Italian law, both owner and charterer are considered carriers. The receiver was willing to refrain from arresting the ship if both the owner and charterer issued a letter of guarantee. The owner's Club could only issue a guarantee on behalf of owner, and the charterer refused to post a separate guarantee. The charterer withheld hire for the amount of time the ship was arrested. The arbitrators held the owner had done all that was required of it to release the ship, and the charterer was obligated to provide security on its own behalf. Finding that the charterer wrongfully withheld hire for the period of arrest, the arbitrators issued an award in the owner's favor.

25A.59 In *The Jerom*, SMA 2790 (Arb. at N.Y. 1991), the arbitrators found that the charterer was fully entitled to exercise its right to place a lien against the ship pursuant to the charter, and that the resulting arrest brought the ship's detention within the off-hire clause.

25A.60 Similarly, in *The SCM Mexico*, SMA 3885 (Arb. at N.Y. 2005), the panel concluded that the off-hire clause applied where the charterer was found to have acted reasonably in arresting the ship because of a good faith dispute with the owner.

And if upon the voyage the speed be reduced

25A.61 In the absence of this provision, reduced speed would not be considered an off-hire event, although the charterer may have a right to damages. See *Steamship Knutsford Co.* v. *Barber & Co.*, 261 F. 866, 870 (2d Cir. 1919), *cert. denied*, 252 U.S. 586 (1920).

Other obligations of charterer

25A.62 U.S. courts have followed the English view that operation of the off-hire clause does not suspend the charterer's other duties under the charter. See *Northern S.S. Co.* v. *Earn Line*, 175 F. 529 (2d Cir. 1910); *Norwegian Shipping & Trade Mission* v. *Nitrate Corp. of Chile Ltd.*, 1942 AMC 1523 (Arb. at N.Y. 1942).

Effect on other remedies of owner and charterer

25A.63 The off-hire clause ordinarily provides the sole measure of the charterer's damages for time lost due to the specified contingencies. *Aaby* v. *States Marine Corp.*, 80 F. Supp. 328 (S.D.N.Y. 1948), *aff'd*, 181 F.2d 383 (2d Cir.), *cert. denied*, 340 U.S. 829 (1950).

25A.64 In *Aaby*, the ship was under charter for one year, and broke down almost immediately after delivery. Two and one-half days were required for repairs. The court held that the charterer was not entitled to treat the charter as having been cancelled, since the breakdown did not frustrate the commercial purpose of the charter. According to the court, the charterer's remedy for loss of time was provided by the off-hire clause, which excused it from paying hire for the repair period.

25A.65 The principle was stated quite plainly by Judge Hough in *The Ask*, 156 F. 678, 681 (S.D.N.Y. 1907):

> The *Ask* broke down and required temporary repairs. . . For such contingencies the charter party provides a stipulated measure of damages—i.e., loss of charter hire—and no other measure is permissible. . .

25A.66 The off-hire clause is obviously limited in scope, however, and while it may operate to relieve the charterer of its obligation to pay hire in certain contingencies, the clause does not

provide any means for reimbursing the charterer for consequential damages it may suffer as the result, for example, of an engine breakdown. Moreover, it does not apply to breaches of any other warranties under the charter as the result of which damages may be incurred. Thus, the clause should not be understood as limiting the charterer's right of recovery for consequential damages resulting from the breakdown. This was recognized in the district court opinion in *Aaby*. According to the court:

> It is perfectly clear, however, that the breakdown, in the present case, falls squarely within the language of Clause 15, and would ordinarily be dealt with under that clause. It was purely a minor breakdown which. . . occasioned a total time loss of less than two days and a half. For this time loss the respondent is concededly entitled to be relieved from the payment of hire. *It also has a right of action for any special damages it may have sustained as a result of the breach of warranty.* [80 F. Supp. at 333.] [Emphasis added.]

25A.67 In *The Strider Isis and The Strider Juno*, SMA 3606 (Arb. at N.Y. 2000), the panel held that where a shipowner breached its obligations to maintain the ship to the charterer's detriment, the charterer was entitled to damages and not limited by the off-hire clause.

25A.68 In *The Polyxeni*, SMA 1961 (Arb. at N.Y. 1984), the owner cited *The Seafaith*, 1955 AMC 2062, 2063 (Arb. at N.Y. 1954), for the proposition that the charterer's recovery was limited only to hire and that other consequential damages were not recoverable because they are not included in the off-hire clause. The panel chose not to agree with *The Seafaith* and cited the first edition of *Time Charters* to support its conclusion that consequential damages may be recoverable.

25A.69 *In The Seaboard Horizon*, SMA 3740 (Arb. at N.Y. 2002), citing *Time Charters*, 4th edn, the panel agreed that the off-hire clause of the NYPE time charter does not preclude an award of consequential damages, but it declined to award them based on the facts before it.

25A.70 In *The Captain John*, 1973 AMC 2005 (Arb. at N.Y. 1973), the ship was forced to put into Lisbon for extensive repairs en route to Hamburg with a cargo of molasses. The cargo was discharged and carried to destination on another ship. In addition, the charterer hired substitute ships to fulfill other contracts while the *Captain John* underwent repairs. The panel held that the ship was off hire while repairs were carried out. Under the charter, the charterer was entitled to tack on the amount of time the ship was off hire. Notwithstanding this right, however, the majority held that the charterer could recover the cost of chartering the substitute ships, less the cost it would have incurred for hire and fuel if *Captain John* had been operating, and less any savings from extending the time period.

25A.71 In *The Tordenskjold*, SMA 1091 (Arb. at N.Y. 1977), the panel held that in addition to off-hire, the charterer was entitled to such other provable damages as may have been sustained during the off-hire period. In that case, the ship was off hire while the owners replaced flanges to conform with Coast Guard regulations for the carriage of propylene. The panel found, however, that the charterer had failed to prove any damages. See also *Fort Morgan S.S. Co.* v. *Baltimore & Jamaica Trad. Co.*, 284 F. 1, 4 (4th Cir. 1922), holding that the off-hire clause "has no relation to damages. . . resulting from the negligence of the navigating officers in stranding the vessel. . .;" *The Ask*, 156 F. 678, 681 (S.D.N.Y. 1907), where the court remarked with respect to a perishable cargo, that "it could hardly be contended that the ship might conceal her known defects, load her cargo, and then remain in port making repairs, with no greater liability than temporary loss of charter hire. . . ."

25A.72 In *The Shena and The Ave*, SMA 2893 (Arb. at N.Y. 1992), the panel rejected the charterer's off-hire calculations which encompassed consequential damages. Note, however, that if the charterer had not been partially responsible for certain delays of the ship, and had demonstrated wilful negligence or flagrant neglect of duties by the ship or its owner, the panel might have awarded this broader relief.

25A.73 In *The Intermar Progress*, SMA 2468 (Arb. at N.Y. 1988), the panel held that pursuant to the charter terms, the charterer was not entitled to place the ship off hire during the period in which owner had crude oil wash and inert gas systems installed on the ship. The owner was not entitled to recover off-hire deducted by the charterer, however, because the charterer would have incurred damages in excess of the off-hire if it had used the ship without these systems in place.

25A.74 A more restrictive approach has been adopted in some cases. See, e.g., *Cia Estrella Blanca Ltda* v. *The Nictric*, 247 F. Supp. 161 (D. Ore, 1965), *aff'd per curiam*, 368 F.2d 575 (9th Cir. 1966), holding that the time charterer's exclusive remedy against the owner was under the off-hire clause, even though the deficiency in the ship's cargo gear which interrupted loading reduced the amount of demurrage the time charterer could recover under the sub-voyage charter.

25A.75 In *The Largo*, SMA 1230 (Arb. at N.Y. 1978), the charterer contended that the ship was off hire while awaiting a berth where the ship arrived some hours after the master's last ETA and the berth which had been reserved was assigned to another ship. The panel denied the claim, concluding that the delay claimed was consequential in nature, and that the charterer had no recourse under the charter. The panel indicated, however, that its decision was influenced in part by the fact that it had awarded the charterer a speed claim allowance for the voyage which resulted in the late arrival.

25A.76 In *The Stolt Capricorn*, SMA 2359 (Arb. at N.Y. 1987), the charter was held to have been commercially frustrated because of extensive delays at a discharge port while the ship was under arrest. The ship was placed off-hire for all of the time lost until the charter was deemed terminated by virtue of the frustration. The charterer sought to recover lost profits which would have been earned under a sub-charter had the ship not been detained. While the panel found that it was true that the charterer would have earned profits under the sub-charter, it concluded that "since charterers were made whole for the time lost under the time charter through the return of hire, it would be a 'double-dip' to also grant them the lost profits for a voyage which the ship, under the prevailing conditions, could not have completed within the available time frame."

25A.77 In *The Universe Explorer*, 1985 AMC 1014 (Arb. at N.Y. 1984), arbitrators held that charterer's sole remedy for the loss of time the ship was detained from entering a berth in Nigeria because of its prior contacts with South Africa was to place the ship off hire. Although charterer had to pay additional freight to charter a substitute ship, the panel denied its claim for damages. The panel adhered to the position that the off-hire clause provides the sole measure of the charterer's damages for time lost due to the specified contingencies in the off-hire clause. In addition, the panel found that under the mutual exceptions clause, no damages could be recovered by either party for losses due to "restraint of princes, rulers or people."

Clauses giving charterer option to cancel

25A.78 It is not uncommon to find that the charter contains a typewritten clause which gives the charterer an option to cancel the contract should the ship be off hire for a specified period of time. Such clauses have been enforced by New York arbitration panels. See, e.g., *The Argo Leader*, SMA 2065 (Arb. at N.Y. 1985) (option to cancel should ship be off hire for an aggregate of 36 days or longer within any 12-month period due to mechanical breakdown); and *The Theodora*, SMA 2333 (Arb. at N.Y. 1985) (option to cancel should the ship be off hire for a continuous period of more than 30 consecutive days).

25A.79 In *The Elinda*, SMA 4006 (Arb. at N.Y. 2008)(Arnold, Nichols, Carroll), the panel upheld the charterer's termination of the time charter. The applicable clause allowed Charterer to cancel the charterparty should the vessel be off hire for more than 15 days, and entitled the charterer to a refund of hire and the cost of bunkers.

25A.80 In *The Seaboard Horizon*, SMA 3740 (Arb. at N.Y. 2002), the panel concluded that the charterer could not cancel the charter, because the delays and breakdowns of the ship did not total the 30 (out of 90) days required to trigger the charterer's cancellation option under the charter.

Frustration due to off-hire

25A.81 In *The Forest Link*, SMA 3745 (Arb. at N.Y. 2002), the panel concluded that the charter was not frustrated where the ship was placed off hire for a total of three months, even though the owner had attempted to repair the ship improperly. The panel found it significant that the NYPE charterparty included a clause requiring the owner to attempt to repair the ship, and concluded that the owner had complied with this requirement.

25A.82 In a later case, however, the panel concluded that the charterparty was terminated due to the owner's failure to repair the ship and otherwise provide adequate assurance of performance. See *The Forest Link*, SMA 3800 (Arb. at N.Y. 2003). The ship was off hire for 12 months, the unpaid crew was threatening to strike and was in danger of being deported, and the owner had not indicated its intent to supply the necessary parts, repairs, and wages.

25A.83 In the same vein, in *The Forest Enterprise*, SMA 3743 (Arb. at N.Y. 2002), the panel concluded that the charter was frustrated where the ship remained off hire for one year.

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CHAPTER 26

Loss of the Ship; Frustration of the Charter

"102. 16.That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be
103. returned to the Charterers at once. . . "

26.1 This chapter deals with the consequences of the loss of the ship, and also other circumstances in which the parties to a time charter may be discharged automatically under the doctrine of frustration.

Loss of the ship

26.2 A ship is lost if she is sunk or destroyed, or so seriously damaged that no repair or recovery for further use is possible, or if the owner is irretrievably deprived of her. In such a case, three consequences will ordinarily follow.

26.3 First, the charterers' obligation to pay hire comes to an end. Clause 15 of the Baltime form says in terms that hire is to cease if the ship is lost; the same is implicit in Clause 16 of the New York Produce form. Both clauses also require the owners to repay any hire paid in advance but not earned by the time the ship was lost. For further discussion of hire repayment, see paragraphs 16.8 *et seq*., above.

26.4 Second, further performance of the charter will be impossible. A time charter is – unless the parties agree otherwise – a contract for the services of the particular ship: see paragraph 3.2 above. If she is lost, the contract cannot be performed, unless it has been agreed that, after the loss of the original, the owners either can or must provide a substitute (as to which see paragraph 26.12, below).

26.5 Third, the charter will be terminated. This is implicit in the stipulation that hire will cease to be payable from when the ship is lost. In *Blane Steamships* v. *Minister of Transport* [1951] 2 Lloyd's Rep. 155, at page 166 lhc, a demise charter case, Singleton, L.J., said, "The charter-party does not say in so many words that in the event of the ship being lost the charter-party shall be at an end, though it does say that in such case hire shall be paid up to and inclusive of the day of loss. . . It seems to me that the object of this is to give a date on which the charter-party is to be deemed to have expired. . . ." Likewise Morris, L.J., at page 169 lhc, said, "I have come to the conclusion that it is necessary to imply a term in the charter-party to the effect that as from the time when hire-payments cease to be due, the charter-party terminates. Such termination would end the hiring, and its date would mark 'the expiration' of the charter-party."

In 1946, the *Empire Gladstone* was bareboat chartered by the Minister of Transport to Blane Steamships for 5 years. By clause 7, the charterers promised to keep the ship insured for £130,000. By Clause 11, the charterers were given the option to purchase the ship for her current, depreciated value, at any time "not later than three months before the expiration of this charter". Clause 8 provided that the obligation to pay hire should cease

if the ship was lost or became a constructive total loss. There was no mutual exception for dangers of the sea or errors of navigation.

On 5 September 1950, the ship went aground off Sydney. By the next day, it was apparent that the ship was unlikely to be salvageable. On 7 September, at 10 a.m., the charterers purported to exercise their option to purchase: it was to their advantage to do so, since the contractual price of the ship was substantially less than the indemnity payable by her insurers for her loss, the benefit of which they hoped to acquire by their purchase. The judge at first instance held that, prior to the charterers' purported exercise of their option, the ship had become incapable of further use as a ship and would never again be capable of such use, but nevertheless was not yet lost.

The Court of Appeal held that the charter came to an end prior to 10 a.m. on 7 September and the charterers' contractual option to purchase did not survive the termination of the charter. The charter would have been terminated if the ship was a complete loss and likewise it was terminated when the ship was so damaged that the commercial purpose of the charter was rendered impossible: *per* Cohen, L.J., at 161 lhc.
Blane Steamships v. *Minister of Transport* [1951] 2 Lloyd's Rep. 155 (C.A.)

26.6 The further consequences of the loss depend upon the circumstances in which it occurs and upon its causes.

26.7 A loss may be attributable to a breach of charter by one of the parties. For example, a loss may be caused by unseaworthiness for which the owners are liable under the terms of the charter (see paragraphs 3.40 *et seq.*, chapters 8 and 11, and paragraph 34.5), or by a breach by the charterers of their safe port obligations (see chapter 10). In such circumstances the party in breach will be liable to the other party in damages.

26.8 Alternatively, the loss of the ship may be caused by something for which, under the terms of the contract, the parties have no liability. So, for example, Clause 16 of the New York Produce form excuses both parties from liability for dangers and accidents of the sea (see chapter 27 below). Consequently if the loss of the ship is caused by a storm, both parties are excused from any liability for the loss of the charter.

26.9 A third possibility is that the ship is lost as a result of something for which the charter makes no express provision and for which neither party is implicitly responsible. In that event, it may be said that the contract has been frustrated. However, given the duties of each party and the wide exceptions in Clause 16, cases of frustration caused by the loss of the ship are rare.

Ship unusable for the purposes of the charter

26.10 A ship may be so damaged that, although capable of being repaired, no further performance of the charter is possible. In such a case, the question which party – if either – is liable for the consequences depends on how the damage was caused: see paragraphs 26.6 to 26.9, above.

26.11 In such an event, however, absent special terms, the charter is discharged. In *Blane Steamships* v. *Minister of Transport* [1951] 2 Lloyd's Rep. 155, Morris, L.J., said, at page 167 lhc, "This ship. . . was on Sept. 6 in such a state that she could not again be used for the purposes of the charter. There must, I think, be implied into the contract a term to the effect that in those circumstances the charter-party was at an end. . . ." Similarly, Cohen, L.J., said at page 162 rhc, "I see nothing inconsistent with any of the clauses [of the charterparty] in implying a provision that in the event of the further use of the ship for the purposes of the charter becoming commercially impossible, the contract should automatically be brought to an end" and, at page 163 lhc, "the implication of such a term is the natural corollary of clause 8" (which provided for the cessation of hire if the ship were lost). It is debatable whether these dicta should be understood as attributing the discharge of the charter to frustration or to the operation of an implied term.

Substitution clause

26.12 Where the loss of the chartered ship brings the charter to an end, then, generally, a clause permitting the substitution of another ship will be of no effect. If it is intended to allow substitution after loss, therefore, particularly clear words must be used. (American law has developed differently; see paragraph 26A.41, below.)

The seven-year time charter for the *World Sky* incorporated a clause giving her owners the right to substitute for her a larger ship. During the charter service she ran aground and became a total loss. McNair, J., held that as the time charter had been frustrated by the total loss of the *World Sky* her owners no longer had a right (or a duty) to make a substitution.

Niarchos v. *Shell Tankers* [1961] 2 Lloyd's Rep. 496.

(See also *The Badagry* [1985] 1 Lloyd's Rep. 395 (C.A.) and paragraph 3.6, above.)

Where repair is possible, but uneconomic

26.13 Where the ship, having been damaged, is capable of repair, then, other things being equal, the owners' duty is to restore her to a serviceable condition and continue performing the charter: see generally chapter 11 above. But what is the position if the cost of repair is greater than the value of the ship once repaired? In that event, the ship is said to be a 'commercial loss' and the owners *may* be excused from performing the charter. However there is no inflexible rule to that effect: in every case, the full terms of the charter must be taken into account.

'Commercial loss': the rule in Moss v. Smith

26.14 In each of the four cases summarised below, a ship was damaged by perils of sea and the voyage she was performing was abandoned. In each case, the owners had entered into either a voyage charter or a bill of lading contract and the courts had to consider the effect of the clause in those contracts which exempted the owners from liability for loss caused by perils of the sea. In each case, it was held that, for the purposes of such a clause, the owners would be regarded as prevented by perils of the sea from performing their contract, if the cost of repairing the ship exceeded her repaired value. In such circumstances, it was said, the ship was a 'commercial loss' and, if the owners chose not to repair, they would be protected by the exemption clause from liability for failing to complete the voyage. (On the other hand, if they chose to repair, and did repair, then, it was said, the owners could not claim to have been prevented from performing their contract: see Bowen, L.J.'s, judgment in *The Bessie Morris* [1892] 2 Q.B. 652, at page 661.)

26.15 This principle – the 'commercial loss' rule – is "a rule of construction or a rule under which a term is implied in the contract of affreightment" (*per* Slesser, L.J., in *Kulukundis* v. *Norwich Union* (1936) 55 Ll.L.Rep. 55, at page 61 rhc). This means it can apply only if it is consistent with the express terms of the charter and it is displaced if the express terms of the charter are incompatible with it: see the discussion of *The Kyla* [2013] 1 Lloyd's Rep. 565 at paragraph 26.21 below.

26.16 As discussed further below, there is a question whether these decisions should now be explained as applications of the doctrine of frustration: see the discussion at paragraph 26.22, *et seq*., below. However, whether that is right or not, it is suggested that the 'commercial loss' rule should apply to a time charter which contains an exception for perils of the sea, just as much as to a voyage charter or bill of lading contract.

The *Alfred* was damaged in the course of a voyage from Valparaiso, Chile to England. She was forced back to Valparaiso, where the master chose to sell the ship, even though the cost of the necessary repairs was less than the repaired value of the ship. The owners' claim was made under a policy of freight insurance: they claimed

that the freight for the voyage had been lost by perils of the sea. The claim failed. The perils of the sea had not prevented the owners from earning freight because the ship was capable of cost-effective repair: per Maule, J., at pages 103 to 104.

Creswell, J., said (at page 105): "What is the nature of the contract between the ship-owner and the merchant whose goods he contracts to carry on freight? The ship-owner engages to carry the goods from the port of loading to the port of discharge. . . unless prevented by perils of the sea. When is the ship-owner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary. . . But, if a ship sustains so much sea-damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The Courts of Law have also engrafted this qualification upon the contract – that, if the damage which results from a peril of the sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract."

Moss v. *Smith* (1850) 9 C.B. 94.

The defendants' ship *Bessie Morris* was chartered by the plaintiffs to carry a cargo from Greece and Croatia to London. The terms of the charter contained the usual exception in respect of perils of the sea. The ship went aground during the voyage near Gibraltar but was got off and taken to Gibraltar. The ship was repaired and the cost of the repair was less than the repaired value of the ship. However, the owners entered into an arrangement with the owners of the cargo (who were not the charterers) to sell the cargo in Gibraltar and then used the ship for a different voyage. The charterers sued the owners for wrongfully abandoning the charter voyage and so depriving them of the freight they would have earned if the voyage had been completed. The claim succeeded before the judge and his judgment was upheld on appeal.

At page 657, Lord Esher, M.R., said: "The charterparty is a contract between the shipowner and the charterer that the former will take the cargo offered by the latter, and will carry it as directed by the charterer to a safe port in the United Kingdom, unless prevented by the perils of the sea, which are excepted in the charterparty. . . In applying this to the facts of the case, we have to see whether the shipowner, who never brought the ship to London, was prevented from so doing by the perils of the sea. The ship was stranded near Gibraltar. . . But in fact. . . she could be repaired. What is the duty of the shipowner in such a case? His duty is to repair the ship, if it is possible for him to do so. . . But. . . the possibility must be a business possibility. If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her."

Assicurazioni Generali v. *SS Bessie Morris* [1892] Q.B. 652.

The *Yero Carras* was chartered for a voyage from Valparaiso to Europe. The charter included the usual exceptions including perils of the sea. The ship was worth £13,000, but she had been insured for £30,000. On her way to Valparaiso, she went aground. The damage to the ship was such that the cost of repair would have been more than £13,000, but less than £30,000. The ship was abandoned by her owners, the claimants, to her hull insurers. The owners then sued their freight insurers claiming the loss of the freight they would have earned for the voyage. The claim failed at first instance on the grounds that, because of her high insured value, she was not a constructive total loss under the hull policy and, for that reason, the owners had not been prevented from completing the voyage. The Court of Appeal reversed that decision, holding that, because of the damage to ship, the owners had been prevented from performing the charter by the perils of the sea. Whether the ship was a constructive total loss under the hull policy was irrelevant to the claim under the freight policy.

Lord Wright said, at page 134 rhc, "If. . . the ship is lost or destroyed, the performance of the charter-party. . . is prevented. . . But apart from the loss or destruction of the vessel. . . the shipowner may be relieved as against the charterers if the vessel is so damaged and disabled as to be incapable of being repaired save at an expense exceeding her value when repaired." At page 135 rhc, he said, "The test is the same under the freight policy as under the charter-party, namely, whether the shipowner has been prevented either in a physical sense or in a business sense from performing the freight contract. . . ."

"Yero Carras" (*Owners*) v. *London & Scottish Assurance* (1935) 52 Ll.L.Rep. 131

The *Mount Taygetus* was loaded on the western coast of South America with a cargo of grain for discharge in the United Kingdom. The charterparty contained an exception clause that the ship was to be in no way liable for perils of the sea. The ship went ashore whilst going through the Magellan Straits but was salvaged. The cost of repairing the ship was just over £19,000. The value of the ship once repaired was just under £19,000 (including the freight she would earn if repaired). However, the insured value of the ship was £25,000, so she was not a constructive total loss under the hull policy. The claimant owners abandoned the ship to the hull underwriters. They claimed under a policy of freight insurance the freight they would have earned on the voyage. The claim succeeded in the Court of Appeal on the same grounds as in *The Yero Carras*. The ship was a commercial loss for the purposes of the charter; it was irrelevant whether she was a constructive total loss for the purposes of the hull policy.

Greene, L.J., said, at page 63, that the owner's "duty to effect the necessary repairs. . . is subject to this qualification. . . that if the cost of the repairs is unreasonably large the shipowner is excused from executing them and is entitled to treat his obligation to carry the goods to their destination as discharged by a peril of the sea. Another way of describing this is to say that the shipowner is entitled to treat the vessel as lost in a commercial sense through a peril of the sea."

Scott, L.J., said, at page 73, "the basic condition under the charter-party here. . . was the continued existence and availability of the *Mount Taygetus* throughout the voyage. If the *Mount Taygetus* should be at any time during the contract voyage rendered incapable of completing the voyage. . . whether the incapability was physical or commercial the basic condition of the contract would be broken and the charter-party *ipso facto* discharged. . . On that footing it is clear that if the ship as a merchant ship employed in a shipowner's business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the cost of repair, the ship would be commercially lost. . .".

Kulukundis v. *Norwich Union* (1936) 55 Ll.L.Rep. 56

26.17 As the third and fourth cases summarised above make clear, the question whether a ship is a 'commercial loss' for the purposes of the rule in *Moss* v. *Smith* is a different question from whether she is a constructive total loss under the owners' hull policy, even though both questions may involve asking whether the cost of repair exceeds the value of the ship.

26.18 In *The Yero Carras*, above, Lord Wright, M.R., said that the two questions are analogous (see page 134), but that as between the owners and the charterers "questions of insurance are irrelevant" (see page 137). Greene, L.J., said, at page 141, that it is important to keep the different contracts distinct: "The rights and obligations of the parties under the charter-party are not affected by the existence or the terms of. . . the hull policy. In considering those rights and obligations it is in my opinion important to avoid the introduction of the expression 'constructive total loss'. This is a technical expression relating to the rights and liabilities of assured and underwriters under marine policies and is not proper to be employed in dealing with the position as between owner and charterer under a charter-party." In *Kulukundis* v. *Norwich Union*, the same judge said, at page 61, that "In considering this question of commercial loss in a case between shipowner and freighter, it appears to me that nothing but confusion results if it is treated as the same question as that of commercial loss as between shipowner and hull underwriter, that is, constructive total loss of ship . . . The rule that a shipowner is entitled to be freed from his obligations to the freighter, if the vessel is lost in a commercial sense, is now well established, and it cannot in my judgment be treated as the same rule, or a branch of the same rule, as that which applies between owner and hull underwriter."

26.19 Thus, showing that the ship was a constructive total loss for the purposes of her hull policy is neither necessary nor sufficient to prove that she was a 'commercial loss' for the purposes of the rule in *Moss* v. *Smith*. The cases suggest at least two ways in which the questions differ. First, as between the owners and the charterers the question whether it is economic to repair the ship is considered by reference to the actual repaired value of the ship; as between the owners and their underwriters, under the Institute Clauses, by reference to the insured value of the ship, which may be different. Second, as between the owners and the charterers, the owners may be entitled to bring into account as part of the expense of repairing what the ship is worth to him as a wreck;

as between the owners and their underwriters, under the Institute Clauses, otherwise: see *The Yero Carras*, above, at page 137 rhc.

26.20 However, it is always open to the parties to agree that their rights under charter *will* depend on whether the ship is, for the purposes of the hull insurance, 'a constructive total loss': *Blane Steamships* v. *Minister of Transport* [1951] 2 Lloyd's Rep. 155 is an example of such a charter. It is thought that where the parties agree what is to happen if the ship becomes 'a constructive total loss', that should be taken to mean a constructive total loss *under the owners' hull policy*: see *The Yero Carras*, above, at page 138 lhc. Clause 20 of the Shelltime 4 form refers to constructive total loss and makes it plain that this refers to such a loss under the ship's hull insurance: see paragraph 37.97, below.

Inconsistent express terms displace the 'commercial loss' rule

26.21 The rule that a 'commercial loss' of the ship excuses the owner from further performance is a rule of construction. It applies therefore only if it is consistent with the express terms of the charter. In *The Kyla* [2013] 1 Lloyd's Rep. 565, the ship suffered damage such that the cost of repair exceeded her repaired value. However, the terms of the charter included a warranty that the ship would be kept insured throughout the charter for a sum substantially in excess of the cost of repair. Flaux, J., held this meant that the owners could not "argue that repairing the vessel and continuing the charterparty were, as at [the date of the casualty], commercially impossible or that the vessel was a commercial loss": see [80].

The *Kyla* was time chartered for 12 to 15 months on an amended New York Produce form. By additional Clause 41, headed "Insurance/P&I Cover", the owners warranted that throughout the currency of the charter the ship would at their expense be "fully covered" for hull, machinery and certain other risks; it continued, "41.3. Insurance full style and value. Hull and machinery: USD 16,000,000 London, Norway and USA Markets". Whilst in the charter service, the ship was struck and damaged by another ship. Consequent repairs would have taken about 160 days and cost $9 million whereas her sound market value was $5,750,000. The owners claimed that on these facts the charter was frustrated.

Flaux, J., held that, although there was no special or inflexible rule that applied to charterparties, a charter would generally be frustrated if the chartered ship became a 'commercial loss'; but in this case the owners had, by Clause 41, warranted that throughout the charter period they would maintain hull and machinery insurance with an insured value of US$16 million and this provided a full and complete provision to deal with what had happened, preventing the charter from being frustrated.

The Kyla [2013] 1 Lloyd's Rep.565. (The case went to the Court of Appeal but only on the question whether a further appeal was possible, to which the answer was no, [2013] 2 Lloyd's Rep. 463.)

A rule of construction or a case of frustration?

26.22 Taken at face value, the four cases summarised in paragraph 26.16 are only concerned with the effect of an exemption clause for perils of the sea and the principle for which they stand is that where the ship is reduced to a 'commercial loss' by perils of the sea, the owners may rely on such a clause to say that they are excused from further performance of the charter. However, in *The Kyla*, above, Flaux, J., held that these cases can and now should be "subsumed within the modern doctrine of frustration": see [67].

26.23 If it is right that the 'commercial loss' rule should be recast in terms of frustration, it has to be asked: what is the frustrating event? And when does the frustration occur? One possibility is that the frustrating event is the occurrence of damage to the ship, so that the frustration occurs when the damage is suffered (which is what seems to have been assumed in *The Kyla*). But that approach would produce this curious result: in the typical case where there is no express term to displace the rule in *Moss* v. *Smith*, the owners could repair the ship, so as to be able to resume

performance, and yet still claim to be discharged from any obligation to do so. That conclusion is difficult to square with the view expressed by Bowen, L.J., in *The Bessie Morris* [1892] 2 Q.B. 652, at page 661, that owners cannot say they are prevented from performing the charter if in fact they repair their ship and are able to complete the voyage. Indeed, if the damage were the frustrating event, one could imagine a case in which the owners were offering to repair the ship and continue the charter, yet the charterers were able to insist that the charter had been discharged.

26.24 It may therefore be better to explain the position in this way. Where the ship is a commercial loss, and there are no special terms displacing the rule in *Moss* v. *Smith*, the owners are entitled not to repair the ship, relying on the exception for perils of the sea. If the ship is not repaired, then the parties are excused from further performance of the charter, which has become impossible: see 26.11 above.

Frustration in cases other than loss or damage to the ship

26.25 Where an event occurs without default of either party, the effect of which is to make the charter either impossible to perform or, as a matter of business, a totally different thing, the charter is automatically terminated by operation of law. This is called frustration. Typical cases in which a charter may be frustrated include: requisition or detention of the ship for an inordinate period of time; performance of the charter becoming illegal; or the destruction or discontinuance of something essential to its performance.

The doctrine of frustration

26.26 As it was put by Lord Radcliffe in *Davis Contractors* v. *Fareham U.D.C.* [1956] A.C. 696, at page 729: "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do."

Building contractors agreed with a local authority to build 78 houses on a certain site within eight months for £92,425. For various reasons, including in particular a lack of skilled labour and adverse weather, the building took 22 months and the eventual cost to the contractors was £115,233. They claimed that as a result of the long delay the contract had become frustrated and that they were entitled to be paid, instead of its fixed price, on a *quantum meruit* basis. The House of Lords held that despite the delay and consequent extra expense to the contractors the contract had not been frustrated and they were entitled only to the fixed price.

Lord Reid said, at page 724: "It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case, in my opinion, the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract."

Davis Contractors v. *Fareham U.D.C.* [1956] A.C. 696 (H.L.).

26.27 The doctrine was restated by Lord Simon in *National Carriers* v. *Panalpina* [1981] A.C. 675, at page 700, in the following terms: "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance." (The phrase "a supervening event" connotes an outside event or extraneous change of situation, not provided for by the parties at the time of contracting,

over which the contracting parties have no control; see the judgment of Hobhouse, J., in *The Super Servant Two* [1989] 1 Lloyd's Rep. 148, at pages 155 and 156.)

26.28 The question whether there has been a sufficiently fundamental change of circumstances depends on a wide range of factors. In *The Sea Angel* [2007] 2 Lloyd's Rep. 517, summarised at paragraph 26.33, below, Rix, L.J., explained, at pages 536 and 537: "Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances."

26.29 Ultimately, as Bingham, L.J., explained in *The Super Servant Two*, [1990] 1 Lloyd's Rep. 1, at page 8, the doctrine is "an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change of circumstances. . .".

Automatic operation

26.30 Lord Roskill, in the *Panalpina* case, at page 712, emphasised that the effect of frustration is to discharge the parties automatically: "Its operation does not depend on the action or inaction of the parties". Thus the fact that the parties may have treated the contract as continuing after a frustrating event will not prevent the operation of the doctrine.

The *Singaporean* was time chartered in 1916 for a period of 10 months, the ship to be placed at the charterers' disposal in March 1917. Prior to delivery she was requisitioned. The owners thought the period of requisition would be short and asked the charterers to confirm that they would still take the ship after her release. The charterers did so, but the ship remained under requisition until March 1919.

It was held by the Privy Council that the charter was frustrated by the requisitioning of the ship and that the parties were thereupon discharged irrespective of the subsequent correspondence between them. There was no new contract and the fact that the parties considered the charter to be still in being was irrelevant.

Hirji Mulji v. *Cheong Yue S.S.* [1926] A.C. 497.

(See also *B.P. Exploration* v. *Hunt* [1981] 1 W.L.R. 232, 241.)

26.31 Similarly, the fact that the charterers may, after a frustrating event, be willing to pay hire or continue to pay hire for the ship will not prevent the owners from relying on the doctrine: see *Bank Line* v. *Capel* [1919] A.C. 435, below.

Events contemplated or provided for by the parties

26.32 The fact that the event may have been contemplated by the parties or even anticipated at the time the contract was entered into is relevant, telling against frustration, when assessing whether performance in the changed circumstances is a thing radically different from that which was bargained for. It is not, however, conclusive, unless the contract is capable of applying in the different circumstances which have arisen. It may not, therefore, be fatal to a claim of frustration that the supervening event was contemplated.

The *Molton* was chartered to an agent of the Republican Government of Spain for a period of 30 days from 1 July 1937. It was expressly provided that the purpose of the charter was to evacuate refugees from North Spain to France. The ship carried out one voyage and then was seized by a Nationalist ship on 14 July. She was held until 7 September. It was held by Goddard, J., that, even on the assumption that the parties had at the time of the charter contemplated that the ship would or might be seized, the charter was frustrated. It was a charter for a very short period at a very high rate of freight for a specific purpose within geographical limits and the seizure destroyed the foundation of the contract.

Tatem v. *Gamboa* (1938) 61 Ll.L.Rep. 149.

26.33 On the other hand, a charter for a short period at a high rate of hire for a specific, local purpose was not frustrated by prolonged delay in *The Sea Angel*, below. It was suggested in that case that *Tatem* v. *Gamboa* depended particularly on the irresistible nature of seizure by opposing forces during wartime, as contrasted with detention or (possibly prolonged) temporary deprivation in more normal circumstances, in which there may be recourse to local courts and to commercial negotiation. Therefore lengthy delay caused by unreasonable detention by port authorities did not frustrate a short time charter where such detention was a foreseeable risk to a ship chartered by salvors to tranship cargo from a damaged tanker.

The *Sea Angel* was time chartered on the Shelltime 4 form by salvors attending the tanker *Tasman Spirit*, aground and broken in two near Karachi, for "up to 20. . . days. . . for transhipment(s) of up to full cargo of crude oil from" the casualty. After she had been on hire for 14 days, the *Sea Angel* had discharged her last transhipment cargo and had only a three-day redelivery voyage to perform to complete the charter. She was then detained at Karachi for 108 days, through no fault of the owners or the charterers, because of unreasonable action by the Karachi Port Trust designed to extract maximum security for pollution and other claims in relation to the initial casualty. In the event, she was redelivered 110 days later than expected.

Gross, J., held that the charter was not frustrated. The Court of Appeal agreed.

The Sea Angel [2007] 1 Lloyd's Rep. 335, [2007] 2 Lloyd's Rep. 517 (C.A.).

26.34 In *Ocean Tramp Tankers* v. *Sovfracht* (*The Eugenia*) [1963] 2 Lloyd's Rep. 381, the parties considered making a provision for the event which in fact occurred (the closure of the Suez Canal) but could not agree on the terms, so they decided to 'leave it to the lawyers to sort out' if the eventuality should arise. Lord Denning, M.R., stated that the doctrine was not for that reason excluded.

26.35 Where express provision is made in the charter for the event which occurs the question is whether it is a complete provision. In *Bank Line* v. *Capel* [1919] A.C. 435 (H.L.), see paragraph 26.51, below, the charter contained an express provision that the charterers were to have the option of cancelling if the ship should "be commandeered by Government during this charter" and the ship was in fact commandeered (or requisitioned). It was held that this did not prevent the frustration of the charter. Lord Finlay said, at page 443, that the clause giving the option, ". . . merely means that in case of the vessel being commandeered, the charterers might cancel at once without having to show that the detention was likely to last so long as to put an end to the contract within the meaning of the authorities". Viscount Haldane said, at page 445: "What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so."

26.36 So, when the allegation is of frustration as a result of delay or of interruption in performance, any provisions in the charter must be examined in their context to see whether on a true construction they are sufficiently wide to cope with the new situation. If they are not – and in practice few will be sufficiently wide to cope with a situation which is so radical as to cause frustration – then they will not prevent frustration. In *Fibrosa* v. *Fairbairn* [1943] A.C. 32 Viscount Simon said, at page 40: "The principle is that where supervening events, not due to the

default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption."

The defendants agreed in August 1913 to supply the plaintiffs with 12 ships of a certain type for each of the years 1914 to 1918 to carry each month a cargo of phosphate from Ocean Island/Nauru to Europe. The contract provided that in the event of a war involving Great Britain endangering shipping either party could opt to suspend the contract until the end of the war with the period of suspension being added to the end of the contract period. The defendants claimed to suspend the contract in August 1914. In June 1919 all their owned ships then being under requisition, they alleged that the whole contract had been frustrated.

Rowlatt, J., accepted that the contract had been frustrated, although it was not restricted to the supply of their own ships and despite the war clause mentioned above. The report of his judgment reads in part: ". . . it was true that war of some kind was contemplated, but it was necessary to inquire not only whether such a war as that which happened was contemplated, but whether the consequences of war which had followed were in the minds of the parties. Looking at the facts he thought that the parties had contemplated a state of affairs in which there would be some risk, but they never contemplated such a war as actually happened or its consequences. The whole shipping industry had been dislocated; the Government had taken control and shipowners were *de facto* not free."

Pacific Phosphate v. *Empire Transport* (1920) 36 T.L.R. 750.

(See also *Tamplin* v. *Anglo-Mexican* [1916] 2 A.C. 397 (H.L.) (exception of "restraints of princes"); *The Penelope* [1928] P. 180; *The Nema* [1980] 2 Lloyd's Rep. 339 (C.A.), [1981] 2 Lloyd's Rep. 239 (H.L.) and paragraph 26.40, below (strikes clauses); *Capel* v. *Soulidi* [1916] 2 K.B. 365 (C.A.) (in which the charter provided for cancellation without any option, if the ship was commandeered); *The Florida* [2007] 1 Lloyd's Rep. 1 (voyage charter for carriage of vegetable oil to Nigeria frustrated by a Nigerian import ban despite a very wide liberty clause); *The Kyla* [2013] 1 Lloyd's Rep. 565, paragraph 26.21, above (collision repairs would cost much more than the repaired ship would be worth, but much less than the owners had promised to insure her for).)

Divisible and indivisible contracts

26.37 *Dominion Coal* v. *Roberts* (1920) 4 Ll.L.Rep. 434 concerned a time charter of a named ship for seven years, with an option to extend to ten years, for the carriage of coal by the same ship each year for as long as the St. Lawrence was free of ice and open for traffic. Rowlatt, J., held that the contract was indivisible and that the requisition of the ship for the first three years frustrated either the whole charter or none of it.

26.38 By contrast, other contracts may be divisible and so frustrated only in part. In *The Nema*, paragraph 26.40, below, the Court of Appeal and the House of Lords relied on the statement by Lord Atkinson in *Larrinaga* v. *Soc. Franco-Américaine des Phosphates* (1923) 14 Ll.L.Rep. 457, at page 461, in which he described a divisible contract as being one which dealt with ". . . wholly distinct, separate, and severable adventures between which there was no inter-dependence in the sense that the carrying out of any one of them was made to depend in any way upon the carrying out or abandonment of any of the others". The *Larrinaga* case concerned a contract of affreightment for six voyages between Tampa and Dunkirk with phosphates over a period of two and a half years, by ships to be nominated from the owners" own fleet or from chartered-in ships. That contract was held by the House of Lords, affirming the decision of a majority of the Court of Appeal, to be a divisible contract, such that the owners remained bound to supply ships to carry out the last three voyages, even though the first three were frustrated by reason of the war.

Question of fact and law

26.39 The question whether a contract is frustrated is a mixed question of fact and law: see *National Carriers* v. *Panalpina* [1981] A.C. 675, *per* Lord Hailsham at page 688. For example,

the question whether delay or delay of the type experienced in the particular case is capable of frustrating the contract is a matter of law, but the question whether, if so, the delay actually experienced is of sufficient length to cause frustration is a matter of fact: see *Universal Cargo Carriers* v. *Citati* [1957] 1 Lloyd's Rep. 174, at page 192, *per* Devlin, J.

26.40 Consequently, where the arbitrators have understood and applied the correct legal test of frustration, the court will not interfere with their decision on the question whether the facts do or do not satisfy that test. In *The Nema*, below, Lord Roskill said, at page 254 rhc: "For the future I think that in those cases which are otherwise suitable for appeal the Court should only interfere with the conclusion on issues such as those which arise in cases of frustration expressed by arbitrators in reasoned awards, either if they are shown to have gone wrong in law and not to have applied the right legal test, or if, whilst purporting to apply the right legal test, they have reached a conclusion which no reasonable person could, on the facts which they have found, have reached." The latter is justified only because of the inevitable conclusion that the arbitrators have in fact got the law wrong, despite having appeared to express themselves in accordance with the correct legal test. It is a ground of appeal that hardly ever succeeds in practice.

The *Nema* was chartered for 6/7 consecutive voyages to carry titanium slag from Sorel on the St. Lawrence to Calais or Hartlepool, between April and December 1979. Clause 5 excluded time lost through strikes from laytime and Clause 27 gave the owners the option to cancel if shipment was prevented by "general strike". After the first voyage there was a strike at the titanium plant in Sorel and when the *Nema* arrived there on 20 June 1979 she was unable to load. Addenda to the charter were then entered into under which the second voyage was postponed on certain terms and the owners agreed to lift seven further cargoes in 1980. However, the strike, which was not a general strike, continued and in September 1979, with no prospect of the strike ending, the question whether the charter was frustrated was referred to arbitration.

The arbitrator treated the voyages for the 1979 season as divisible from the agreement for the voyages for the 1980 season and held that by 26 September 1979 the contract for the 1979 season was frustrated.

On appeal to the Commercial Court, Robert Goff, J., held that the charter constituted one indivisible contract extending over two seasons, but that even if the 1979 season could be regarded as a separate contract, the strike did not affect it so radically as to frustrate the 1979 contract.

The Court of Appeal, whose decision was affirmed by the House of Lords, restored the arbitrator's decision, agreeing with him that the charter was divisible into separate seasons for the 1979 and 1980 voyages. It was held further that unless the arbitrator misdirected himself on a point of law or unless his decision was one that no reasonable arbitrator could reach, the arbitrator's conclusion on the question of frustration should be accepted.

The Nema [1980] 2 Lloyd's Rep. 83 and 339 (C.A.) and [1981] 2 Lloyd's Rep. 239 (H.L.).

26.41 However, in every case one has to look at the nature of the question that has been decided. In *The Mary Nour* [2008] 1 Lloyd's Rep. 526, at [11], Moore-Bick, L.J., said, "[It was submitted] that there is high authority in the form of the observations of Lord Roskill in *Pioneer Shipping Ltd* v. *BTP Tioxide Ltd* (*The Nema*) [1982] AC 724, page 753 that where frustration is in issue the court should generally accept the arbitrators' conclusion. However, the issue of frustration arises in a wide range of different factual circumstances. At one end of the scale there are cases, of which *The Nema* is a prime example, in which the question is essentially one of fact and degree, calling for the evaluation of a range of factors which a commercial tribunal is particularly well equipped to undertake. At the other there are cases which call for the application of established principles to a clearly defined event rendering performance impossible. Such cases give rise to a clear-cut issue of law. The present case falls very much towards the latter end of the scale, requiring little more than the application of established principles to the particular facts of the case. Accordingly, although I accept that the court must accept loyally the findings of fact made by the arbitrators, I do not think it need be unduly inhibited by the arbitrators' conclusion that the facts they have found are sufficient to satisfy the legal test for frustration."

Frustration by delay or interruption of service

26.42 A time charter may be held to be frustrated if performance of it is sufficiently interrupted by damage to the ship or the ship being, for example, requisitioned or physically trapped. Likewise, if the performance of the charter is sufficiently delayed, for example, by circumstances which prevent the ship from reaching a port or discharging her cargo. However, for this to be so, the effect of the delay or interruption must be radical: Goddard, J., in *Tatem* v. *Gamboa* (1938) 61 Ll.L.Rep. 149, said at page 156, that frustration would occur "by reason of such long interruption or delay that the performance is really in effect that of a different contract. . .".

The *Errington Court* was chartered on the New York Produce form in March 1937. Redelivery was to be in Australia between 15 December 1937 and the end of January 1938. She loaded cargo at Portland, Oregon, in July 1937 and on 7 August arrived at Wu-hu, 750 miles up the Yangtze River. The Japan/China War broke out on 13 August and the Chinese sank ships in the river to form a boom to prevent the Japanese coming up it. The evidence was that at the time the ship became trapped (on 3 September when she had completed discharge of her cargo) it was expected that she would be prevented from sailing down river indefinitely (wrongly as it turned out; see paragraph 26.39, above). In holding that the charter was frustrated, Branson, J., said: "It was urged, on behalf of the owners, that the doctrine of frustration cannot apply to a time charter unless the ship is physically removed from the control of both parties. I cannot see why the adventure in question before me was any the less frustrated than was the adventure in the *Bank Line* case. All power in the ship's officers to continue the adventure was taken away, in the one case by requisition, and, in the other, by the construction of the boom."

Court Line v. *Dant & Russell* (1939) 44 Com. Cas. 345.

The *Dunolly* was time chartered for one Baltic round (a voyage from the U.K. to Baltic ports and back to the U.K.). She was delivered in early July 1914, sailed to the Baltic and was loading in Finland when, at the beginning of August, war broke out. She was prevented from leaving Finland by orders of the Russian authorities. The Court of Appeal held the charter frustrated, as the charterers were deprived for an indefinite period of the agreed use of the ship.

Scottish Navigation v. *Souter* [1917] 1 K.B. 222 (C.A.).

26.43 In general, a critical factor is whether the interruption will be, or is likely to be, of very substantial duration in relation to the unexpired balance of the charter period. If it appears that any substantial period of the charter will remain after the interruption has ceased, then the courts are unlikely to hold that the contract has been frustrated. In a requisition case, *Anglo-Northern* v. *Jones* [1917] 2 K.B. 78, Bailhache, J., suggested, at page 84, that "The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired portion of the charterparty". It is undoubtedly right that this is an important factor, but it may be going too far to say it is the main factor.

26.44 In *Bank Line* v. *Capel* [1919] A.C. 435, Lord Sumner said, at p. 454: "Bailhache J. says that the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charterparty, and I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered." In *The Wenjiang (No. 2)* [1983] 1 Lloyd's Rep. 400, Bingham, J., said at page 408, that the question how much weight should be given to this comparison was a matter for the arbitrators' judgment. Likewise in *The Sea Angel* [2007] 2 Lloyd's Rep. 517, Rix, L.J., accordingly dismissed, at page 538, a submission that Bailhache, J.'s comparison is the "critical or main and in any event overbearing test to apply".

26.45 When frustration by delay is alleged, it is important to consider the nature of the service involved and the nature and extent of the consequences of the intervening events. In *The Sea Angel*, see paragraph 26.33, above, one of the factors telling against the charterers' claim of frustration was that the ship had been chartered for salvage services and these carried with them the risk that

had materialised, namely that the port authorities might arbitrarily detain the chartered ship in the hope of obtaining security in respect of claims relating to the initial casualty: see [2007] 2 Lloyd's Rep. 517, *per* Rix, L.J., at pages 538 to 541.

26.46 By contrast, in *The Fjord Wind* [1999] 1 Lloyd's Rep. 307, had it not been for a finding of breach by the owners, Moore-Bick, J., would have held the voyage charter frustrated as a result of delay due to engine breakdown. That was because "there was a significant risk that after nearly five months in the vessel this cargo would have suffered very serious damage as a result of mould growth". The charter service, which at that stage was solely the carriage of that particular cargo, was transformed from "a voyage of about one month which involved no appreciable risk of damage to the cargo resulting from its inherent qualities. . . into one which involved both prolonged delay and a significant risk of serious damage. That. . . rendered the performance of the contract radically different for both parties".

Time at which assessment of delay is to be made

26.47 The length and effect of the interruption must be assessed at the time that the cause of the delay operates and without the benefit of hindsight. In *Anglo-Northern* v. *Jones* [1917] 2 K.B. 78 the rule was stated by Bailhache, J., at page 85, in the following terms: "the parties must have the right to claim that the charterparty is determined by frustration as soon as the event upon which the claim is based happens. The question will then be what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service. . . and it will be immaterial whether his anticipation is justified or falsified by the event."

26.48 So in *Court Line* v. *Dant & Russell* (1939) 44 Com. Cas. 345, and paragraph 26.42, above, the probable length of delay was judged entirely on the evidence of expectations as at the beginning of September 1937. It was held to be immaterial that in the event the Chinese boom was breached by the Japanese on 9 December and that the ship sailed down river on 17 December, leaving sufficient time for her to reach Australia and redeliver within the period stipulated. At the time the ship was trapped by the boom in early September, the evidence was that the ship was likely to be blocked indefinitely and it mattered not that this was subsequently proved wrong. Branson, J., said: "The Court must, as the parties have to when the event arises which is alleged to cause frustration, estimate as best it can the probable duration of that event. The probabilities as to the length of the deprivation, and not the certainty arrived at after the event, is material." What actually happened is relevant only as an aid to determining the reasonable probabilities at the time the decision was called for: see *Denny, Mott & Dickson* v. *James B. Fraser & Co.* [1944] A.C. 265 (H.L.), *per* Lord Wright, at pages 277 and 278, and *National Carriers* v. *Panalpina* [1981] A.C. 675 (H.L.), *per* Lord Simon, at page 707.

26.49 In *The Nema* [1980] 2 Lloyd's Rep. 339 (C.A.), see paragraph 26.40, above, Templeman, L.J., at page 349, dismissed as irrelevant the fact that the strike unexpectedly ended only nine days after the arbitrator had decided that it had frustrated the charter.

Expected length of delay changes

26.50 Where a delay appears at first to be likely to be of short duration the contract will be frustrated if, and then as soon as, it appears subsequently that the delay will, after all, be inordinately lengthy. Lord Sumner in *Bank Line* v. *Capel* [1919] A.C. 435 said, at page 455: ". . . when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided."

Delay in commencement of the charter

26.51 The prospect of delay in the commencement of the charter may be held sufficient to frustrate it.

The *Quito* was chartered in February 1915 for a period of 12 months with cancelling date 30 April. The ship was not delivered by 30 April but the charterers did not cancel and on 11 May the ship was requisitioned. During May and June the owners tried to obtain the ship's release, but failed. In August 1915 the owners agreed to sell the ship conditionally on obtaining her release from the Government. A release was agreed only on terms that the owners provided a substitute. The ship was released in September and sold. The charterers claimed damages for non-delivery.

It was held by a majority of the House of Lords that the postponement of the commencement date of the charter for what was thought an indefinite period which would probably be lengthy frustrated the contract. Lord Sumner said, at page 460: ". . . I am of opinion that the requisitioning of the *Quito* destroyed the identity of the chartered service and made the charter as a matter of business a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party."

Bank Line v. *Capel* [1919] A.C. 435 (H.L.).

(For consideration of another aspect of this case, see paragraph 26.35, above.)

Requisition

26.52 Requisition may well frustrate the charter but there is no presumption that it will always do so. In *The Sea Angel* [2007] 2 Lloyd's Rep. 517, Rix, L.J., said, at [98], ". . . the requisition, seizure or trapping of a vessel in the course of a major conflict are quite unlike [a case of peacetime detention by government authorities]. One cannot negotiate or litigate one's way out of such consequences of war. If in such circumstances the charter has not made express provision for what has occurred (as may yet happen, e.g. in the case of requisition, or by reference to a war clause: see *The Safeer* [1994] 1 Lloyd's Rep. 637), the possibility of frustration, subject to any default by either party, can never be far away."

The *Breconian* was chartered for about 15 months and was delivered in December 1914. She was requisitioned by the British authorities in October 1915, when the charter had about 4 months to run. Her owners claimed that the charter was thereby frustrated and this was accepted by the Court of Appeal (without calling on the owners' counsel to argue).

Heilgers v. *Cambrian Steam Navigation* (1917) 34 T.L.R. 72 (C.A.).

(See also *Pacific Phosphate* v. *Empire Transport* (1920) 36 T.L.R. 750, at paragraph 26.36, above; and *The Evia* (*No. 2*), summarised at paragraph 26.57, below.)

The tanker *F.A. Tamplin* was time chartered for five years from December 1912. In December 1914 the ship was requisitioned for a short period and then before her return was requisitioned a second time in February 1915. She then had structural alterations made to her to fit her as a troop carrier. The owners contended that the charter was frustrated by the requisition and the alterations made to the ship. At the time the case was heard by the House of Lords, 19 months of the charter remained unexpired.

It was held by a majority of three to two that the charter was not frustrated: although the period of the requisition was indefinite, there was a sufficient chance that the ship might be available for further service under the charter before its expiry. Earl Loreburn said, at page 405: "There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of the ship at the stipulated freight. Why should he be deprived of it?"

Tamplin Steamship v. *Anglo-Mexican Petroleum* [1916] 2 A.C. 397 (H.L.).

(See also the summary of *Bank Line* v. *Capel* [1919] A.C. 435 (H.L.), at paragraph 26.51, above.)

26.53 The *Tamplin* case should, however, be treated with caution: it was the owners who argued that the charter was frustrated; the charterers, who hoped to obtain the compensation which

the Admiralty were paying at a rate in excess of the charter hire, were content for the charter to continue despite the fact that they would not receive the contracted services during requisition. It is conceivable that if the Admiralty compensation had been lower than the hire and the charterers had refused to continue with the charter the decision of the House of Lords might have been different: see the comments of Lord Dunedin in *Metropolitan Water Board* v. *Dick*, *Kerr* [1918] A.C. 119 (H.L.), at page 129.

War

26.54 For the reasons expressed by Lord Roskill in *The Nema*, above, it has been doubted whether any presumption about the effect of war still exists. The presumption was said to be that a state of war will last indefinitely and consequently that delay caused by a war and likely to last throughout it will be of such inordinate duration as to cause the frustration of commercial contracts. In the case of *Geipel* v. *Smith* (1872) L.R. 7 Q.B. 404, which concerned the prevention of a voyage by the French blockade of Hamburg, Lush, J., said, at page 414: "a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this." These words have often been approved since, for example by Lord Atkinson in *Horlock* v. *Beal* [1916] 1 A.C. 486, at page 501. Lord Wright in *Denny*, *Mott and Dickson* v. *James B. Fraser* [1944] A.C. 265, at page 278, also referred to them with approval, although he explained: "It is true that Lush, J., was there referring to a single definite adventure, not to a continuous trading, but the real principle which applies in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period."

26.55 But Lord Sumner in *Akties. Nord-Osterso Rederiet* v. *Casper*, *Edgar* (1923) 14 Ll.L.Rep. 203, at page 206, emphasised that whether the mere outbreak of war (apart from cases of illegality) would cause frustration would depend upon its effects on the charter. Wars vary greatly in their intensity and geographic scope; some may be expected to have a devastating effect on a particular charter while others might affect it slightly or not at all. Moreover, any presumption that a state of war will last indefinitely can be rebutted in a particular case and in any event does not necessarily mean that the state of war will continue indefinitely to affect performance of the contract.

26.56 Mustill, J., in *The Chrysalis* [1983] 1 Lloyd's Rep. 503, having reviewed the authorities, concluded that the position was as follows: "(1) Except in the case of supervening illegality, arising from the fact that the contract involves a party in trading with someone who has become an enemy, a declaration of war does not prevent the performance of a contract; it is the acts done in furtherance of the war which may or may not prevent performance, depending on the individual circumstances of the case. (2) If there is any presumption at all, it relates to the duration of the state of war, not to the effects which the war may have on the performance of the contract. The war itself and its effects on the contract are by no means necessarily coterminous. (3) Any presumption as to the indefinite duration of the war is capable of being rebutted."

26.57 In cases arising out of the war between Iraq and Iran which began in 1980, the courts were called upon to review the decisions of arbitrators as to the date upon which particular charters were frustrated by the effects of the war. Different arbitrators came to different conclusions as to the date of frustration on substantially the same sets of facts, but it was established by the decisions of the House of Lords in *The Nema* [1981] 2 Lloyd's Rep. 239 and *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307, that it was not permissible for the courts on an appeal in any particular case to pay attention

to the decisions of other arbitrators with a view to achieving uniformity. The courts could interfere with the decisions of arbitrators only if it was shown that they had misdirected themselves in law or that the decision was one which no reasonable arbitrators could properly have reached.

The *Evia* was chartered on the Baltime form for 18 months, two months more or less, and subject to the option was due to be redelivered on 20 May 1981. On 22 September 1980 she was at Basrah when war broke out between Iraq and Iran and hostilities in the area of the Shatt-al-Arab prevented her sailing. On 1 October some of her crew were repatriated, leaving only a skeleton crew on board. Initially it was generally thought that the hostilities would be of short duration, but by 4 October it became clear that each of the combatants was heavily committed and that the Shatt-al-Arab had become a theatre of major operations. The Court of Appeal upheld the decision of the umpire that the charter was frustrated on 4 October. The House of Lords agreed.

The Evia (*No. 2*) [1981] 2 Lloyd's Rep. 613, [1982] 1 Lloyd's Rep. 334 (C.A.) and [1982] 2 Lloyd's Rep. 307 (H.L.).

26.58 In *The Wenjiang* (*No. 2*) [1983] 1 Lloyd's Rep. 400, an arbitrator decided on similar facts that a 12-month time charter, due to expire in March or April 1981, was frustrated on 24 November 1980. Bingham, J., found no grounds for interfering with the arbitrator's decision, although the Court of Appeal in giving leave to appeal ([1982] 1 Lloyd's Rep. 128) had suggested that, on a full hearing, a date early in October might prove more appropriate. Mustill, J., in *The Chrysalis* [1983] 1 Lloyd's Rep. 503, likewise refused to disturb a finding by a legal arbitrator that a time charter for a trip was frustrated, in similar circumstances, by 24 November 1980. (For the circumstances in which the decision of an arbitrator on such matters may be challenged before the court, see paragraphs 26.39 to 26.41, above.)

Strikes

26.59 Since strikes are by their nature of uncertain duration and may terminate at any time they will not usually be held to frustrate a charter: see the judgment of Sellers, L.J., in *Reardon Smith* v. *Ministry of Agriculture* [1961] 1 Lloyd's Rep. 385, at page 404. Nevertheless, there is nothing in principle to prevent a strike having this effect in appropriate circumstances, and the following case was cited by Sellers, L.J., in the above case without disapproval.

The *Penelope* was chartered under a consecutive voyage charter of 12 months from a date to be fixed between 20 May and 20 June 1926, to carry coal from South Wales to Italy. On 1 May the general coal strike began and no coal could be exported for six months – until November 1926 as a result of the strike and thereafter until towards the end of December as a result of Government embargo. It was held that in early September, after the ship had carried out two substitute voyages by agreement, the charter was frustrated, performance of the contract according to its true intent having been prevented.

The Penelope [1928] P. 180.

26.60 In *The Nema* [1981] 2 Lloyd's Rep. 239 (H.L.) neither the Court of Appeal nor the House of Lords was prepared to disturb the decision of an arbitrator that a strike that after three months still showed no prospects of ending, frustrated a consecutive voyage charter, which had then only a further three months to run (see paragraph 26.40, above, for a fuller account of the facts of the case). Lord Roskill said, at page 255: "I am quite unable to say that the conclusion which [the arbitrator] reached was one which he was not, on the facts which he found, fully entitled to reach. It was not suggested that a strike could never bring about frustration of an adventure. But it was pointed out that most attempts to invoke strikes as a cause of frustration have in the past failed. *The Penelope* [1928] P. 180 is almost the only example of success, and in that case the underlying reasoning of the judgment is far from easy to follow, even though the decision may well be correct. . . I see no reason in principle why a strike should not be capable of causing frustration of an adventure by delay. It cannot be right to divide causes of delay into classes and then say that one

class can and another class cannot bring about frustration of an adventure. It is not the nature of the cause of delay which matters so much as the effect of that cause upon the performance of the obligations which the parties have assumed one towards the other."

Delay arising from changes of route

26.61 The fact that the contemplated route is not available will not generally frustrate the charter.

The *Eugenia* was time chartered on the Baltime form for a trip from Genoa to India via the Black Sea. Before the terms of the charter were fixed the parties, who were aware of the danger of the Suez Canal being closed, discussed special terms to deal with that situation. In the end no such terms were agreed, but the charter did include the printed War Clause of the then current form. The ship loaded a cargo of iron and steel goods in the Black Sea and then proceeded to Port Said. When she arrived there the Egyptian anti-aircraft guns were already firing and the zone was, as the court held, "dangerous" within the meaning of the War Clause. The owners' agent called upon the charterers' agent on 30 October 1956 to take action under the War Clause to ensure that the ship should not enter Port Said or the Suez Canal. No action was taken and the charterers' agent in Port Said made arrangements for the ship to enter the Canal, which she did on 31 October 1956. On the evening of the same day the Egyptians blocked the Canal and the *Eugenia* was trapped until January 1957 when the northern passage out of the Canal was cleared. The southern end was not cleared until April 1957.

It was held by the Court of Appeal that:

1. The charterers were in breach of the War Clause in allowing the ship to enter the Canal.
2. The fact that the ship was trapped was the charterers' own fault and they could not rely on the detention in the Canal as a ground of frustration.
3. The fact that the ship would, if not trapped, have had to proceed around the Cape to India did not frustrate the charter because the cargo was not perishable and the prolongation (138 days from delivery to redelivery against 108 days) was not so great that it made the voyage around the Cape radically different: the only real difference was that it was considerably more expensive and this was not a ground for regarding the contract as frustrated.

Ocean Tramp Tankers v. *Sovfracht* (*The Eugenia*) [1963] 2 Lloyd's Rep. 381 (C.A.).

The *Captain George K*. was voyage chartered to carry sulphur in bulk from Mexico to Kandla and Bombay at a time when the Suez Canal was open and there was no reason to anticipate its closure. However, when she reached the northern end of the Canal her master was advised it had been closed by the war which had recently started in that area. Her owners thereupon sent her back through the Mediterranean and around the Cape to her destination. She eventually sailed a distance of 18,400 miles against the 9,700 that she would have sailed had the Canal remained open. Her owners claimed extra expenses of $67,969 on the basis that the original charter had been frustrated.

Mocatta, J., rejected this claim, but only because he felt bound by the Court of Appeal decision in *The Eugenia*, above, without which he "would have concluded that the voyage performed was fundamentally different in kind from that clearly contemplated by the charter".

The Captain George K. [1970] 2 Lloyd's Rep. 21.

Impossibility

26.62 There may be more scope for frustration if a particular route becomes impossible which is the only route permitted under the charter; for example, if in *The Eugenia*, above, the charter had required the Suez Canal route to be used.

26.63 The judge at first instance, Megaw, J., dealt with this possibility in the following words: "If, by the express or implied terms of a charter-party, the parties have agreed that a particular route, and that route only, is to be followed, then, if the vessel is, in the commercial sense, prevented from using that route, it may not be necessary for the court to consider whether any other route was commercially practicable. The contractual obligation can be performed only by a particular route which the parties have defined and agreed." ([1963] 2 Lloyd's Rep. 155, at page 174)

26.64 The Court of Appeal in *The Eugenia* overruled the decision of Pearson, J., in *The Massalia* [1960] 1 Lloyd's Rep. 594 that the provision "Captain also to telegraph to 'Maritsider Genoa' on passing Suez Canal" created an obligation to follow the Suez route on a charter voyage from India to Italy. But nothing was said by the court to preclude in principle the frustration of a charter which did make it clear that one route only was to be followed when that route became impossible.

26.65 However, in practice the point may not often be important in the case of time charters, as even when their duration is fixed by reference to the time that a particular voyage will take it is unusual to stipulate the route to be followed. Moreover, in that unusual case it would still need to be asked whether the parties' stipulation for a particular route was such a key element of the bargain that performance by another route was a thing radically different from that for which they had contracted. Only then, it is suggested, would it become irrelevant, as posited by Megaw, J., to consider whether another route was practicably available.

Financial loss

26.66 It does not necessarily follow from the fact that circumstances have occurred which impose a heavier financial burden than expected on one party to the contract that the contract will be frustrated. Financial loss would have to be extraordinary to produce that result: see the decision of the House of Lords in *Davis* v. *Fareham U.D.C.* [1956] A.C. 696, summarised at paragraph 26.26, above. In that case Lord Radcliffe said, at page 729: ". . . it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

26.67 Similarly, Lord Denning, M.R., said in *The Eugenia* [1963] 2 Lloyd's Rep. 381, at page 390: "The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound."

26.68 Again, Lord Sumner said in *Larrinaga* v. *Société Franco-Américaine des Phosphates* (1923) 14 Ll.L.Rep. 457, at page 464: "All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money, and rarely, if ever, is it a ground for inferring frustration of an adventure that the contract has turned out to be a loss or even a commercial disaster for somebody."

26.69 So, for example, in *The Sea Angel*, summarised at paragraph 26.33, above, the charterers' expected burden of paying a final three days' hire became a requirement to pay hire for 113 days, without the charter being frustrated. Or again, the losses caused to a party to a charter by an unexpectedly large upsurge in the price of bunkers or by the periodic fluctuations of the freight market will not cause the charter to be frustrated. Commenting on such a suggestion in *Occidental* v. *Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, at page 325, Kerr, J., said: "The fact that these ships were chartered during a boom period when rates were high, which was then followed by a period of depression during the currency of the charters, is a normal phenomenon of the fluctuations to which the tanker market is ordinarily subject from time to time. This resulted in losses to the charterers, though not in itself in profits to the owners since the rates of hire were fixed for the currency of the charters. If, instead of falling, the market had moved even higher, as it did in 1973, then the charterers would have been able to earn corresponding profits, but any suggestion of frustration would have been equally groundless."

Effect of fault

Breach of contract

26.70 A party to the charter will not be able to rely upon the doctrine of frustration if an event which makes further performance impossible has been caused by his breach of the charter. Strictly speaking, this is not a situation of frustration at all but rather a case of discharge of the contract by breach, and the damages against the party in breach may include losses flowing from the event that might otherwise have been regarded as the basis of the frustration of the contract.

26.71 In *Monarch Steamship* v. *Karlshamns Oljefabriker* [1949] A.C. 196 Lord Wright and Lord Porter took the view that breach by the owners of the seaworthiness obligation prevented their reliance upon frustration against a claim by the owners of cargo. Donovan, L.J., said in *The Eugenia* [1963] 2 Lloyd's Rep. 381 that it was common ground that the charterers could not rely on the trapping of the ship in the Suez Canal as frustrating the charter if they were in breach of the War Clause in sending her in. In the same case Lord Denning, M.R., said simply: "They were in breach of the War Clause in entering it. They cannot rely on a self-induced frustration. . . ."

26.72 However, where what would otherwise have been a breach of contract is excused by a suitably worded exceptions clause, there is no bar to frustration. For example, if the chartered ship is damaged because of negligent navigation by the owners' servants, the owners will be entitled to rely on frustration if (as is the often the case) liability for negligent navigation has been excluded. In the case at paragraph 26.77, below, *Constantine* v. *Imperial Smelting*, Lord Wright lent support to this view by saying: "Exceptions, however, may be important. . . as excluding fault if the frustrating event was induced by what, apart from the exception, would be an actionable breach of contract." The view also seems to be in line with general principle. In the leading case of *Jackson* v. *Union Marine* (1874) L.R. 10 C.P. 125, Bramwell, B., said: "Now, what is the effect of the exception of perils of the seas, and of delay being caused thereby? . . . I think this: they excuse the shipowner, but give him no right." See also the judgment of Hobhouse, J., in *The Super Servant Two* [1989] 1 Lloyd's Rep. 148, at page 156.

Deliberate act or election

26.73 Moreover, if the event relied upon as being an event frustrating the charter is brought about by the deliberate act or choice of one of the parties, not in itself a breach of contract, he will not be allowed to rely upon the doctrine of frustration in his defence.

The *St. Cuthbert*, a steam trawler, was chartered in 1928 for 12 months with a provision that the charter should thereafter continue from year to year unless terminated by three months' notice on either side. It was expressly agreed that the ship should be used in the fishing industry only. In 1932 it was agreed that the charter should be renewed at a reduced rate of hire, and when this new agreement was entered into it was known to both parties that legislation had been passed prohibiting the use of otter trawls without a licence. The *St. Cuthbert* was fitted with and could only use such a trawl. The charterers operated four other trawlers fitted with otter trawls and applied for licences for the five ships. Only three licences were granted and the charterers did not include the *St. Cuthbert* among the three ships they nominated for them. The charterers contended that the charter was frustrated on the ground that it had become illegal to operate the ship for the only purpose permitted by the charter (in the fishing industry) and that they were therefore relieved from further performance.

It was held by the Privy Council that the frustration was "self-induced" and that the charterers could not rely on their own election not to nominate the *St. Cuthbert* for a licence, in order to excuse themselves from liability under the charter.

Maritime National Fish v. *Ocean Trawlers* (1935) 51 Ll.L.Rep. 299 (P.C.).

26.74 Delivering the judgment of the Privy Council, Lord Wright said, at page 303: "What matters is that they could have got a licence for the *St. Cuthbert* if they had so minded. If the case

be figured as one in which the *St. Cuthbert* was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the *St. Cuthbert*. The essence of 'frustration' is that it should not be due to the act or election of the party."

The owners of the self-propelled barge *Super Servant Two* undertook to carry for Lauritzen a drilling rig from Japan to Rotterdam. The contract allowed them to use either *Super Servant Two* or her sister barge, *Super Servant One*. They formed the intention to use the former barge but before the time arrived to start her approach voyage, she sank while transporting another rig and became a total loss. Her sister barge was already scheduled for other work and two weeks after the loss of *Super Servant Two*, the owners claimed that the loss had frustrated the contract with Lauritzen. At the trial of certain preliminary issues, the court was asked to determine, inter alia, whether the contract was frustrated on the alternative assumptions that (a) the loss of *Super Servant Two* occurred without the owners' negligence and (b) that the owners were negligent.

The Court of Appeal held, affirming Hobhouse, J., that on either assumption the contract was not frustrated. On assumption (a) it accepted the argument that since the contract with Lauritzen provided for carriage to be performed by one or other of the two barges, the loss of one did not render performance radically different, let alone impossible; and further that the loss did not bring the contract to an end automatically, since it was not until two weeks later, after the owners had reviewed their schedules, that they communicated their decision to Lauritzen not to reschedule *Super Servant One* to undertake the carriage. On the alternative assumption (b), the Court of Appeal rejected the owners' case that a party was precluded from relying on an event only when it had acted deliberately, or in breach of an actionable duty, in causing it. Bingham L.J., said, at page 10: "A fine test of legal duty is inappropriate; what is needed is a pragmatic judgment whether a party seeking to rely on an event as discharging him from a contractual promise was himself responsible for the occurrence of that event." It was not the loss of *Super Servant Two* which prevented their performance, but the owners' own decision not to use *Super Servant One*. Thus the owners' failure was 'self-induced'.

The Super Servant Two [1989] 1 Lloyd's Rep. 148 and [1990] 1 Lloyd's Rep. 1 (C.A.).

Negligence

26.75 The same may also be true if the event relied upon has been caused by a negligent act, not in itself a breach of contract. Hobhouse, J., and the Court of Appeal in *The Super Servant Two*, above, held that the owners of the barge could not rely upon her loss to frustrate a contract of carriage yet to commence if the events surrounding the loss were within their control; a failure to exercise proper skill in such circumstances prevented reliance upon the loss although the failure was not in breach of contract or of any other relevant duty of care.

26.76 However, in *Constantine* v. *Imperial Smelting*, below, both Lord Wright and Viscount Simon doubted whether mere negligence could amount to "default" and lead to its being held that frustration had been self-induced. Viscount Simon said: ". . . I do not think that the ambit of 'default' as an element disabling the plea of frustration to prevail has as yet been precisely and finally determined. 'Self-induced' frustration, as illustrated by the two decided cases involves deliberate choice, and those cases amount to saying that a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about. 'Default' is a much wider term and in many commercial cases dealing with frustration is treated as equivalent to negligence. Yet in cases of frustration of another class, arising in connection with a contract for personal performance, it has not I think been laid down that, if the personal incapacity is due to want of care, the plea fails." ([1942] A.C. 154, at page 166.) Lord Wright added (at page 195) that "mere negligence seems never to have been suggested as sufficient to constitute 'fault' in this connection". See also *The Evia* (*No. 2*) [1982] 1 Lloyd's Rep. 334. Hobhouse, J., in *The Super Servant Two*, above, referred to these comments and said, at page 156 of the first instance report: "I consider that they are not good law if they are taken to suggest that events within the reasonable control of one of the parties can frustrate a contract." On appeal, Bingham, L.J., at page 10 of the Court of Appeal report, suggested that "the real question" was "whether the frustrating event relied upon is truly an outside event or extraneous

change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about". It is suggested that this is the correct approach and that it answers the above-mentioned concerns of Lord Wright and Viscount Simon (while still preserving the proposition, in paragraph 26.72, above, that crew negligence covered by an exceptions clause in the charter will not defeat a plea of frustration).

Burden of proof

26.77 The burden of proving that frustration was self-induced is upon the party arguing that the doctrine of frustration should not be applied. Thus if the owners establish that *prima facie* the charter is frustrated, the burden is on the charterers to prove that this situation was induced by the owners.

The *Kingswood*, while under voyage charter, suffered a serious explosion in her auxiliary boiler which caused such extensive damage that the time needed for repairs was (as the parties agreed) so great as to frustrate the commercial object of the voyage. The charterers contended, however, that the owners were not excused from liability for failing to load a cargo unless they established that the explosion occurred without their fault. The matter was referred to arbitration and the arbitrator was unable to say, on the evidence, what the cause of the explosion was: he could neither exclude the possibility that negligence of the owners' servants was involved nor the possibility that the explosion occurred without their negligence. The question thus became whether the burden was upon the charterers to prove default on the part of the owners or, alternatively, upon the owners to prove absence of such default. It was held by the House of Lords that the burden of proof lay on the charterers who were alleging that the charter was not frustrated.

Constantine v. *Imperial Smelting* [1942] A.C. 154 (H.L.).

Obligations following frustration

Common law position

26.78 At common law frustration immediately brought a contract and the obligations of the parties to it to an end. Rights which existed at the time of frustration continued and those which did not then exist could never arise. Thus, contractual payments which were not yet due never had to be made. Conversely, advance payments already due remained due in full, and if already paid might be retained: see, for example, *Lloyd Royal* v. *Stathatos* (1917) 34 T.L.R. 70, where the Court of Appeal rejected the charterers' claim for the return of hire paid in advance; it was said that the charterers could recover only under some provision of the charter and as the charter had been frustrated all its provisions had gone. In 1942 the common law rule as to advance payments was changed by the House of Lords to the extent that an advance payment may be refunded, but only if the consideration for it has wholly failed (*Fibrosa* v. *Fairbairn* [1943] A.C. 32 (H.L.)), and this will often not be the case.

Modification of common law by the Frustrated Contracts Act 1943

26.79 The common law was modified by the Law Reform (Frustrated Contracts) Act 1943. The Act does not deal with the question whether a contract is or is not frustrated: it deals only with the subsequent position of the parties to a contract which has been frustrated. The Act applies to time charters, but not to voyage charters or bills of lading (Section 2(5)(a)). It is therefore important to decide into which category, time or voyage, a frustrated charter falls.

The charter for the *Eugenia* was on the Baltime form. Its duration was expressed as being "for a trip out to India via Black Sea from. . . Genoa. . .". The charterers were to pay hire every month. The trading limits were "Genoa via Black Sea thence India". Megaw, J., held this to be a time charter, and this the Court of Appeal

approved although overruling his judgment that the contract had been frustrated (as to which see paragraph 26.61, above).

Ocean Tramp Tankers v. *Sovfracht* (*The Eugenia*) [1963] 2 Lloyd's Rep. 155 and 381.

(See also *Temple Steamship* v. *Sovfracht* (1945) 79 Ll.L.Rep. 1 (H.L.), and *The Democritos* [1976] 2 Lloyd's Rep. 149 (C.A.).)

26.80 The Act applies only to contracts which are governed by English law. Section 1(2) and (3) and Section 2(3) of the Act were considered generally in the case of *B.P. Exploration Co*. v. *Hunt* [1979] 1 W.L.R. 783 and [1981] 1 W.L.R. 232 (C.A.).

26.81 The effect of the Act on the rights of the parties to a frustrated time charter may be summarised as follows:

(1) Sums paid before the time of frustration are to be repaid and sums payable before that time cease to be payable: but the court is given a discretion to allow such sums to be retained (or recovered if already payable) in whole or in part by the party to whom they were paid or payable where he has expended money in or for the performance of the contract: see Section 1(2).

Thus a semi-monthly payment of hire in advance will be repayable upon the frustration of the charter at any time during that half month (see, for an example, *The Eugenia* [1963] 2 Lloyd's Rep. 155, *per* Megaw, J., at page 177); but the court could be expected to use its discretion to allow the owners to retain the running costs expended by them in performing the charter during that half month prior to the time of frustration. Additionally or in the alternative, the owners might seek a payment under Section 1(3). See point (3) below as to earlier periodic payments.

(2) Where one party receives a valuable benefit, before the time of frustration, from something done by the other party in or for the performance of the contract, then the court is given a discretion to require a suitable payment to be made by him to that other party. In assessing the just sum to be paid (if any) the court must take into account: – (a) any expenses incurred by the benefited party, including any sums paid or payable under Section 1(2); and (b) the effect in relation to the benefit of the circumstances giving rise to frustration: see Section 1(3).

This sub-section gives the court an alternative to its discretion to order retention under Section 1(2), above, where an advance payment of hire has been paid or becomes payable. Section 1(2) is restricted to incurred expenses (presumably running expenses) whereas Section 1(3) would permit the court to order, in a suitable case, a payment equivalent to the full amount of the hire for the appropriate number of days.

(3) Where the court decides that part of the frustrated contract can properly be "severed" from the rest of the contract, for example, because that part was wholly performed before the time of frustration, that part shall be treated as if it had not been frustrated at all: see Section 2(4).

Thus when a time charter which provides for monthly payments of hire is frustrated by an event occurring during, say, its seventh month, the court may and presumably will "sever" and therefore leave undisturbed each of the payments of hire made in respect of the previous six months. (No suggestion was raised in *The Eugenia* [1963] 2 Lloyd's Rep. 155 that the Act should be applied to any semi-monthly hire payment earlier than the one made for the period in which the alleged frustration occurred. Also, the owners were held entitled to recover the cost of bunkers on board on delivery in accordance with Clause 5 of the Baltime form.)

Exclusion of the effects of the Frustrated Contracts Act

26.82 Section 2(3) of the Act provides that: "Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the

court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision."

26.83 It is suggested that the stipulations in Lines 102 and 103 of the New York Produce form and Lines 208 to 213 of the Baltime form as to the manner in which hire is to be dealt with if the ship is lost are stipulations to which Section 2(3) of the Act applies.

Charterers' property

26.84 When a time charter has been frustrated, the charterers are entitled to bunkers and other stores then on board for which they have paid in accordance with the charter. Megaw, J., said in *The Eugenia* [1963] 2 Lloyd's Rep. 155, at page 177: "These stores were, in the circumstances, the property of the charterers, since they had paid, or have to pay, for them, and they are no longer liable to be used by the owners for the charterers' purposes." (The charterers were held liable to pay, however, the price of bunkers, galley fuel and water which were on board at the time of delivery, in accordance with Baltime Clause 5: see point 3 above.)

U.S. Law

Money paid in advance and not earned

26A.1 The mutual exceptions clause is preceded by the following language:

> That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once.

26A.2 The quoted language should, as a matter of draftsmanship, appear in a clause separate and apart from the mutual exceptions language that follows it, since the latter provision has no application to it. The charterer's right to a refund of prepaid hire in the event the ship is lost, or in the event the ship goes off-hire under Clause 15, is an independent right, just as the owner's duty to make repayment is an independent duty, performance of which is not in the usual case rendered impossible by any of the mutually excepted perils. See *Clyde Commercial S.S. Co*. v. *West India S.S. Co*., 169 F. 275 (2d Cir. 1909), *cert. denied*, 214 U.S. 523 (1909), where the court found that the charterer was obligated to pay hire despite a delay caused by a restraint of princes.

Frustration of charter

26A.3 Under U.S. law, either the owner or charterer may be relieved of its obligations under a charter if an unforeseen occurrence renders performance of the charter impossible or "commercially impracticable." There are strict criteria, however, which must be met in order for the doctrine of frustration to apply. See generally *Restatement (Second) Contracts*, §§ 261 *et seq*.

26A.4 The leading American case on frustration of charters is *Transatlantic Financing Corp*. v. *United States*, 363 F.2d 312, 1966 AMC 1717 (D.C. Cir. 1966). There, the chartered owner of the *Christos* sought to recover from the voyage charterer additional costs incurred in transporting cargo from the United States to Iran as a result of the closing of the Suez Canal. The owner contended that the charter provided that the voyage was to be performed by the "usual and customary" route from Texas to Iran via the Suez Canal, and that the closing of Suez rendered performance of the charter impossible. The owner did deliver the cargo by going around the Cape of Good Hope and sought to recover the additional costs incurred in doing so.

26A.5 In considering the owner's claim of impossibility, the court stated the factors which must be considered in determining whether a frustration has occurred in the following manner:

> The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance. When the issue is raised, the court is asked to construct a condition of performance, based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail. [363 F.2d at 315–316.]

26A.6 After reviewing the facts of the case in the context of these three criteria, the court concluded that the first two requirements were in fact met. The closing of the Suez Canal was found to have been unexpected, and the risk of this contingency had not been allocated between the parties. The court went on to conclude, however, that while the closing of the Suez Canal increased the cost of completing the voyage, the additional cost was not so extreme as to have made performance of the charter commercially impracticable and, consequently, there was no frustration.

26A.7 See also *Reefer and General Shipping Co*., *Inc*. v. *Great White Fleet Ltd*., 1996 AMC 1254 (S.D.N.Y. 1995), *aff'd w/o opinion*, 107 F.3d 4 (2d Cir. 1996); *American Trading & Pro Corp*. v. *Shell Int'l Mar*. *Ltd*., 453 F.2d 939, 1972 AMC 318 (2d Cir. 1972); and *Asphalt Int'l* v. *Enterprise Shipping Corp*., 514 F.Supp. 1111, 1981 AMC 2235 (S.D.N.Y.), *aff'd*, 667 F.2d 261, 1982 AMC 333 (2d Cir. 1981).

Event must be unforeseen

26A.8 The first of the requisite elements of a claim of frustration is that the event giving rise to it must be unexpected. As the Court of Appeals for the Second Circuit held: "Discharge under this doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *United States* v. *Gen. Douglas MacArthur Sr. Vil. Inc*., 508 F.2d 377, 381 (2d Cir. 1974). See also *United States* v. *Buffalo Coal Mining Co*., 345 F.2d 517, 518 (9th Cir. 1965), where the court held that:

. . . [T]he parties should be bound unless their contractual purpose was frustrated by a completely unforeseeable cause. And the test of foreseeability should be an objective one, not a subjective inquiry into the state of mind of the parties.

26A.9 Hence, in *The Sunshine Sky*, SMA 3616 (Arb. at N.Y. 2000), the panel found that fluctuating freight rates combined with an oversupply of ships were not entirely unforeseeable events beyond the contemplation of the parties when they entered into a five-year charter.

26A.10 The concept of foreseeability is illustrated by *The Poznan*, 276 F. 418, 425 (S.D.N.Y. 1921). An action was commenced against the shipowner for breach of a contract to deliver cargo at Havana. He defended on the ground that for a period of six weeks in October and November while the ship lay at anchor at Havana, there was no berth or lightering ship available due to port congestion, and that the contract was frustrated by impossibility of performance. The court rejected the defense, finding that when the charter was entered into in September it was known that the port was congested. Thus, according to the court, the delays encountered in October and November could not be deemed to have been unforeseeable:

The case is clearly not one of frustration. . . It is perhaps needless to repeat that these are but instances of the general rule that subsequent events, making the performance of a contract impossible, may be so unforeseen and so completely disappoint the expectation of the parties as to absolve the promisor from performance. . . Yet any promisor recognizes that his performance is subject to some risks, which may prevent fulfillment, and such risks he must be understood as accepting when he makes the promise. . . To excuse performance altogether and leave the promisee without remedy for his loss, courts have always found it necessary, though with various degrees of strictness, that the intervening event which prevents performance shall be so improbable as to be outside any contingency, which, had the parties been faced with it, they would have agreed that the promisor should undertake. . . *Prima facie* he is bound, however impossible it may be for him to perform. . . [276 F. at 425].

26A.11 In *The Kronprinzessin Cecilie*, 244 U.S. 12, 22 (1917), the U.S. Supreme Court held that the owner of a German ship bound for England with a cargo of gold was entitled to turn back to New York when war broke out between Germany and England. The court held that performance of the contract was excused because "it cannot be believed that the contractee would have demanded or the contractor would have assumed" the risk of capture created by the outbreak of the war.

26A.12 In *Mádeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co*., 147 F.2d 399 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945), however, by an agreement entered into in October 1940, a seller of lumber was obligated to contract with an ocean carrier for the transportation of the lumber from Brazil for delivery to the buyer at New York. The seller defended against the buyer's claim for

non-performance on the ground that a shortage of ships made it impossible to carry out the contract. The court rejected this defense, stating:

> [Seller] further seeks to excuse its failure to perform by claiming that it could not deliver the goods as required, because no ships were available. Although this claim is not disputed by [buyer], the factual issue need not be decided, for even had there been no ships available, [seller] was not, under the circumstances of this case, excused from performance. For [seller's] letters indicate clearly that at the time of the making of the second contract it was aware of the fact that boats were at a premium. Indeed, it pressed for the second contract largely because it expected that additional shipment to facilitate its procuring a ship. There was no startling change in conditions. The war in Europe had been underway for more than a year, and Pearl Harbor was still in the future. Further, neither the United States nor any of the South American countries entered the war for a year or more after making the contract. Hence, the lack of ships in January 1941, was a foreseeable risk which [seller] took upon itself; and it cannot under such circumstances plead the defense of force majeure. . . [147 F.2d at 403].

26A.13 *Glidden Co*. v. *Hellenic Lines Ltd*., 275 F.2d 253 (2d Cir. 1960), presents a final example of the "foreseeability" test. The case arose out of the closing of the Suez Canal, which the owner claimed frustrated a chartered voyage from India to the U.S. Because the charter gave the owner an option to sail via Suez, the Cape of Good Hope, or the Panama Canal, the court concluded that the parties had contemplated the possibility that the voyage might have to be performed by a route other than through the Suez Canal, and that the voyage was not frustrated.

Allocation of risk

26A.14 The second requirement for frustration is that there be no allocation of the risk as between the owner or the charterer, either by the express language of the charter or by custom. This principle is closely linked to the foreseeability element of the defense, since if there is a contractual allocation of the risk, it obviously cannot be said to be "unexpected."

26A.15 In *Reefer and General Shipping Co*. *Inc*. v. *Great White Fleet*, *Ltd*., 1996 AMC 1254 (S.D.N.Y. 1995), the owner sued the charterer for early termination of the charter and the court dismissed the charterer's frustration defense based on its finding that there was an express allocation of risk in the charter with respect to the events at issue. The charter contained a seaworthiness clause which gave the charterer the right to terminate if the ship became unseaworthy. The charter also contained an off-hire clause and a separate breakdown clause which gave the charterer the right to terminate if the ship or its refrigeration machinery and equipment were to break down on three occasions within a 12-month period. The court noted that the inclusion of these clauses in the charter constituted an express allocation of the risk of unexpected contingencies which precluded the frustration defense as a matter of law.

26A.16 In *The Ocean Commander*, SMA 2930 (Arb. at N.Y. 1992), repairs of a pipeline leakage problem caused by crew negligence delayed the voyage. The charterer argued that the ship was unseaworthy upon delivery and that the owner did not exercise due diligence with respect to the pipelines. The charterer argued that the voyage was frustrated, and claimed that the voyage charter was cancelled because the ship could not load its cargo in time for the charterer to fulfil its purchase contracts. The arbitrators held that the charterer failed to prove that the ship was unseaworthy. The charterer's claim of frustration was also denied, on the basis that the problems which the charterer experienced were extrinsic to the charter itself. The leakage was not unforeseeable, the risk of delay due to breakdown of the ship's equipment was allocated by the parties, and the charter excluded owner from liability for, inter alia, damages due to crew negligence without the actual fault or privity of the owner. The arbitrators also found that the charter did not include a specific performance date for the cargo to be discharged, and that the delays encountered did not render performance impossible.

Performance commercially impracticable

26A.17 The greatest difficulty in frustration cases inevitably arises from the requirement that performance must have been rendered impossible, or, as the court stated in *Transatlantic*, "commercially impracticable." In *Cameron-Hawn Realty Co*. v. *City of Albany*, 207 N.Y. 377, 381, 101 N.E. 162, 163 (1913), in what is recognized as a classic statement of the law of impossibility, the court stated:

> It is a well-settled rule of law that a party must fulfill his contractual obligations. . . (If) what is agreed to be done is possible and lawful, the obligation of performance must be met. Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligator. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance.

26A.18 While the "commercially impracticable" standard is less stringent than that of impossibility, it nonetheless places a very heavy burden of proof on the party claiming a frustration. Thus, performance of a charter will not be deemed "commercially impracticable" because it has become more difficult or more expensive. In *American Trading & Production Corp*. v. *Shell International Marine Ltd*., 453 F.2d 939 (2d Cir. 1972), a ship on a voyage from Texas to India was in the mid-Atlantic Ocean when the Suez Canal was closed at the outbreak of war in the Middle East. The owner sent the ship around the Cape of Good Hope to complete the voyage, and commenced an action against the charterer for the extra expenses incurred, on the theory that the chartered voyage was frustrated, and that the shipment was delivered on a *quantum meruit* basis. The court adopted the three tests set down in *Transatlantic*, and found that the first two were satisfied. The court went on to conclude, however, that the chartered voyage was not made commercially impracticable by the closing of the Suez Canal. While the added cost of the voyage around the Cape was about 33 per cent of the original freight, the court held that to justify a claim of frustration, the extra cost must be "extreme and unreasonable," and that the costs incurred by the owner did not meet this test.

26A.19 A similar result was reached in *The Paros*, SMA 1025 (Arb. at N.Y. 1976), where the charterer was held to have wrongfully cancelled the charter in anticipation of long delays at the loading port. In rejecting the defense of frustration, the panel stated:

> We do not consider an anticipated loading delay of three months to create an "excessive and unreasonable" cost. Knowledgeable owners and charterers recognize that this is an unhappy but not unusual occurrence in many areas of the world.

26A.20 *The Mermaid I*, SMA 1836 (Arb. at N.Y. 1983), concerned a voyage charter but provides a useful analogy. The case involved a ship which was involved in a collision immediately after it had been accepted by the charterer. The collision occurred while the ship was waiting at an anchorage for a loading berth to become available. The panel unanimously ruled that such a collision was not an "unexpected contingency," and thus the first element necessary to establish frustration had not been met. The second criteria was also held not to have been met in that "the risk of delay that occurred was allocated in the contract by the terms and conditions governing the running of laytime." Furthermore, the panel held that the third element was not proven "because charterer did have cargo to load in numerous other vessels which should have been provided to 'Mermaid I' despite some extra cost or inconvenience the adjusted schedules might have caused the charterer."

26A.21 In *The Gulf Sea*, SMA 3095 (Arb. at N.Y. 1994), the charterer could not use an 11-day period of detention for repairs to the ship as an excuse for declaring the remainder of the charter frustrated, and was ordered to pay the owner hire for the period in which the charter was wrongfully cancelled.

26A.22 In *The Intermar Progress*, SMA 2468 (Arb. at N.Y. 1988), the owner was required

to install crude oil wash and inert gas systems in the ship pursuant to the U.S. Port and Tanker Safety Act ("PTSA"), and the International Convention for the Prevention of Pollution from Ships ("MARPOL" 73/78). The owner argued for contribution and *quantum meruit*, and invoked the doctrine of commercial impracticability. The arbitrators held that the PTSA and MARPOL requirements did not frustrate the time charter, finding it significant that the owner never raised the issue of commercial frustration or impracticability in negotiations with the charterer concerning the sharing of these costs.

26A.23 In *The Turmoil*, SMA 2842 (Arb. at N.Y. 1992), the charterer's delay in providing acceptable letters of credit, thus making cargo unavailable, was held not to cause a frustration of the charter. The owner's repudiation of the charter when laytime had just expired and the charter was only one day into demurrage was found to be unreasonable.

26A.24 In *The Clipper Odyssey*, SMA 3906 (Arb. at N.Y. 2005), the panel found that the slowdown in the travel industry following the September 11, 2001 terrorist attacks did not frustrate a cruise ship charterparty for travel between Australian ports.

26A.25 In *The Suchada Naree*, SMA 4143 (Arb. at N.Y. 2011)(Arnold, Fox, McCormack), the panel rejected the charterer's early redelivery of the ship based on the argument that no business could be found for the ship due to the state of the freight market.

Default of third parties preventing performance

26A.26 An issue that has arisen with some frequency, particularly under voyage charters, is whether the charterer can be excused from performance of the charter because of contractual difficulties with either the shipper or the receiver. The general rule appears to be that problems extrinsic to the charter will not excuse performance. For example, in *Krulewitch* v. *National Importing & Trading Co*. *Inc*., 195 A.D. 544, 186 N.Y.S. 838 (1921), National contracted to sell Krulewitch a shipment of tapioca flour. The contract provided that the goods would be shipped "from Java Feb/Mch." Because of an embargo on shipments to New York imposed by the governmental authorities of Java that resulted in a suspension of direct transportation to New York, National claimed it was excused from performance. The court rejected this defense, finding that, notwithstanding the embargo, the goods could have been shipped to New York via intermediary ports, albeit at greater expense. Moreover, the court held that National's difficulties in arranging transportation for the cargo could not excuse performance of its contract with Krulewitch:

> The availability of transportation facilities was a matter extrinsic to the contract; it did not concern the plaintiff; he agreed to pay for the goods at the dock in New York, how they were to be brought there was no part of his concern. . . [186 N.Y.S. at 840.]

26A.27 In *Bardons & Oliver Inc*. v. *Amtorg Trading Corp*., 123 N.Y.S.2d 633 (Sup. Ct. 1948), *aff'd w/o opin*., 275 App. Div. 748, 88 N.Y.S.2d 272 (1st Dep't 1949), *aff'd*, 301 N.Y. 622, 93 N.E.2d 915 (1950), A agreed to sell certain machines to B, who intended to export them from the United States to the Soviet Union. When B was unable to obtain an export license from the United States Government, it contended that its contract with A was frustrated. In rejecting B's defense, the court stated:

> The agreement does not mention that its validity or performance shall be dependent upon defendant procuring an export license. It definitely sets forth the obligations of the parties under it and is clear and unambiguous. Neither party assumed any obligation in this contract with respect to the shipment out of the country. Under the contract in concern, delivery was to be "F.O.B. cars, Cleveland, Ohio. . . ." Thus all that the seller undertook to do was to place the goods on board railroad cars in his country suitably marked and with bills

of lading properly executed. Transshipment was a matter which concerned defendant alone. Certainly if defendant wished to make performance dependent upon its obtaining an export license, it could readily have made this a condition and inserted such a provision in the contract. It did not do so and this claim cannot, in my opinion, now be successfully advanced. . . . [123 N.Y.S. 2d at 634.]

26A.28 *The Erisort*, SMA 1022 (Arb. at N.Y. 1976), also illustrates this point. There, the voyage charterer was held liable for its failure to provide a cargo of scrap as required by the charter. The panel rejected the charterer's alternative defenses that it was unable to perform because it had not received an export permit for the cargo from the Government of Guatemala, and because the supplier had failed to perform its contract with the charterer. Similarly, in *Econolines Inc. and Mohammed Al-Haddad, et al.*, 1980 AMC 424 (Arb. at N.Y. 1979), where the buyers of certain asphalt cargoes repudiated the purchase contract, the charterer's claim of frustration of charter was denied. See also *The Ocean Commander*, at paragraph 26A.16.

For a contrary view, see *Tradax International S.A.* v. *Government of Pakistan*, 1973 AMC 1609 (Arb. at N.Y. 1973).

Effect of fault

26A.29 The frustrating event must not have been brought about by one of the parties to the contract. In *Gemini Shipping* v. *Seas Shipping*, SMA 1253 (Arb. at N.Y. 1978), it was held that the charterer could not invoke *force majeure* or frustration defenses when the Government of Thailand refused to permit the export of zinc ore contemplated by the shipping contract because the charterer contributed to the suspension of exports by failing to comply with its concession agreement to construct a zinc smelter in Thailand.

Changes in law

26A.30 There are a number of cases in which frustration has been claimed because of subsequent changes in the law that affected performance of the charter. In this regard, it is most important to distinguish between changes in American law governing performance of the contract from similar changes in foreign law. The reason for this is that while prohibitions imposed by domestic law will excuse performance on grounds of frustration, the rule is the reverse where foreign law is involved. Thus, the general rule under American law is that impossibility due to foreign law does not excuse non-performance of contractual obligations. *J. Zeevi & Sons Ltd.* v. *Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975); *Central Hanover Bank & Trust Co.* v. *Siemens & Halske Akt.*, 15 F.Supp. 927 (S.D.N.Y.), *aff'd on opinion below*, 84 F.2d 993 (2d Cir.), *cert. denied*, 299 U.S. 585 (1936); *Gonzalez* v. *Industrial Bank*, 12 N.Y.2d 33, 234 N.Y.S.2d 210 (1962).

26A.31 The point is illustrated by *Tweedie Trading Co.* v. *James P. McDonald Co.*, 114 F. 985 (S.D.N.Y. 1902). Tweedie and McDonald entered into a contract by which Tweedie agreed to make four trips with its steamer to transport laborers from Barbados to Colon. After the second trip, the colonial Government of Barbados promulgated a decree forbidding the future embarkation of any laborers, and consequently, McDonald was unable to provide any workers for the third and fourth voyages. Tweedie commenced an action for freights lost on the last two voyages, and the court held in its favor. According to the court:

The contract was valid in its inception, both at the place of making and the place of performance, and was capable of being performed until an event intervened which was not in the contemplation of the parties when the contract was made. It seems to be settled that an impossibility of performance, arising from natural

causes, in a case of this kind, cannot be recognized as a defense, but that one arising from a governmental act which would render performance illegal would be an excuse. It is contended here by the Tweedie Company, however, that the excuse cannot prevail, because, though performance was prevented by the law, such law, being foreign, was merely a fact, and the case should for that reason fall within the general rule. On the other hand, it is urged by the McDonald Company that the law of the place of performance governed the contract, and, as such law made fulfillment impossible, the contract was dissolved. The question really is, do the legal acts of the agents of a foreign government, which prevent the full performance of a contract of this character, control the rights of the parties? Contracting parties are subject to the contingencies of changes in their own law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality, not of impossibility. Prevention by the law of a foreign country is not usually deemed an excuse, when the act which was contemplated by the contract was valid in view of the law of the place where it was made, . . . and *a fortiori* when it was also then valid at the place of performance. It was intended that this contract should be performed. The law of the place of performance, in the absence of evidence of a contrary intention, ordinarily governs the incidents of a performance. . .

26A.32 See also *Krulewitch* v. *National Importing & Trading Co. Inc*., above, where the court held that a foreign embargo furnished no excuse for the failure to perform a contract; *P. N. Gray & Co*. v. *Cavalliotis*, 276 F. 565 (E.D.N.Y. 1921), *aff'd w/o opin*., 293 F. 1018 (2d Cir. 1923), holding that "foreign embargoes are ordinarily not an excuse for nonperformance;" *Richards & Co*. v. *Wreschner*, 156 N.Y.S. 1054, 1057 (1915), *aff'd*, 174 A.D. 484, 158 N.Y.S. 1129 (1916), holding "it is well settled that impossibility due to a foreign war is no excuse;" *Glynn* v. *United Steel Works Corp*., 160 Misc. 405, 289 N.Y.S. 1037 (1935), holding that a German moratorium could not prohibit payment of German notes payable in New York; *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), holding that a Russian decree confiscating accounts in a New York bank's Petrograd branch did not excuse the bank's obligation to repay the plaintiff's deposit.

26A.33 There are cases, however, in which the parties have been excused from their obligations under the charter because the act of a foreign state has made performance impossible. *Texas Co*. v. *Hogarth Shipping Co*., 256 U.S. 619 (1921), is a leading case. There, a British ship on voyage charter was requisitioned by the British Government for war service. The Supreme Court held that this act of state excused the owner from performing:

Here the ship, although still in existence and entirely seaworthy, was rendered unavailable for the performance of the charterparty by the requisition. . . In other words, compliance with the charterparty was made impossible by an act of state, the charterer was prevented from having the service of the ship and the owner from earning the stipulated freight. . . These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it [256 U.S. at 629–631].

Embargo

26A.34 Notwithstanding the general rule that the acts of foreign governments ordinarily do not provide grounds for finding a frustration, commercial arbitrators have in some cases held that an embargo imposed by a foreign government may excuse non-performance. In *The Caliopi Carras*, SMA 1111 (Arb. at N.Y. 1977), the panel found the contract frustrated when the Libyan oil embargo precluded shipments to the United States, as had been contracted for. Similarly, in *The Gota River*, SMA 1241 (Arb. at N.Y. 1978), the seizure of the charterer's crude supply by the Ecuadorian Government was held to frustrate a contract for shipment from Ecuador.

26A.35 In *The Orduna*, SMA 2967 (Arb. at N.Y. 1993), the nominated loadport was closed and an embargo on Iraqi oil was imposed due to the invasion of Kuwait. Basing its decision on the reasonable efforts exerted by the charterer to find substitute cargo, the arbitrators found that the

charterer's cancellation of the voyage charter was not wrongful, and viewed the invasion of Kuwait as a *force majeure* event.

26A.36 If the embargo or other government interference does not make performance impossible or commercially impracticable, however, there will be no finding of frustration. For example, in *The Corona*, SMA 961 (Arb. at N.Y. 1975), the Arab oil embargo prevented shipment to the Netherlands, but the charterer had a wide range of discharge port options and frustration was denied. Similarly, in *Retla Steamship* v. *Canpotex*, 1977 AMC 1594 (Arb. at N.Y. 1977), the charterer alleged that it could not discharge phosphate at Singapore because of severe congestion in shore facilities following a collapse of the market for phosphate in Southeast Asia and the refusal of the Indonesian Government to allow imports of fertilizer. It was held that these conditions did not make discharge at the agreed transhipment port of Singapore so difficult as to amount to frustration.

26A.37 The same result obtained in *The Tore Knudsen*, SMA 1108 (Arb. at N.Y. 1977), where the Turkish Government banned the export of petroleum products, but the charterer had the option to load at other ports, and in *The Thomas A & Thomas Q*, 1979 AMC 202 (Arb. at N.Y. 1978), where a Libyan embargo did not affect the charterer's option to load at other North African ports.

26A.38 Similarly, in *The Energy Explorer*, SMA 3033 (Arb. at N.Y. 1993), an Iraqi embargo was held not to preclude the voyage charterer from loading at other ports. The charterer also had the options of subletting the ship and obtaining VLCC size cargoes in lieu of the ULCC size cargoes which were difficult to obtain at that time.

26A.39 See also *The Sea World*, SMA 3791 (Arb. at N.Y. 2003), where the panel concluded that an Iraqi embargo on the export of petroleum products did not frustrate the charter because the embargo did not preclude the ship from calling at other ports.

26A.40 See also *The Golden Gate*, SMA 2188 (Arb. at N.Y. 1986), where the panel declined to hold that the charter was frustrated by the closing of trade waters between Costa Rica and Guatemala since the charterer had the option of trading in other locales.

Effect of total loss—substitution clause

26A.41 In an English decision, *Niarchos* (*London*) *Ltd*. v. *Shell Tankers Ltd*. [1961] 2 Lloyd's Rep. 496, it was held that the loss of a ship terminated the charter and therefore extinguished owner's option to substitute. The decision was followed in a New York arbitration, *The Mary Ellen Conway*, 1973 AMC 772 (Arb. at N.Y. 1973). However, a subsequent New York arbitration panel, in *The Giovanna Lolli-Ghetti*, 1974 AMC 2161 (Arb. at N.Y. 1974), declined to follow the reasoning of the *Niarchos* case. There, the ship was lost before delivery to the time charterer. The charterer refused to accept a substitute nominated by the owner, and the owner claimed an anticipatory breach of the charter. A majority of the panel accepted the owner's argument that "if options are enforceable only if mandatory, they are no longer options," and held that the time charter was not frustrated by the loss and that the owner was entitled to exercise its privilege to substitute another ship.

26A.42 Similarly, in *The Grand Zenith*, 1979 AMC 2179 (Arb. at N.Y. 1979), even though the ship was lost during the charter period, the arbitrators held that the owner retained an option under the charter to substitute another ship. Since the owner wished to exercise the option, the loss of the named ship did not constitute a frustration of the charter. The panel's award concerning damages issues in *The Grand Zenith* is reported at SMA 2186 (Arb. at N.Y. 1986).

Constructive total loss

26A.43 In *Asphalt Int'l.* v. *Enterprise*, 514 F. Supp. 1111 (S.D.N.Y. 1981), *aff'd*, 667 F.2d 261 (2d Cir. 1981), the court considered the issue of whether damage to a ship exceeding its repaired value frustrated the charter. The ship was operating under a long-term time charter when it was damaged in a collision. Prior to the collision the ship had a fair market value of $750,000, and the estimated repair costs were a minimum of $1,500,000. Since its insured value was some $2,500,000 it was not a constructive total loss for insurance purposes. The owner concluded, however, that the ship was not worth repairing and scrapped it. The charterer then sued for breach of charter, contending that the owner had a duty to repair the ship or, alternatively, provide a substitute ship. The court held that repair costs well in excess of the ship's sound market value represented an excessive and unreasonable burden on the owner not contemplated by the charter, and that performance was excused on the grounds of "commercial impracticability." The court also held that the owner was under no duty to provide a substitute ship.

CHAPTER 27

Exceptions

[Clause 16 continued]

"103. . . . The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas,

104. Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted."

General

27.1 These Lines constitute the main exceptions clause in the New York Produce form. The protection they afford is, however, quite restricted. In particular they do not include an exception of negligence. The owners are given wider protection by the United States Carriage of Goods by Sea Act (U.S. COGSA), incorporated into the charter by Clause 24. Such protection as is given by Lines 103 and 104 of the form is, however, extended to the charterers as well as to the owners.

27.2 The meaning and effect of an exceptions clause under English law is a matter of construction, like that of any other contractual term. If it is not possible on other grounds to choose between two or more meanings that the contractual language could realistically convey, then, as a principle of last resort, the rule is that the meaning restricting most the scope of the exclusion of liability under the clause is to be adopted. Lord Diplock encapsulated the modern law on the interpretation of exclusion clauses in *Photo Production* v. *Securicor* [1980] 1 Lloyd's Rep. 545, at page 554: "My Lords, the reports are full of cases in which what appear to be very strained constructions have been placed upon exclusion clauses. . . In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only. . . ." (Note that the Unfair Contract Terms Act 1977 does not apply to time charters and so is not considered here.) Where special provision has been made in an additional clause imposing responsibility on the owners for a particular matter, the additional clause is unlikely to be overridden by an exceptions clause contained in the printed charter form: see *The Brabant* [1965] 2 Lloyd's Rep. 546, approved by the House of Lords in *The TFL Prosperity*, [1984] 1 Lloyd's Rep. 123 (H.L.), which is summarised at paragraph 27.35, below. That said, in *The TFL Prosperity*, Lord Roskill, with whom the other members of the House agreed, observed that where an additional clause was clearly intended to be in substitution for a clause in the standard form, the contract would be read as a whole, so that the exceptions clause would qualify the substitute just as it did the original: see page 126 lhc.

Not restricted to loss of the ship

27.3 Lines 103 and 104 are of general application and are not restricted in their application to the loss of the ship by their proximity to the first sentence of Clause 16. Mocatta, J., rejected an argument that they were so restricted in *The Oliva* [1972] 1 Lloyd's Rep. 458.

United States Carriage of Goods by Sea Act

27.4 If Clause 24 is unamended and therefore U.S. COGSA is incorporated into the charter, the exceptions in Section 4(2) of the Act protect the owners not only in relation to the "loading, handling, stowage, carriage, custody, care, and discharge of" the goods but in relation generally to all contractual activities performed by the owners under the charter (see paragraphs 34.23 *et seq*., below). Clause 16 will therefore be of little or no relevance except where the *charterers* wish to escape a liability. In particular, Section 4(2)(*a*) provides an exception in respect of neglect or default in the navigation or in the management of the ship, whereas Clause 16 contains no such exception of negligence but only an exception against errors of navigation, which has been held not to exclude negligent navigation: see below.

27.5 It follows that where, as is sometimes the case, the Clause Paramount and thus U.S. COGSA are deleted from Clause 24, the exceptions remaining are very limited. On the other hand, the voyage by voyage obligation of due diligence to make the ship seaworthy, described at paragraphs 34.13 *et seq*., below, will not arise.

Act of God

27.6 Cockburn, L.J., said in *Nugent* v. *Smith* (1876) 1 C.P.D. 423, at page 437: "all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God." Apart from extraordinary conditions of wind or sea, lightning or frost (*Siordet* v. *Hall* (1828) 4 Bing. 607) may amount to "act of God". This exception also appears in U.S. COGSA, Section 4(2)(d).

Enemies

27.7 This probably covers the actions of enemies of the state whose flag the ship flies and of enemies of the states in which the charterers or owners, if companies, are registered. It certainly includes enemies of those states of which the parties, if individuals, are nationals: see *Russell* v. *Niemann* (1864) 34 L.J.C.P. 10.

27.8 Section 4(2)(f) of U.S. COGSA contains the exception "Act of public enemies", which probably includes piracy.

27.9 The exception will afford no protection if what occurs is caused by negligence on the part of the owners or the crew.

Fire

27.10 Again, this exception can be relied upon only if the fire is not caused by negligence on the part of the owners or the crew.

While under time charter the *Thrasyvoulos* was carrying a quantity of spirit. During unloading, a plank was dropped into the hold as a result of negligence on the part of the charterers' stevedores; this caused a spark from which a fire followed and the ship was destroyed. The time charter provided: "loss or damage from fire. . . always mutually excepted." It was held by the Court of Appeal that the charterers could not rely on the exception: the fire was caused by their servants' negligence and in the absence of clear words the exception did not cover negligence.

Polemis v. *Furness Withy* (1921) 8 Ll.L.Rep. 263 and 351 (C.A.).

27.11 If Clause 24 of the New York Produce form is unamended and therefore U.S. COGSA is incorporated, the exception in respect of fire will be widened by virtue of Section 4(2)(b) to "Fire, unless caused by the actual fault or privity of the carrier". But the owners will not be protected under Section 4(2)(b) if they have failed to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage and the unseaworthiness causes the fire: see *Maxine Footwear* v. *Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105 (P.C.).

27.12 Where the ship is a United Kingdom ship, the owners and charterers will also have the protection of Section 186 of the Merchant Shipping Act 1995. This provides that the owner, charterer, manager or operator of a ship shall not be liable for any loss or damage "where any property on board the ship is lost or damaged by reason of fire on board the ship", unless the loss or damage results from "his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". For cases on what is meant by "personal act or omission" see paragraph 27.39 *et seq*., below. For authority on analogous terms in the Warsaw Convention on International Carriage by Air, see *Goldman* v. *Thai Airways International* [1983] 1 W.L.R. 1186 (C.A.), *Thomas Cook* v. *Air Malta* [1997] 2 Lloyd's Rep. 399 and *Nugent* v. *Goss Aviation* [2000] 2 Lloyd's Rep. 222.

27.13 The statutory protection will not be lost by unseaworthiness, even if unseaworthiness caused the fire, provided there is no personal act or omission of the nature described above, which alone excludes the right to protection.

27.14 Damage "by reason of fire" in earlier legislation (Section 502(i) of the Merchant Shipping Act 1894) was held to include damage by smoke and damage from water used to extinguish the fire: see *The Diamond* [1906] P. 282. But "fire" does not include heating where there has been no actual combustion: see *Tempus Shipping* v. *Dreyfus* [1930] 1 K.B. 699.

Restraint of Princes, Rulers and People

27.15 These words cover forcible interference by a government or state preventing or impeding the performance of the charter, such as the imposition of restrictions on trade, action taken pursuant to customs or quarantine regulations, action to protect the government's own proprietary interests in the cargo or action taken for political reasons.

27.16 The words will also cover a *risk* of forcible interference when the restraint is actually in being and will affect the performance of the charter if an alternative course of action is not adopted. The test is whether a reasonable man would consider performance likely to be affected by the restraint: see *Watts* v. *Mitsui* [1917] A.C. 227 (H.L.), *Phosphate Mining* v. *Rankin* (1915) 21 Com. Cas. 248 and *Nobel's Explosives* v. *Jenkins* [1896] 2 Q.B. 326.

27.17 Actual physical force is not a necessary ingredient. In *Rickards* v. *Forestal* [1942] A.C. 50, Lord Wright said, at page 81: "there may be a restraint, though the physical force of the state concerned is not immediately present. It is enough, I think, that there is an order of the state, addressed to a subject of that state, acting with compelling force on him, decisively exacting his obedience and requiring him to do the act which effectively restrains the goods." (See also *Miller* v. *Law Accident Insurance* [1903] 1 K.B. 712 (C.A.) and *The Bamburi* [1982] 1 Lloyd's Rep. 312.)

27.18 Nor does the fact that the ship is outside the jurisdiction of the state exercising the restraint prevent reliance on the exception, if the owners (or, probably, the charterers as operators of the ship) are within the state and subject to its jurisdiction.

Swedish owners of the *Zamora* chartered her to British charterers for a period of six months in 1916, the trading limits including "United Kingdom, Continent (Dunkirk, Sicily limits)". The ship carried out one voyage from the U.K. to Italy but the owners refused to allow the charterers to send her on a second voyage. The charter included an exception against restraint of princes and the owners maintained that, under Swedish

Emergency Regulations, they were not permitted to trade the ship outside Swedish waters. Bailhache, J., held that although the ship was not within the jurisdiction of the Swedish courts, the owners themselves were and that they were protected by the exception.

Furness, Withy v. *Banco* [1917] 2 K.B. 873.

27.19 But the exception will not apply:

(1) to actions by any body of persons who do not constitute the ruling power, or the executive of the ruling power, of the country: see *Nesbitt* v. *Lushington* (1792) 4 T.R. 783. Thus it would not apply to actions of rebels or guerrillas;
(2) to arrest or detention under ordinary judicial process: see *Finlay* v. *Liverpool* (1870) 23 L.T. 251. In *The Anita* [1970] 2 Lloyd's Rep. 365, Mocatta, J., held that where a ship was confiscated by state officials, the interposing of a decision by an extraordinary military tribunal did not prevent the confiscation being a restraint of people (the judge was reversed on other grounds at [1971] 1 Lloyd's Rep. 487 (C.A.)). Under Section 4(2)(g) of U.S. COGSA, however, the exception of restraint of princes, rulers, or people, is expressly extended to include "seizure under legal process";
(3) to a restraint arising from a state of affairs which existed at the time the charter was entered into, where the applicable legal restriction or control was known to the party seeking to rely on the exception: see *Ciampa* v. *British India* [1915] 2 K.B. 774 (fumigation under decree of ship from plague port); *Induna* v. *British Phosphate Commissioners* (1949) 82 Ll.L.Rep. 430 (ban on night working unknown to both parties to charter); and *Reardon Smith* v. *Ministry of Agriculture* [1959] 2 Lloyd's Rep. 229, [1961] 1 Lloyd's Rep. 385 (C.A.) (strikes);
(4) to a restraint resulting from negligence.

27.20 As noted above, Section 4(2)(g) of the U.S. COGSA gives the wider exception of "Arrest or restraint of princes, rulers, or people, or seizure under legal process".

Dangers and accidents of the Seas, Rivers

27.21 This covers perils peculiar to seas or rivers or to the navigation of a ship at sea or in rivers which cannot be avoided by the exercise of reasonable care. Thus damage caused by an exceptionally severe gale is within the exception where there has been no negligence. The foreseeability of the heavy weather experienced does not necessarily preclude reliance on the defence. In this respect American law appears to take a narrower view of the exception; see the decision of the High Court of Australia in *The Bunga Seroja* [1999] 1 Lloyd's Rep. 512 and paragraphs 27A.24 *et seq*.

27.22 The entry of seawater may be within the exception although the weather is not severe. Thus the exception covers its entry following the striking, without negligence, of an iceberg or a sunken rock or another ship being negligently navigated or as a result of rats gnawing through a lead pipe: see *The Xantho* (1887) 12 App. Cas. 503 (H.L.), and *Hamilton*, *Fraser* v. *Pandorf* (1887) 12 App. Cas. 518 (H.L.). The exception also covers damage resulting from action necessarily and reasonably taken to counter dangers and accidents of the seas or rivers, such as the closing of ventilators to prevent the entry of seawater during a storm: see *Canada Rice Mills* v. *Union Marine* [1941] A.C. 55 (P.C.).

27.23 But the exception relates to dangers and accidents of the seas rather than on the seas, so fire or lightning, for example, are not within it: see *Hamilton*, *Fraser* v. *Pandorf*, above. In *Canada Rice Mills* v. *Union Marine*, above, Lord Wright said: "Rain is not a peril of the sea, but at most a peril on the sea."

27.24 Section 4(2)(c) of the U.S. COGSA excludes "Perils, dangers, and accidents of the sea or other navigable waters".

Machinery, Boilers and Steam Navigation

27.25 Lord Coleridge, C.J., said in *Mercantile Steamship* v. *Tyser* (1881) 7 Q.B.D. 73, of "risks of steam navigation": "These risks, I think, must mean physical risks. . . incident to vessels propelled by steam machinery. The breakdown of an engine, the disabling of a screw, and things of that kind . . . though they happened in calm water and fair weather. . ."

The exception will, however, afford no protection if what occurs is caused by negligence.

Errors of Navigation

27.26 The effect of this exception is limited by the rule of construction that words of exception do not cover negligence unless they show a clear intention to do so. As there may be errors of navigation which do not amount to negligence, the words afford no protection against negligent navigation: see *The Satya Kailash* [1984] 1 Lloyd's Rep. 588, in which the Court of Appeal affirmed the decision of Staughton, J., on this point ([1982] 2 Lloyd's Rep. 465) and approved the decision of Bingham, J., to the same effect in *The Emmanuel C* [1983] 1 Lloyd's Rep. 310. (As to the wider protection given by Section 4(2)(a) of the United States Act, see below where the text of that provision is set out.)

27.27 Moreover, for the exception to be effective there must be navigational error, in the sense of error in some aspect of seamanship. Thus, it will not protect against a breach of the utmost despatch obligation in Clause 8 of the New York Produce form if this arises simply from a choice by the master to carry out a voyage ordered by the charterers by a route other than the quickest; see the comments of Lord Hobhouse in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, at page 160. See further paragraphs 18.2 and 18.10, above.

Always mutually excepted

27.28 These words make the exceptions available to the charterers as well as the owners. If an exception, such as fire, is not apt to protect the owners from liability in the event of negligence, then since the exceptions are mutual it will not protect the charterers in the event of their negligence or that of their servants: see *Polemis* v. *Furness*, *Withy* (1921) 8 Ll.L.Rep. 263 and 351 (C.A.), cited above under "Fire", and *Fagan* v. *Green* [1926] 1 K.B. 102 (C.A.), at page 108. Further, these general exceptions will not exclude the charterers' liability for breach of an undertaking to ship only lawful cargo, or not to ship cargo excluded under the charter, or an undertaking as to the safety of ports or berths, although one of the excluded perils may in such cases be an immediate cause of damage. Thus, for example, in *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, *per* Colman, J., at [292], held that "clause 27(a) . . . – the mutual exception clause [in the Shelltime 4 form] excluding the liability of either [owners or charterers] for loss, damage, delay or failure in performance arising or resulting from arrest or restraint of princes, rulers or people – does not assist. . . with regard to liability for breach of clauses 4 or 28. Clause 27(a) has to be construed to the effect that the arrest or restraint to which it refers are not attributable to the shipment of unlawful cargo (clause 4) or cargo which prospectively presents a risk of capture or seizure [Clause 28]."

Exceptions under U.S. COGSA

Section 4(2)

27.29 The full list of exceptions provided by Section 4(2) of U.S. COGSA and incorporated into the charter by Clause 24 is as follows:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
(b) Fire, unless caused by the actual fault or privity of the carrier;
(c) Perils, dangers, and accidents of the sea or other navigable waters;
(d) Act of God;
(e) Act of war;
(f) Act of public enemies;
(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
(h) Quarantine restrictions;
(i) Act or omission of the shipper or owner of the goods, his agent or representative;
(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
(k) Riots and civil commotions;
(l) Saving or attempting to save life or property at sea;
(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
(n) Insufficiency of packing;
(o) Insufficiency or inadequacy of marks;
(p) Latent defects not discoverable by due diligence; and
(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

27.30 For detailed comments on the individual meaning and scope of each of these, see the discussion of the equivalent exceptions under Article IV, rule 2 of the Hague(-Visby) Rules in *Bills of Lading*, paragraphs 10.201 to 10.260, and *Voyage Charters*, paragraphs 85.264 to 85.350.

Section 4(3)

27.31 Section 4(3) of U.S. COGSA provides as follows: "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

27.32 An attempt by charterers to use this provision as a defence to a claim by owners under the implied indemnity arising from Clause 8 of the New York Produce form (see paragraphs 19.15 *et seq*., above) was rejected by Mustill, J., in *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277 (see paragraph 19.23, above and paragraph 34.40, below). Mustill, J., cast doubt on whether this provision had any meaning at all in the context of a time charter.

Charter exceptions and the first sentence in Lines 102 and 103

27.33 The exceptions contained in the second sentence of Clause 16 in Lines 103 to 104 of the New York Produce form do not operate to prevent the repayment of hire in the circumstances set out in the first sentence in Lines 102 and 103. An argument to this effect was rejected by Mocatta, J., in *The Oliva* [1972] 1 Lloyd's Rep. 458, who said, at page 462, that the words of exception in the second sentence "have no application to the [owners'] obligation in the first sentence to repay unearned hire".

Exceptions under Clause 12 of the Baltime form

27.34 Clause 12 of the Baltime form presents owners with unusually wide exemption from liability. Its first sentence, Lines 163 to 170, provides in essence that the owners are to be responsible for delay in delivery, delay during the currency of the charter and loss or damage to goods on board, only if this has been caused by want of due diligence on their part or that of their manager in making the ship seaworthy or by any other personal act, omission or default. Its second sentence, Lines 170 to 173, says that "The Owners shall not be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants". Its third sentence, Lines 173 to 177, protects owners against liabilities arising from strikes, lock-outs, stoppage and restraint of labour; it is discussed at paragraphs 27.48 *et seq*., below.

27.35 The second sentence of Clause 12, Lines 170 to 173, does not exempt the owners from liability for all other types of loss or damage than those set out in the first sentence, and in particular does not extend the exemption to financial loss generally.

The *TFL Prosperity*, a 'roll-on, roll-off' ship, was chartered on the Baltime form. An additional typed clause (Clause 26) specified in detail certain fixed structural attributes of the ship. In particular, the free height under the main deck was stated to be 6.10 metres. In fact the height was only 6.05 metres, which meant that a trailer double-stacked with containers could not be loaded into the main deck. The charterers claimed the financial losses they had suffered as the result of the misdescription. The owners relied on the exceptions clause, there having been no personal default on their part.

It was held by the House of Lords, reversing the Court of Appeal and overruling that court's decision in *The Charalambos N. Pateras* [1972] 1 Lloyd's Rep. 1, that:

(i) the first sentence of the exceptions clause dealt only with the matters for which liability was accepted by the owners, namely delay in delivery, delay during the currency of the charter and loss or damage to goods on board (which necessarily meant physical loss or damage – as opposed to financial loss or damage) if due to the stated causes;

(ii) the second sentence was, as a matter of construction of the clause read as a whole, linked to the first sentence and was also directed, and directed only, to the same types of delay and physical loss or damage to goods as the first sentence;

(iii) hence the clause did not afford the owners a defence to the charterers' claim for financial losses suffered as a result of the owners' breach;

(iv) in any event, the clause could not be construed so as to exempt the owners from liability for breach of a term as to description.

The TFL Prosperity [1984] 1 Lloyd's Rep. 123 (H.L.).

27.36 In reaching its decision in *The TFL Prosperity* the House of Lords disagreed with the decision of Walsh, J., in the Supreme Court of New South Wales in *Westfal-Larsen* v. *Colonial Sugar Refining* [1960] 2 Lloyd's Rep. 206, which had been accepted as correct by McNair, J., in *The Brabant* [1965] 2 Lloyd's Rep. 546 and by Mocatta, J., in *The Apollonius* [1978] 1 Lloyd's Rep. 53. In the *Westfal-Larsen* case the owners claimed general average contribution from the charterers who defended on the ground of unseaworthiness. The owners were held entitled to defeat that defence by relying upon the exceptions clause. Lord Roskill, in criticising Walsh, J.'s

decision, observed that the claim in the *Westfal-Larsen* case "was not one for loss of or damage to cargo, but arose because of the inability of the vessel to maintain proper steam by reason of bunker trouble which it seems was the fault of the chief engineer".

Delay in delivery

27.37 Baltime Clause 12 will not protect the owners against all delays in the delivery of the ship, even if not caused by personal want of due diligence or personal default of the owners or their manager. In particular, it will not apply to delays arising out of prior contractual arrangements to which the charterers are not parties unless in the context of the charter as a whole it is clear that the intention was that the charterers should bear the risks of such delays. The clause, being for the benefit of the owners, will be construed in favour of the charterers.

The *Helvetia-S*, which was described in the charter as "the new building motor vessel to be named later. . . now in course of construction", was chartered on the Baltime form. By Clause 1 the ship was "to be delivered per 10th June, 1956 laydays"; the cancelling date was 15 July. There was a delay in the construction of the ship and on 12 June the owners informed the charterers that she would not be ready before August. The question arose whether the owners were protected by the exceptions clause. It was argued for the owners that "delay in delivery" (in what are now Lines 163 and 164) meant "postponement of delivery" and that any event which was outside the control of the owners and which occurred in the course of construction was within the scope of the clause if it caused delay. Pearson, J., held that the clause did not bear such a wide interpretation; delay in construction was not delay in delivery.

The Helvetia-S [1960] 1 Lloyd's Rep. 540.

(This decision was approved by the House of Lords in *The TFL Prosperity*, above.)

Delay during the currency of the charter

27.38 The clause may protect the owners against liability for delay during the charter period even where there has been a breach of the master's obligation to prosecute voyages with the utmost despatch (Clause 9), provided there has been no personal want of due diligence or personal default on the part of the owners or their manager: see *Istros* v. *Dahlstrom* (1930) 38 Ll.L.Rep. 84 and paragraph 27.39 *et seq*., below.

Personal want of due diligence

27.39 By Baltime Clause 12, the owners are liable, in respect of a failure to make the ship seaworthy, only in the case of personal want of due diligence on their part or on the part of their manager. That cuts down any absolute warranty of seaworthiness, such as that in Lines 25 and 26 of that form. "Due diligence" in its Lines 166 and 167 is not construed as in the Hague Rules so as to include the failures of servants, agents and independent contractors (see *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57), but is qualified by the word "personal" in Line 169.

The *Brabant* was chartered on the Baltime form for one round voyage for the carriage of woodpulp. The charter provided in an additional clause in typescript: "The decks and holds and other cargo spaces to be properly cleaned at Owners' risk and expense before loading." Woodpulp shipped at Swedish ports was damaged by residues of a previous cargo of coal. The owners incurred liability to bill of lading holders and sought an indemnity from the charterers under Clause 9. It was found that the presence of coal residues was due to the failure of the crew properly to clean the holds prior to loading but that there was no personal fault on the part of the owners or their managers. It was held by McNair, J., that the liability of the owners under the exceptions clause was limited to personal want of due diligence; but that in the particular circumstance of the case the typescript clause putting upon the owners the risk of hold cleaning overrode the exceptions clause.

The Brabant [1965] 2 Lloyd's Rep. 546.
(See also *Westfal-Larson* v. *Colonial Sugar Refining* [1960] 2 Lloyd's Rep. 206.)

27.40 Where a corporate entity is involved, the considerations which arise in the interpretation of "personal" are analogous to those which arose in the interpretation of "actual fault or privity" of the owner under the limitation provisions of Section 503 of the Merchant Shipping Act 1894. In this connection, Viscount Haldane, L.C., in *Lennards Carrying Co*. v. *Asiatic Petroleum* [1915] A.C. 705, at page 713, observed: ". . . a corporation is an abstraction. It has no mind of its own any more than that it has a body of its own; its active and directing will must be found in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."

27.41 Whose acts or omissions are to be regarded as the "personal" acts or omissions of the owner depends, it seems, on the constitution and organisation of the owner's concern, or if the operation of the ship has been delegated to managers, of the managers' concern: see *The Marion* [1984] 2 Lloyd's Rep. 1 (H.L.) and *The Ert Stefanie* [1989] 1 Lloyd's Rep. 349 (C.A.). As Willmer, L.J., said in *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, at page 345: "Where. . . the owners are a limited company it is almost inevitable that difficult questions will arise. It is necessary to look closely at the organisation of the company in order to see of what individual it can fairly be said that his act or omission is that of the company itself."

27.42 In that case the question of the owners' "personal" fault or privity arose in the context of their right to limit liability under Section 503 of the Merchant Shipping Act 1894. The owners were a brewery company whose shipping activities were subsidiary to their main business. The ships were run by a manager who was not a member of the board of directors but who was responsible to an assistant managing director. It was held by Hewson, J., and the Court of Appeal that the assistant managing director was, so far as concerned the shipping operations of the company, the owners' *alter ego* and that his defaults were defaults of the owners personally. Views were however expressed in the Court of Appeal that the omissions of the manager of the shipping department might also rank as personal omissions of the owners. Willmer, L.J., said, at page 345: "Where, as in the present case, a company has a separate traffic department, which assumes responsibility for running the company's ships, I see no good reason why the head of that department, even though not himself a director, should not be regarded as someone whose action is the very action of the company itself, so far as concerns anything to do with the company's ships."

27.43 But Lord Diplock, in *Tesco* v. *Nattrass* [1972] A.C. 153, disagreed with those views in so far as they suggested that a person who was not entrusted with the powers of the company itself could be the *alter ego* of the company. He considered that the question of which persons were to be treated under a *criminal* statute as being the company for the purpose of acts done in the course of its business, was to be answered by identifying those "who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company". He then referred to Denning, L.J.'s judgment in *H.L. Bolton* (*Engineering) Co. Ltd*. v. *T. J. Graham & Sons* [1957] 1 Q.B. 159, 172, 173, and said "The decision in that case is not authority for extending the class of persons whose acts are to be regarded in law as the personal acts of the company itself, beyond those who by, or by action taken under, its articles of association are entitled to exercise the powers of the company. In so far as there are dicta to the contrary in *The Lady Gwendolen* [1965] P. 294 they were not necessary to the decision and, in my view, they were wrong."

27.44 These views were not, however, expressed by the other member of the House of Lords in that case and Mustill, L.J., giving the judgment of the Court of Appeal in *The Ert Stefanie*

[1989] 1 Lloyd's Rep. 349, observed, at page 352, that a person who was not on the board of the company might be treated as being among those persons who together constituted the governing mind and will of the company if he exercised a senior managerial function which, had it not been delegated to him, would have fallen within the competence of the directors. A similar conclusion was reached by Rose, L.J., in *El Ajou* v. *Dollar Holdings* [1994] 2 All E.R. 685, at page 699. After analysing the judgments in the *Lennards Carrying Co*. case and in *Tesco* v. *Nattrass*, he concluded that the position was that "First, the directors of a company are, *prima facie*, likely to be regarded as its directing mind and will whereas particular circumstances may confer that status on non-directors. Secondly, a company's directing mind and will may be found in different persons for differing activities of the company." See also *Meridian Global Funds Management* v. *Securities Commission* [1995] 2 A.C. 500, at page 507.

27.45 But whereas it seems that a non-director may in certain circumstances be added to those who would together constitute the governing mind and will of the company, it is not possible (save in a very exceptional case where authority in a particular field is explicitly withdrawn from a particular director) to subtract someone from the corporate direction, just because when doing the act which has led to the liability, he was performing a function which would ordinarily lie outside the sphere of the board. In the case of *The Ert Stefanie*, which again concerned an owner's right to limit under Section 503 of the Merchant Shipping Act 1894, it was held by Hobhouse, J., and the Court of Appeal that the personal fault of a director of the managing company in giving advice to a master about special requirements and precautions for the carriage of a particular cargo was the "actual fault" of the owners, although the giving of such advice is not ordinarily a function of the board.

27.46 It has also been held in cases relating to the right to limit under the Merchant Shipping Acts that owners or their managers are personally responsible for instituting and maintaining proper systems for the efficient management, operation and manning of their ships and that it is not enough for them merely to appoint competent subordinates: see *The Garden City* [1982] 2 Lloyd's Rep. 382 and *The Marion* [1984] 2 Lloyd's Rep. 1 (H.L.).

27.47 *A fortiori* the owners will not have the benefit of Baltime Clause 12 if the damage has been caused by the incompetence of a crew member who has been personally engaged by them without due enquiry into his capabilities, for the lack of such enquiry will amount to personal want of due diligence: see *The Roberta* (1938) 60 Ll.L.Rep. 84 (C.A.) and *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.).

Strikes and other risks excepted under Baltime Lines 173 through 177

27.48 "Loss or damage" in Line 174 includes financial as well as physical loss or damage: see *The TFL Prosperity* [1984] 1 Lloyd's Rep. 123, *per* Lord Roskill, at page 128. But these exceptions will afford no protection if what occurs is caused by negligence (see *Polemis* v. *Furness Withy* (1921) 8 Ll.L.Rep. 263 and 351), unless the claim can be categorised as a claim for delay within the first sentence of Clause 12 and there has been no personal want of due diligence or personal default on the part of the owners or their manager (see paragraph 27.39 above).

Strikes

27.49 "Strike" was defined by Lord Denning, M.R., in *The New Horizon* [1975] 2 Lloyd's Rep. 314 as "a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavour. It is distinct from a stoppage

which is brought about by an external event such as a bomb scare or by apprehension of danger." The second part of that definition serves only to emphasise that a grievance related to wages, conditions or circumstances of an employment is required. It does not mean that an "external event" or "apprehension of danger" cannot provoke a strike, as it did in *Williams* v. *Berghuys Kolenhandel*, below.

27.50 The fact that other work goes on and that the action is confined to particular ships or even to one ship does not necessarily prevent the action constituting a strike.

The *Laga* was delayed by the refusal of port workers at Nantes to unload or assist vessels carrying coal, in support of French coal miners who were on strike. The port workers continued to work other ships as normal. It was held by McNair, J., that "strike" in the exceptions clause of the voyage charter under which the *Laga* was employed included a sympathetic or general strike and that the fact that other work continued was irrelevant. So far as the *Laga* was concerned there was a strike.

The Laga [1966] 1 Lloyd's Rep. 582.

27.51 Nor does the fact that the action involves no breach of the workers' contracts of employment, or that what is involved is merely a reduction of the hours of work, prevent the action being regarded as a strike.

The *New Horizon* was delayed by the refusal of certain workers at St. Nazaire to work a night shift. Normally the port worked throughout the 24 hours, the work being done in three shifts; but the workers were not obliged by their contracts to work a night shift. It was held by the Court of Appeal that the refusal to work the night shift, which was aimed at improving conditions of work, amounted to a strike.

Tramp Shipping v. *Greenwich Marine* (*The New Horizon*) [1975] 2 Lloyd's Rep. 314.

Crew as strikers

27.52 Where there was a concerted refusal by crew members to sail because of fear of submarine action in time of war, it was held by Sankey, J., that the owners were protected by an exception against strikes: *Williams* v. *Berghuys Kolenhandel* (1915) 21 Com. Cas. 253. Sankey, J., said at page 257 that the grievance that qualified the crew's refusal to sail as a strike "was the fact that the [owners] insisted upon the crew going upon a voyage which they considered to be dangerous in consequence of the German threat". On the other hand, where crew members refused to permit stevedores to unload cargo in pursuance of a grievance against the owners, it was held that the resulting loss did not come within the exception in the charter against "strikes or stoppages of labour": *Compania Naviera Bachi* v. *Hosegood* (1938) 60 Ll.L.Rep. 236. Porter, J., said, at page 243: "Neither strike nor stoppage of labour, in my view, caused the loss; it was rather an interference with those endeavouring to discharge by an outside body than a withholding of labour by the workmen engaged in the discharge themselves." It is important to note, however, that on the facts of that case the crew's assistance was not required for the discharging operations they sabotaged. A refusal to provide necessary assistance to stevedores seeking to discharge a ship, in pursuance of a grievance between crew and owners, would amount to a "strike", it is suggested.

Stoppage

27.53 "Stoppage" is not confined to interruptions caused by labour disputes. Thus, whereas the refusal of men to work because of a fear of disease may not constitute a strike (*Stephens* v. *Harris* (1887) 57 L.T. 618), such a refusal would, it seems, be a "stoppage": see *The New Horizon*, above. When used on its own the word "stoppage" has been construed to mean a complete stoppage of work.

The *Mercedes de Larrinaga* was employed under a voyage charter which provided "in the event of any stoppage. . . continuing for the period of six running days from the time of the vessel being ready to load, this charter shall. . . become null and void". The vessel, although ready to load, did not receive any cargo over the six-day period. Over this period there was a rail strike which impeded but did not completely prevent cargo being brought to the loading berth. The evidence was that there was loading of other ships going on over the whole period although at a reduced rate. Roche, J., held this did not amount to a stoppage. His decision was upheld by the Court of Appeal.

Miguel de Larrinaga v. *Flack* (1924) 20 Ll.L.Rep. 268 and (1925) 21 Ll.L.Rep. 284.

(See also *Akt. Adalands* v. *Whittaker* (1913) 18 Com. Cas. 229.)

27.54 In Baltime Clause 12 the word "stoppage" is qualified by the words 'whether partial or general' and so may include interruptions which are not complete. But it does not, it is suggested, cover a 'go slow' or 'work to rule'.

Burden of proof

27.55 Under Baltime Clause12, the burden of proof is on the owners to show how the delay, loss or damage complained of arose and that this is covered by the clause . As Greer, L.J., said of the clause in *The Roberta* (1938) 60 Ll.L.Rep. 84, above: "That, I think, means that if the shipowner can establish that the loss or damage was not caused by want of due diligence on his part, then he would bring himself within Clause 12, but if he does not establish that and he does not give an account of how he came to deliver damaged goods he does not bring himself within the exception."

Relationship between the Baltime exceptions clause and other clauses

27.56 It has been seen above that Baltime Clause 12 may protect the owners from a breach of the obligation under Clause 9 to prosecute the voyage with the utmost despatch and may protect the owners also from a breach of the charterers' employment orders. Clause 12 will also cut down the absolute warranty of seaworthiness which would otherwise be imposed by the obligation to deliver the ship "in every way fitted for ordinary cargo service".

Misdescription

27.57 But it seems that Clause 12 will not ordinarily protect the owners against misdescription of the ship. In the following case the question arose in relation to the speed warranty, but was not decided.

The *Apollonius* was time chartered for a trip on the Baltime form. In the charter, she was described as "when fully loaded, capable of steaming about 14½ knots in good weather and smooth water on a consumption of about 38 tons oil fuel". The exceptions clause was amended to read: "The Owners only to be responsible for delay in delivery of the vessel or for delay during the currency of the charter and for loss or damage to goods on board, if such delay or loss or damage has been caused by want of due diligence on the part of the Owners or their servants or their Manager in making the vessel seaworthy and fitted for each voyage during the currency of the Charter, or any other personal act or omission or default of the Owners or their Manager." As the result of heavy fouling (not attributable to want of due diligence), the ship was not capable at the time of delivery of the speed warranted. As a result time was lost on the charter voyage from Japan to the Argentine. Time was also lost on that voyage by the failure of the engineers to work the engines at their full output.

Mocatta, J., took the view that the warranty as to speed applied at the time of delivery but left open the question whether the owners were protected by the exceptions clause from liability for breach of that obligation. In dealing with this aspect of the case, Mocatta, J., said: "[Counsel for the charterers] sought to say here that the word 'delay' in this clause was inapt to describe what had happened consequent upon the breach of the speed warranty or upon the failure of the engineers to work the main engine as it should have

been worked, but I do not find this argument wholly convincing as regards delay due to breach of the speed warranty and in my opinion it fails as regards the engineers' conduct. It seems to me in its context may well be applicable to both events, but. . . it is unnecessary to decide this as regards the speed warranty."

The Apollonius [1978] 1 Lloyd's Rep. 53.

27.58 However, it was held by the House of Lords in *The TFL Prosperity* [1984] 1 Lloyd's Rep. 123 that the Baltime exceptions clause (then Clause 13) would not, even if widely construed, protect the owners against a claim for misdescription where the parties had set out in the charter a detailed description of the ship which was built for, and to be employed in, a particular trade. (See paragraph 27.35, above, for a summary of the facts of the case.) Lord Roskill, with whom all other members of the House agreed, said, at page 130: "In truth if cl. 13 were to be construed so as to allow a breach of the warranties as to description in cl. 26 to be committed or a failure to deliver the vessel at all to take place without financial redress to the charterers, the charter virtually ceases to be a contract for the letting of the vessel and the performance of services by the owners, their master, officers and crew in consideration of the payment of time charter hire and becomes no more than a statement of intent by the owners in return for which the charterers are obliged to pay large sums by way of hire, though if the owners fail to carry out their promises as to description or delivery, are entitled to nothing in lieu. I find it difficult to believe that this can accord with the true common intention of the parties and I do not think that this conclusion can accord with the true construction of the charter in which the parties in the present case are supposed to have expressed that true common intention in writing."

27.59 Furthermore, if the ship has been misdescribed in the negotiations leading to the fixture and the misrepresentation has induced the charterers to enter into the contract, the exceptions clause will afford no protection unless the owners show that it was a fair and reasonable provision under Section 3 of the Misrepresentation Act 1967, as amended by Section 8(1) of the Unfair Contract Terms Act 1977.

Paramount clause in a Baltime charter

27.60 Where a charter in the Baltime form is made subject to a Paramount clause, the effect of such a clause in relation to other terms of the charter will depend upon the words of incorporation and the words of the Paramount clause itself, but in general the provisions of Clause 12 will be overridden by the Hague Rules: see *Adamastos* v. *Anglo-Saxon Petroleum* [1958] 1 Lloyd's Rep. 73; *Marifortuna* v. *Government of Ceylon* [1970] 1 Lloyd's Rep. 247; and paragraphs 34.5 *et seq*., below.

27.61 If a Paramount clause of the type incorporated into the New York Produce form by Clause 24 (see chapter 34, below) were to be incorporated into the Baltime form it seems that the general result would be the same as in the case of the New York Produce form. The wide exceptions of Clause 12 would be replaced so far as concerned physical loss of or damage to cargo by the narrower immunities of Section 4(2) of U.S. COGSA. The initial seaworthiness obligation would become one to exercise due diligence, but liability would not be limited to the 'personal' fault of the owners or managers, and an obligation of the same type would probably arise in respect of each voyage under the charter: see paragraphs 34.13 *et seq*., below.

27.62 If an incorporating clause refers only to "Paramount clause" without identifying any particular enactment under which the Hague Rules have been given statutory force, the Hague Rules themselves (or possibly the Hague-Visby Rules, see below) are incorporated.

The *Agios Lazaros* was chartered under a voyage charter which provided: "New Jason clause, both-to-blame collision clause, P and I bunkering clause and Chamber of Shipping War Risks clauses Nos. 1 and 2 and also Paramount clause are deemed to be incorporated in this Charter Party."

The question arose whether a claim under the charter was subject to the one-year time limit in Article III, rule 6 of the Hague Rules. It was contended that since there were many different forms of Paramount clause, the reference merely to "Paramount clause" was ineffective.

It was held by the Court of Appeal that as the intention of the parties was clear from the reference to "Paramount clause" the charter should be subject to the Hague Rules, and that the Hague Rules in their original form should be incorporated. Lord Denning, M.R., said: "What does 'paramount clause' or 'clause paramount' mean to shipping men? Primarily it applies to bills of lading. In that context its meaning is, I think, clear beyond question. It means a clause by which the Hague Rules are incorporated into the contract evidenced by the bill of lading and which overrides any express exemption or condition that is inconsistent with it. . . It seems to me that when the 'paramount clause' is incorporated [in a charter], without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the rules (for example, art. IV), or only so far as compulsorily applicable, they say so. In the absence of any such qualification, it seems to me that a 'clause paramount' is a clause which incorporates all the Hague Rules."

The Agios Lazaros [1976] 2 Lloyd's Rep. 47.

27.63 The charter in *The Agios Lazaros* was entered into before the Carriage of Goods by Sea Act 1971 (Commencement) Order 1977 brought the Hague-Visby Rules into force in the United Kingdom. In *Seabridge Shipping* v. *Orssleff's* [1999] 2 Lloyd's Rep. 685, a similar question arose under a voyage charter entered into some 20 years after the 1971 Act came into force. The charter in that case provided that a number of standard clauses and "Paramount Clauses" were to be "deemed to be incorporated into this Charter Party". It was argued by the charterers that since the charter was governed by English law and the states in which both owners and charterers were resident had enacted the Hague-Visby Rules, it was the Hague-Visby Rules, rather than the Hague Rules, that were applicable. However, it was held, in the absence of any evidence of what shipping men in general, and the particular owners and charterers in that case, might have intended by a reference to "Paramount Clause", that the same meaning was to be given to these words as had been given to the words in *The Agios Lazaros* – namely, they must be regarded as referring to the Hague Rules and not the Hague-Visby Rules. The judge pointed out that there were other phrases in use which would have the effect of incorporating the Hague-Visby Rules.

27.64 It is suggested, however, that the decision in *Seabridge Shipping* v. *Orssleff's* should be treated with some caution. The judge remarked at page 689 of the report that had proper materials been available on the question of intention, the charterers' argument might have succeeded.

U.S. Law

Mutual exceptions clause

27A.1 The purpose of the mutual exceptions clause is to protect either the owner or charterer from liability to the other for damages resulting from any of the specified excepted causes. The leading U.S. case in which the clause was applied was *Clyde Commercial S.S. Co*. v. *West India S.S. Co*., 169 F. 275 (2d Cir. 1909), *cert*. *denied*, 214 U.S. 523 (1909). There the court explained the function of the clause in the following manner:

> By mutual we understand that the parties intended the exceptions to protect each from liability to the other whenever performance of any covenant was prevented or delayed by any exception. If the owner were prevented from maintaining the vessel in an efficient state or from giving the whole space contracted for or from prosecuting the voyage with dispatch or from properly ventilating the cargo or cleaning the ship's bottom by any of these exceptions, he would not be responsible to the charterer. On the other hand, if the charterer were so prevented from furnishing coals, paying port charges or furnishing pilots or from paying hire on the date fixed, it would be relieved from liability therefor to the owner, and, in the case of charter hire, the owner could not withdraw the steamer as provided in article 6. [169 F. at 277.]

27A.2 See also *The Marine Sulphur Queen*, 460 F.2d 89, 1972 AMC 1122 (2d Cir. 1972), *cert*. *denied*, 409 U.S. 982 (1972); *The Toledo*, 122 F.2d 255 (2d Cir. 1941), *cert*. *denied*, 314 U.S. 689 (1941); *The African Glen*, 1969 AMC 1465, 1467 (A.S.B.C.A. 1969);*Gans Line* v. *Wilhelmsen* (*The Themis*), 275 F. 254 (2d Cir. 1921), *cert*. *denied*, 257 U.S. 655 (1921).

27A.3 The mutual exceptions clause does not excuse either party from performing their many independent obligations under the charter, unless that performance is actually prevented by one of the excepted causes. While the clause most often works to the benefit of the shipowner, its warranty of seaworthiness is not modified by it. Any loss caused by an unseaworthy condition, or the failure to exercise due diligence if the charter is so modified, will not be excused by Clause 16. *The Caledonia*, 157 U.S. 124 (1895); *The Marine Sulphur Queen*, above. The owner must also bear in mind that, in the usual case, this clause will be strictly construed against it on the theory that it has been inserted in the charter for its own benefit. See *Compania de Navegacion La Flecha* v. *Brauer*, 168 U.S. 104, 118 (1897).

27A.4 It is settled that the mutual exceptions clause does not affect the rights and obligations of either party under the off-hire provisions of Clause 15. Thus, even if the ship suffers a breakdown as the result of a cause which is also listed in the mutual exceptions clause, the charterer will be excused from its duty to pay hire, or will be entitled to recover prepaid hire for that period. The rule was stated in *Clyde Commercial S.S. Co*. v. *West India S.S. Co*., above, as follows:

> . . . [A]rticle 15 must be understood to state absolute categories in which the parties intended the hire to be suspended whether the Owner was at fault or not, and therefore. . . article 17 ["general exceptions" clause] does not apply to them at all. [169 F. at 278.]

27A.5 In that case, the ship was first delayed at Panama as the result of a deficiency of men which was held to relieve the charterer from its obligation to pay hire for the time lost. The ship proceeded on the voyage, but was delayed because of a quarantine order applying to ships coming from Panama. This latter delay, the court held, was attributable to a restraint of princes, which was mutually excepted under Clause 16. The charterer therefore was not excused from paying hire for that period.

Act of God

27A.6 To fall within the scope of this exception, an event must be "due to natural causes, without human intervention." *Gans S.S. Line* v. *Wilhelmsen*, above. Therefore, when an attempt to widen the Panama Canal triggered a slide which blocked it, the event was held not to be an act of God which would excuse a failure by the charterer to redeliver a ship to its owner on time. *Id*.

27A.7 Furthermore, the event must be so overwhelming and unanticipated as to "fairly preclude charging a carrier with responsibility for damage occasioned by its failure to guard against it in protection of property committed to its custody." *Compania de Vapores Insco S.A*. v. *Missouri Pacific R. Co*., 232 F.2d 657, 660 (5th Cir. 1956), *cert*. *denied*, 352 U.S. 880 (1956). See also *New Rotterdam Insurance Co*. v. *The Loppersum*, 215 F. Supp. 563, 567 (S.D.N.Y. 1963); *The Hsing May*, SMA 3019 (Arb. at N.Y. 1993).

27A.8 An act of God is no excuse, if negligence contributed to the damage caused by the event. *Sidney Blumenthal & Co*. v. *Atlantic Coast Line R. Co*., 139 F.2d 288 (2d Cir. 1943), *cert*. *denied*, 321 U.S. 795 (1944). It also does not obviate the duty of a carrier to use reasonable diligence to save the shipper's property and protect it from further loss. *McNeil Higgins Co*. v. *Old Dominion S.S. Co*., 235 F. 854, 857 (7th Cir. 1916).

Fire

27A.9 In *The Buckeye State*, 39 F.Supp. 344, 347 (W.D.N.Y. 1941), "fire" was defined as follows:

> "Fire" is caused by ignition or combustion, and it includes the idea of a visible heat or light.

27A.10 Thus, it has been held that heat and smoke alone, without combustion or flames, are not "fire." *Western Woolen Mill Co*. v. *Northern Assurance Co. of London*, 139 F. 637, 639 (8th Cir. 1905), *cert*. *denied*, 199 U.S. 608; *Cargo Carriers* v. *Brown S.S. Co*., 95 F. Supp. 288, 290 (W.D.N.Y. 1950). Like the English cases, decisions of American courts hold that fire damages will include those resulting from smoke and water or other materials used to extinguish the fire. See, e.g., *American Tobacco Co*. v. *Goulandris*, 173 F. Supp. 140, 177–178 (S.D.N.Y. 1959), *aff'd*, 281 F.2d 179, 1962 AMC 2655 (2d Cir. 1960), *modified on other grounds*, *Lekas & Drivas Inc*. v. *Goulandris*, 306 F.2d 426 (2d Cir. 1962). In that case, the court found that some of the damage to the cargo of tobacco occurred prior to the actual fire, due to spontaneous heat resulting from inherent vice of the cargo. The court held that this damage "prior to the actual fire is all part and parcel of the one continuous and uninterrupted process," and excused the owner from any liability.

27A.11 In addition to the widened exception for fire damages provided under Section 4(2)(b) of the U.S. Carriage of Goods by Sea Act (COGSA), discussed below at paragraphs 34A.1 to 34A.11, the Limitation of Liability Act includes a provision, known as the "Fire Statute," which also provides the owner with a broader defense than that given by the general exceptions clause. The Fire Statute provides as follows:

> No owner of any vessel shall be liable to answer for or make good to any person any loss or damages, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. [46 U.S.C. § 30504 (formerly 46 U.S.C. § 182.)]

27A.12 The last words of the statute, excusing the owner from liability unless the fire is caused by its "design or neglect," have been held to have essentially the same meaning as the "actual fault and privity" requirement of COGSA. *In The Matter of The Complaint of Ta Chi Navigation*

(*Panama*) *Corp*. (*The Eurypylus*), 677 F.2d 225 (2d Cir. 1982); *Asbestos Corp. Ltd*. v. *Compagnie de Navigation Fraissinet* (*The Marquette*), 480 F.2d 669, 672, 1973 AMC 1683, 1686, (2d Cir. 1973). Under both statutes, the owner will not be liable for damage caused by the fire unless he is personally at fault. *Walker* v. *Transp.Co*., 70 U.S. 150 (1866); *The Marquette*, above, 1973 AMC at 1687 n. 7. Thus, a fire resulting from the negligence of the master or other officers and crew will not be attributed to the owner. *Consumers Import Co*. v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 1943 AMC 1209 (1943); *Earle & Stoddart Inc*. v. *Ellerman's Wilson Line*, 287 U.S. 420, 1933 AMC 1 (1932); *American Tobacco Co*. v. *The Katingo Hadjipatera*, 81 F.Supp. 438, 446 (S.D.N.Y. 1948), *modified on other grounds*, 194 F.2d 449 (2d Cir. 1951). In the case of a corporate shipowner, the negligence must be that of a managing officer or agent.

27A.13 To invoke the Fire Statute or COGSA, the shipowner must prove that the cargo loss complained of was caused by fire. The burden of proof is then on the cargo owner to establish that the fire was caused or its extinguishment was prevented by the shipowner's negligence or an act within his actual fault or privity. *The Eurypylus*, above. It is important to note that this involves a different allocation of burdens of proof as between the carrier and cargo than generally applies in a non-fire case. Whereas in a non-fire case the burden is on the carrier to show that he exercised due diligence to make the ship seaworthy, the fire exemptions shift that burden of proof to the cargo owner. *The Eurypylus*, above; *The Marquette*, above. Thus, the burden is on the cargo owner to prove that the fire was caused by negligence of the shipowner or the shipowner's failure to exercise due diligence to correct an unseaworthy condition which either caused the fire or prevented its extinguishment. *The Boni*, SMA 3053 (Arb. at N.Y. 1994), holding that sub-charterer/cargo owner sustained its burden of proof under the Fire Statute and COGSA, and was awarded salvage expenses and interest in excess of $3.4 million. But see *Sunkist Growers Inc*. v. *Adelaide Shipping Lines Ltd*., 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 449 U.S. 1012 (1980), holding contrary to *The Eurypylus* and *The Marquette*, that the burden of proof is on the carrier to show that it exercised due diligence to provide a seaworthy ship in order to avail itself of the Fire Statute or Section 4(2)(b) of COGSA.

27A.14 Where the cause of the fire is undetermined, the owner will be excused from liability under the Fire Statute, since the burden of proof is on the cargo owners to prove that the owner's negligence caused the loss. *Re Caldas*, 350 F. Supp. 566, 1973 AMC 1243 (E.D. Pa. 1972), *aff'd without opinion sub nom*., *Re Anderson*, *Clayton & Co*., 485 F.2d 678 (3d Cir. 1973). This same result would be reached in an action where COGSA is applicable. See *The Marquette*, above.

Restraint of Princes, Rulers and People

27A.15 A restraint of princes involves the exercise of sovereign power in a manner which prevents performance of the charter. As stated in *Baker Castor Oil Co*. v. *Insurance Co.of North America*, 60 F.Supp. 32, 1945 AMC 168 (S.D.N.Y. 1944), *aff'd*, 157 F.2d 3, 1946 AMC 1115 (2d Cir. 1946), *cert. denied*, 329 U.S. 800 (1947):

> Restraint of princes means the operation of the sovereign power by the exercise of vis major, in its sovereign capacity . . .

27A.16 This defense comprises non-performance caused by an actual stopping of a ship by a blockade in time of war, *Olivera* v. *Union Insurance Co*., 16 U.S. 183 (1818), as well as a delay in delivery based on a well-founded apprehension of capture by the cruisers of a belligerent, *The Styria*, 101 F. 728 (2d Cir. 1900), *modified on other grounds,* 186 U.S. 1 (1902). See also *The George J. Goulandris*, 36 F. Supp. 827, 1941 AMC 1804 (D. Me. 1941). The defense extends to a

non-wartime, official quarantine of a ship, *Clyde Commercial S.S. Co*. v. *West India S.S. Co*., above, but does not extend to detention of a ship by a government official acting beyond the scope of his authority. See *Northern Pacific R. Co*. v. *American Trading Co*., 195 U.S. 439 (1904).

27A.17 There must be official government action to have a "restraint of princes." In the *Andros Island*, SMA 1548 (Arb. at N.Y. 1980), for example, the owner contended that certain instructions issued by the Greek Ministry of Merchant Shipping to Greek ships following the outbreak of hostilities between Greece and Turkey over Cyprus fell under the general exceptions clause. The arbitrators found, however, that the instructions were not government orders, but were instead only warnings and precautionary recommendations which did not require any obedience by the owner. The owner was held not to be entitled to the protection of the general exceptions clause.

27A.18 In *The Otelia*, 1980 AMC 424 (Arb. at N.Y. 1979), a sole arbitrator held that the threatened refusal of a minor department of the Government of Iraq to permit the ship to enter the discharge port in Iraq was not a restraint of princes since it was not shown that the actions of the department represented an official action of the Government. At the same time, it was clearly recognized by the arbitrator that official government action to prohibit the ship's entry would constitute a restraint of princes.

27A.19 The detention of a ship by reason of a court order issued in the course of regular legal proceedings has been held not to be a restraint of princes. *The Gabriele Wesch*, 1981 AMC 1324 (Arb. at N.Y. 1981).

27A.20 In *The Universe Explorer*, 1985 AMC 1014 (Arb. at N.Y. 1984), the ship was not permitted by the Government to load a cargo of oil in Nigeria from September 18, 1979 until October 8, 1979 because it had previously taken on stores by helicopter off Cape Town, South Africa. The Government acted pursuant to a Nigerian regulation which prohibited ships from entering Nigerian waters if they had called at a port in South Africa within six weeks preceding arrival in Nigeria. The panel ruled that the ship was off-hire during the entire period in question under a clause in the charter which provided that hire would cease in the event of loss of time due to the interference of authorities. In addition to its claim that the ship was off-hire, the charterer claimed damages. The panel held, however, that the restraint of princes provision in the general exceptions clause prevented any recovery of damages.

27A.21 In *The Bright Evelyn*, SMA 2914 (Arb. at N.Y. 1992), a voyage charter case, the ship's berthing was delayed due to an alleged "decree" of the President of Romania which gave berthing priority to Government shipments so that Romania could complete a 200,000-ton "government-to-government" urea contract with China. When the charterer was advised that its cargo could not be loaded for approximately six weeks, it declared *force majeure* and cancelled the charter. The arbitrators held that the charterer was not justified in repudiating the charter, and that no *force majeure* event took place which would give rise to frustration of the charter. The arbitrators found that no official action of the Government had taken place because the alleged "decree" was not published, and was only known unofficially. In addition, the exception clause did not apply after the ship went on demurrage. Lastly, the arbitrators found that the delay was not excessive enough to make performance commercially impracticable and frustrate the charter.

27A.22 In *The N'tchengue*, SMA 2665 (Arb. at N.Y. 1990), the charterer argued that because the Nigerian Minister of Petroleum and Energy would not permit the ship to load crude oil in Nigeria based upon regulations prohibiting part cargo loads, it was excused from performance by the "restraint of princes" clause, and the doctrine of impossibility of performance. The arbitrators rejected the charterer's argument, finding that both parties were aware of the regulations when they entered into the charter and, therefore, both were aware of the risk that the Nigerian Minister could exercise his discretionary power to change the "operational practice" of not enforcing these regulations at any given time. In addition, the majority viewed the charterer's efforts to appeal the

Minister's decision as insufficient to draw the conclusion "that the possibility of performance was utterly destroyed."

Dangers and accidents of the Seas, Rivers

27A.23 The peril of the sea defense is broader in scope than "act of God," and may include losses other than those caused by entirely natural forces. See *The Majestic*, 166 U.S. 375 (1897).

27A.24 "Peril of the sea" was perhaps most dramatically described in *The Rosalia*, 264 F. 285, 288 (2d Cir. 1920), as "something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety." See also *Duche* v. *Thomas and John Brocklebank*, 40 F.2d 418, 1930 AMC 717 (2d Cir. 1930); *The Warren Adams*, 74 F. 413, 415 (2d Cir. 1896), *cert*. *denied*, 163 U.S. 679; *The Giulia*, 218 F. 744, 746 (2d Cir. 1914). The cases since *The Rosalia* have widened the exception somewhat, and as noted in *The Philippine Bear*, 1960 AMC 670, 677 (A.S.B.C.A. 1959), "more recently less emphasis has been given to the extraordinary or catastrophic features of 'perils of the sea.'" Thus, in *Davison Chemical Co*. v. *Eastern Transp. Co*., 30 F.2d 862, 1929 AMC 161 (4th Cir. 1929), it was held that cargo damage was caused by a peril of the sea, albeit the storm, although violent, was not unusual for that time of year. As Judge Parker noted:

> Storms of the greatest intensity are to be anticipated in certain waters at certain seasons; and, if that fact removed them from the classification of perils of the sea, that term might as well be stricken from bills of lading. [30 F.2d at 864.]

27A.25 In *Gerber & Co*. v. *The Sabine Howaldt*, 437 F.2d 580 (2d Cir. 1970), the court stated that determination of a peril of the sea turns on how violent and tempestuous the winds and seas are, which is a matter of degree not capable of precise definition. The court held that the district court's finding that the wind and sea encountered by the *Sabine Howaldt* were not perils of the sea was clearly erroneous. The court also held that the *Sabine Howaldt* was a seaworthy ship when it left port, was operated in good and seamanlike manner throughout the voyage, and that there was no negligence on the part of the carrier. Thus the owner was exonerated from liability.

27A.26 In *Thyssen Inc*. v. *The Eurounity*, 21 F.3d 533, 1994 AMC 1638 (2d Cir. 1994), the court followed *The Sabine Howaldt*, above, and emphasized that to have a peril of the sea, weather conditions must not have been foreseeable, taking into consideration the location and time of the year. In that case, the court held that the stormy weather conditions did not create a peril of the sea because the conditions experienced by *The Eurounity*, which included wave heights between 10 and 11.5 meters, were not unusual in the North Atlantic in the wintertime.

27A.27 In *Taisho Marine & Fire* v. *The Sea-Land Endurance*, 815 F.2d 1270, 1987 AMC 1730 (9th Cir. 1987), the Ninth Circuit affirmed the district court's holding that the cargo was lost because of the weather alone, based on findings of unusually high winds and seas which battered and rolled the ship more than 40 degrees, and that there was no unseaworthiness or incompetent management of the ship by the master and the crew.

27A.28 In *Nichimen Co*. v. *The Farland*, 462 F.2d 319 (2d Cir. 1972), the charterer argued that it was not responsible for cargo damage pursuant to the peril of the sea exception to liability of Section 4(2)(c) of COGSA. The court found that the loss was caused by negligence of the charterer due to improper stowage. The court rejected the defendant's argument that the shifting of the cargo was caused by a peril of the sea, stating that the carrier is liable for a loss due to a peril of the sea if it might have been avoided by skill and diligence at the time. Accord, *Royal Insurance Co*. v. *The Maracaibo*, 488 F. Supp. 521 (S.D.N.Y. 1980), where the court found that the ship experienced

sufficiently severe weather to constitute a peril of the sea within the meaning of COGSA, but did not rule in favor of the owner because the cargo was negligently stowed.

27A.29 In *Re Complaint of Tecomar S.A.*, 765 F. Supp. 1150, 1991 AMC 2432 (S.D.N.Y. 1991), the court held that the mysterious loss of the ship and its crew of 27 and cargo worth $22 million was caused by unseaworthiness and not by a peril of the sea. Emphasizing that foreseeability in light of all of the circumstances is the test for determining whether a peril of the sea occurs, the court found that although the ship had experienced severe weather conditions, they were "nevertheless 'expectable' in the North Atlantic during the middle of February."

27A.30 In *Quigley Co*. v. *The Safir*, 750 F. Supp. 790, 1990 AMC 2104 (S.D. Tex. 1989), the court held that the ship was seaworthy prior to its departure for loading port, and that the severe weather which the ship encountered that caused the ventilation covers to be torn off and several air pipes to be broken, allowing seawater to enter the holds, triggered the peril of the sea defense.

Machinery

27A.31 As used in Clause 16, "machinery" refers to the whole of the ship's machinery.

27A.32 In *The Toledo*, 30 F. Supp. 93 (E.D.N.Y. 1939), *aff'd*, 122 F. 255 (2d Cir. 1941), *cert. denied*, 314 U.S. 689, a fracture of a crankshaft web was held to be an "accident of machinery." The court gave full effect to the mutual exceptions clause, and held that the charterer was not entitled to recover losses it suffered when the ship's breakdown made it necessary to ship cargo on other ships. The fracture was caused by a latent defect which the court found was not discoverable by the exercise of due diligence. The defect was such, however, that it made the ship unseaworthy both at the time of the making of the charter and on delivery to the charterer. The court held that the owner was nonetheless entitled to the benefit of the exceptions clause from accidents of machinery occurring after the making of the charter.

Errors of Navigation

27A.33 The effect of this exception is to excuse the owner from liability for any damages sustained by the charterer as the result of errors in navigation on the part of the ship's officers. The exception will apply, however, only if there is no finding that a breach of the owner's warranty of seaworthiness caused or contributed to the error in navigation or the damages claimed. *The Binship*, SMA 1416 (Arb. at N.Y. 1980).

Exceptions under the Carriage of Goods by Sea Act (COGSA)

27A.34 COGSA contains exceptions from liability which benefit both the owner and the shipper of the cargo. The owner is entitled to the benefit of all the provisions of Section 4(2), which states:

> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
> (b) Fire, unless caused by the actual fault or privity of the carrier;
> (c) Perils, dangers, and accidents of the sea or other navigable waters;
> (d) Act of God;
> (e) Act of war;
> (f) Act of public enemies;
> (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
> (h) Quarantine restrictions;
> (i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
(k) Riots and civil commotions;
(l) Saving or attempting to save life or property at sea;
(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
(n) Insufficiency of packing;
(o) Insufficiency or inadequacy of marks;
(p) Latent defects not discoverable by due diligence; and
(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

27A.35 The incorporation in the charter of COGSA or the Harter Act does not destroy or weaken the exceptions set out in Clause 16. *The Toledo*, 30 F. Supp. 93, 96 (E.D.N.Y. 1939), *aff'd*, 122 F.2d 255 (2d Cir. 1941), *cert. denied*, 314 U.S. 689. Thus, the owner may have the benefit of the defenses available under COGSA or the Harter Act in addition to those which may be raised under the exceptions clause. See also *The Westmoreland*, 86 F.2d 96, 97, 1936 AMC 1680 (2d Cir. 1936).

27A.36 COGSA also contains provisions which may affect the shipper's liability. Section 4(3) states:

The shipper shall not be responsible for loss or damages sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agent, or his servants.

27A.37 Where the charterer is not the shipper of the goods, however, it is doubtful that it would be entitled to the benefit of these provisions, particularly if it is a "carrier" of the shipment under COGSA.

Rules of Construction

27A.38 See discussion at paragraphs 1A.9 to 1A.10

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CHAPTER 28

Liberties

[Clause 16 continued]

"105. The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the

106. purpose of saving life and property."

28.1 Under a voyage charter, the consequences of a deviation not authorised by the contract are drastic: the contract is terminable by the charterers. Even if the contract is not terminated, exclusions or limitations of liability intended to protect the owners may well cease to apply (see *Voyage Charters*, paragraphs 12.28 to 12.45). It is not considered that this concept of deviation is generally applicable to time charters, although it might apply in the case of certain trip charters: see paragraphs 4.99 *et seq*. and 18.12, above. The liberties stated in Lines 105 and 106 of the New York Produce form appear therefore to be relevant mainly to the obligations under Clause 8 of the form to proceed with the utmost despatch and to comply with the charterers' orders as to employment: see chapters 18 and 19, above. For comments on an argument in *The Hill Harmony* [1998] 2 Lloyd's Rep. 367 and [2001] 1 Lloyd's Rep. 147 (H.L.), to the effect that the owner's right to rely on the defence in Article IV, rule 2(a), of the Hague-Visby Rules in response to a claim based on failure to prosecute voyages with the utmost despatch under Clause 8 of the New York Produce form might be lost by a finding of deviation, see paragraph 18.12, above.

28.2 The United States Carriage of Goods by Sea Act, incorporated by Clause 24 of the New York Produce form, modifies the latter part of Lines 105 and 106. Its provisions, which supplement those of the charter (see chapter 34, below), include Section 4(4), which reads: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided*, *however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

28.3 It will be seen that "any reasonable deviation" is included, which requires the question to be asked "what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive": *Stag Line* v. *Foscolo*, *Mango & Co*. (1931) 41 Ll.L.Rep. 165, *per* Lord Atkin, at page 171. See also *The Daffodil B* [1983] 1 Lloyd's Rep. 498. To this extent, the incorporation of the section extends the liberties given by Lines 105 and 106. The words of the proviso to the section do not appear in the Hague or Hague-Visby Rules. They raise an unsurprising presumption and place on the owners the burden of establishing that a deviation was authorised by the contract.

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CHAPTER 29

Arbitration

"107. 17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York,
108. one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for
109. the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

The scope of this chapter

29.1 So far as English law is concerned, this chapter deals only with a very few specific points particular to the arbitration clause in the New York Produce form. Specific points particular to the Shelltime 4 form are mentioned in chapter 37. For a full treatment of English arbitration law, see *Ambrose and Maxwell* and *Mustill & Boyd*. United States law is still given fuller treatment here, because of the continued absence of an American work comparable to those English law texts.

Place of arbitration

29.2 Clause 17 of the New York Produce form provides for arbitration in New York. Where London is agreed instead, "New York" in Line 107 should be struck through and replaced by "London" when drawing up the charter.

NYPE 93

29.3 Clause 45 of NYPE 93 contains two arbitration agreements: paragraph (a) providing for New York arbitration subject to U.S. Law and paragraph (b) providing for London arbitration under English law. One should be struck out by the parties.

Governing law

The charter

29.4 The impact of the arbitration clause on the question of which law governs the charter is discussed in paragraph I.21, above.

The arbitration agreement

29.5 The Rome I Regulation and Rome Convention (see paragraphs I.19 *et seq*., above) do not apply to arbitration agreements and agreements on the choice of court (Article 1.2). The law governing an arbitration agreement, which includes its formation, validity and effect, will

therefore be determined by reference to common law conflict of laws rules (for which generally see *Dicey*, *Morris & Collins*, chapter 16 and paragraphs 32–002 to 32–008). Where, as in the New York Produce form, the arbitration agreement is contained in the commercial contract to which it relates, in this case the time charter, it will typically be right to conclude that the arbitration agreement is governed by the law which governs the commercial contract. However, as Section 7 of the Arbitration Act 1996 emphasises under English law, an arbitration agreement is considered a distinct and severable contract, even where it is contained in the commercial contract. There is, therefore, no reason in principle why an arbitration agreement should not be governed by a different law from that which governs the commercial contract. But the typical time charter on the New York Produce form contains no express choice of law clause and a choice of London arbitration will usually outweigh other considerations and have the effect that English law governs both the charter and the arbitration agreement in Clause 17.

The arbitration procedure

29.6 Whether or not English law is the governing law of the contract, if London is chosen by the parties, or (if they do not make a choice) by the arbitrators, as the place or "seat" of the arbitration, the procedure to be followed will be governed by Part I of the Arbitration Act 1996 (Section 2(1) of the Act) and the English court's supervisory and supportive powers. Section 3 of the Act defines the "seat" of the arbitration as its "juridical seat", which means the legal place of the arbitration, which need not be where all the hearings take place. In practice, disputes arising out of time charters on the New York Produce form, but with London chosen as the venue for arbitration, are typically referred to arbitration without any specific discussion of the seat. The implication will ordinarily be that London was intended to be the seat. Where, as is often the case, the Terms of the London Maritime Arbitrators Association are agreed, either in an additional clause or when a reference to arbitration is commenced, that is explicitly the default rule in the absence of agreement to the contrary: see paragraph 6(b) of the LMAA Terms (2012).

Reference to "three persons"

29.7 Clause 17 of the New York Produce form requires disputes to be referred to three arbitrators, one to be appointed by each of the parties and the third to be appointed by the two so chosen. For such cases, subject to contrary agreement between the parties, Section 16(5) of the 1996 Act requires that each party appoint their arbitrator not later than 14 days after service of a written request to do so and the two so appointed are required "forthwith" to appoint a third arbitrator. However, in practice, parties frequently agree between themselves that unless the two arbitrators first appointed disagree, a third arbitrator shall not be appointed unless and until the case reaches the stage of a formal hearing or final determination of the dispute on documents. The LMAA Terms (2012) deal with these matters in paragraph 8. In particular, the requirement that the third arbitrator be appointed forthwith is replaced by a right in the two arbitrators appointed by the parties to appoint a third "at any time" after their appointment, an obligation to appoint a third only "before any substantive hearing or forthwith if they cannot agree on any matter relating to the arbitration", and power, if a third arbitrator has not been appointed and they are agreed, "to make decisions, orders and awards in relation thereto". Since many LMAA arbitrations are determined 'on the documents' with no oral hearing, the practical result is that often the award in an arbitration under LMAA Terms will be that of a tribunal of two arbitrators.

NYPE 93

29.8 The London arbitration clause in the NYPE 93 (Clause 45(b)) provides for the appointment of two arbitrators and an umpire, unless a sole arbitrator is agreed upon forthwith when a dispute has arisen. For such cases, again subject to contrary agreement, Section 16(6) of the Act provides that each party is to appoint not later than 14 days after written request and the two arbitrators may appoint an umpire at any time after they themselves are appointed, but must do so before any substantive hearing or forthwith if they cannot agree. In this instance, the LMAA Terms (2012) are to like effect: see paragraph 9. Again, it is normal practice for arbitrators to postpone the appointment of an umpire. It is also very common for the parties, often at the invitation of the tribunal, to agree to convert a 'two plus umpire' panel into a panel of three arbitrators shortly before or at the outset of the substantive hearing.

"Commercial men"

29.9 In the case below, Donaldson, J., suggested that lawyers practising in commercial matters are not "commercial men" within Line 109 of the New York Produce form. But full-time maritime arbitrators are.

The arbitration clause in a voyage charter for *The North Duchess* provided: "The Arbitrators shall be commercial men." One party appointed a full-time professional arbitrator who, although originally qualified as a lawyer, no longer practised as such. It was held by Donaldson, J., that his engagement as a full-time professional arbitrator in maritime disputes put him within the class of commercial men for the purposes of the New York Produce form. But it was said, *obiter*, that those whose experience was solely as practising lawyers, although practising in the commercial field, would not be so regarded: "Some of them can rightly be described as 'commercial lawyers', but whilst they serve the commercial world they are not of it."
Pando v. *Filmo* [1975] 1 Lloyd's Rep. 560.

29.10 Allowing "commercial men" in Line 109 to encompass full-time professional arbitrators continues to be a convenient result, for otherwise many of the arbitrators most often chosen by parties referring maritime disputes to arbitration in London would be disqualified from appointment in time charter disputes on the New York Produce form. It is not clear, however, how far Donaldson, J.'s view on the position of practising lawyers extends. Many senior maritime lawyers spend a substantial proportion of their time upon appointments as arbitrators and mediators. There seems little real justification for disqualifying such practitioners as arbitrators under the New York Produce form merely because they have not yet made, or indeed never make, arbitration and mediation their sole occupation.

NYPE 93: "engaged in Shipping"

29.11 The London arbitration clause in the NYPE 93 provides much more specific requirements than that the arbitrators be "commercial men". By Lines 511 to 512 of NYPE 93, the arbitrators appointed by the parties in relation to a contract on that form: (*a*) must be carrying on business in London; (*b*) must be members of the Baltic Exchange; and (*c*) must be "engaged in Shipping". In *The Myron* [1969] 1 Lloyd's Rep. 411, at page 415, Donaldson, J., in considering the Centrocon arbitration clause, which contains a requirement that the arbitrators be engaged in the shipping and/or grain trades, said: "A person who is actively engaged throughout all available working hours in maritime arbitrations is regarded in practice as being engaged in the shipping trade." He remained of that view in *Pando* v. *Filmo*, above. One or both of the first two requirements, however, may need to be waived to qualify a number of the arbitrators often chosen by parties for

London maritime arbitrations. In that regard, it should be noted that an objection to an appointed arbitrator's qualifications, as against Lines 511 to 512, must be taken promptly, or be lost forever, at least so far as English law is concerned, under Section 73 of the 1996 Act.

A "final" decision

29.12 The agreement that the arbitrators' decision is to be "final" is not an agreement which excludes the parties' right to appeal to the High Court on a point of law under Section 69 of the Arbitration Act 1996: see the decision of Gloster, J., with respect to similar wording ('final, conclusive and binding') in *Shell Egypt* v. *Dana Gas* [2010] 1 Lloyd's Rep. 109.

United States Carriage of Goods by Sea Act

29.13 Many, but not all, claims by charterers against owners arising out of a time charter on the New York Produce form will fall within Section 3(6) of the U.S. Carriage of Goods Act (U.S. COGSA), incorporated by Clause 24 of the form. Owners will be discharged from liability in respect of such claims where arbitration is not commenced within the one-year time period provided by Section 3(6) or any extension agreed by the owners or (exceptionally) granted by the English court; see paragraphs 34.26 *et seq*., below.

U.S. Law

Agreement to arbitrate

29A.1 Arbitration is strictly a creature of agreement between the parties to specify a method of resolving disputes which arise between them. The place of the arbitration and the composition of the panel are matters to be decided by the parties, although it is customary to choose either New York or London as the place for the arbitration and to specify that the arbitration shall be conducted by a panel of three persons. Clause 17 of the New York Produce form, like other standard time charter forms, constitutes such an agreement, and binds the owner and charterer to submit any disputes between them to arbitration by a panel of three persons in New York.

Choice of law

29A.2 In the absence of an express choice of law clause which provides otherwise, the selection of New York as the place of arbitration means that the general maritime law of the United States will govern the dispute. The general maritime law consists primarily of judicial decisions of the federal courts sitting as Admiralty courts. English precedents and state law (particularly New York law) will be considered in the absence of a federal case precedent. State statutes (such as the Uniform Commercial Code) are not applicable to maritime contracts of their own force, however, and should be followed only when there is no established principle under the general maritime law on the point at issue. Because arbitration is a creature of contract, the parties may agree to a specific choice of law clause.

Statutory recognition of arbitration

29A.3 The Federal Arbitration Act, 9 U.S.C. §§ 1–16, 201–208, is applicable to arbitration agreements in any maritime contract. The text of the Act is in Appendix D.1. This statute provides for the compelling of arbitration, stays of judicial proceedings pending arbitration, the entering of judgments on awards and generally for the ultimate supervision of the arbitral process by the courts. Federal and state courts have concurrent jurisdiction to enforce arbitration agreements and awards, although to the extent of any conflict, federal law governs. In *Preston* v. *Ferrer*, 552 U.S. 346,128 S.Ct. 978, 169 L.Ed. 2d 917, 2008 U.S. LEXIS 2011 (2008), the United States Supreme Court held that when an arbitration clause calls for the arbitration of all questions arising under a contract, the Act pre-empts any state laws granting primary jurisdiction to another forum, judicial or administrative. In practice, the vast majority of actions to enforce arbitration agreements are initiated in federal courts.

Written agreement to arbitrate

29A.4 The Act expressly provides that "a written provision" in a charterparty providing for arbitration shall be valid. 9 U.S.C. § 2. While an oral charterparty is a valid, enforceable agreement, an oral agreement to arbitrate disputes is not enforceable under the Arbitration Act. The charter need not have been signed by the parties, however, and a fax, email or other writing confirming the fixture is a sufficient writing to make the agreement to arbitrate enforceable under the Arbitration Act. See *A/S Custodia* v. *Lessin Int'l Inc*., 503 F.2d 318, 320 (2d Cir. 1974); *Ocean Industries Inc*. v. *Soros Assoc. Int'l Inc*., 328 F.Supp. 944 (S.D.N.Y. 1971).

29A.5 In *P.E.P. Shipping* (*Scandinavia*) *APS* v. *Noramco Shipping Corp*., 1997 AMC 2933

(E.D.La. 1997), the parties had agreed to use an earlier charter as a pro forma for the terms and conditions of a new charter. The court ruled that the arbitration clause of the pro forma was binding and enforceable.

29A.6 In *Phoenix Bulk Carriers* v. *Oldendorff Carriers GMBH & Co*., 2003 AMC 51 (S.D.N.Y. 2003), the court ruled that no charter was formed and no agreement to arbitrate was made when the charter was made "subject to headcharterer's approval" and the parties did not communicate approvals to one another. The nomination of a ship by head charterer did not by itself constitute an approval. In *Samsun Corp*. v. *Khozestan Machine Kar Co*., 926 F. Supp. 436, 1996 AMC 1986 (S.D.N.Y. 1996), the court found that a reference in owner's fixture telex to "otherwise as per owner's charter party" was not precise enough to give charterer notice of and bind it to an arbitration clause subsequently inserted in the typed charter.

29A.7 In *Toisa Ltd* v. *Camac International Corp*, 2012 U.S. Dist. LEXIS 74714 (S. D. Tex. Nov. 30, 2011), the court denied a petition to compel arbitration where there was no "meeting of the minds" on the final terms of the charterparty which contained the arbitration provision. Because no binding charter party was formed, no written agreement was found to bind the parties to arbitrate the dispute at issue.

29A.8 In *Hart Enterprises Int'l Inc*. v. *Anhui Provincial Import & Export Corp*., 888 F.Supp. 587, 1995 U.S. Dist. LEXIS 7432 (S.D.N.Y. 1995), the court held that a party is required to arbitrate disputes concerning a settlement agreement that does not contain an arbitration clause when the underlying contract provides for arbitration, and the claims relating to the settlement agreement are "inextricably interrelated" to the contract that contains the arbitration clause.

29A.9 Arbitration agreements may also be enforced on principles of estoppel or ratification. See *JLM Indus*., *Inc*. v. *Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004), holding that a signatory was estopped from refusing to arbitrate with a non-signatory because the issues the non-signatory was seeking to arbitrate were sufficiently intertwined with the agreement to which the signatory was a party; and *Deloitte Noraudit* v. *Deloitte Haskins & Sells*, 9 F.3d 1060 (2d Cir. 1993), holding that a non-signatory affiliate of a signatory to an agreement containing an arbitration clause was bound by it on principles of estoppel because the non-signatory had knowingly accepted the benefits of the agreement. See also *Sunkist Soft Drinks Inc*. v. *Sunkist Growers Inc*., 10 F.3d 753 (11th Cir. 1993), where the court held that an arbitration agreement could be enforced on grounds of equitable estoppel; *Daisy Manufacturing* v. *NCR Corp*., 29 F.3d 389 (8th Cir. 1994), holding that a party was bound because it ratified an agreement its predecessor had signed. See discussion above at paragraphs 2A.43–2A.52.

29A.10 In *The Ming Hai*, SMA 4149 (Arb. at N.Y. 2011) (Arnold), the arbitration clause called for arbitration "in London" but provided that in the event of default of a party in appointing an arbitrator, the president of the "Society of Maritime Arbitrators in London" would make the appointment. The small claims procedure, moreover, under which the subject arbitration was actually commenced, provided that the "Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc (SMA) of New York" should apply. The arbitrator concluded that the arbitration was properly commenced in New York under the SMA rules, but that English law would apply.

Incorporation of arbitration clauses in bills of lading

29A.11 Bills of lading frequently incorporate by reference the terms and conditions of a charter, including the arbitration clause. Where this occurs, there is an arbitration agreement between the carrier and the bill of lading holder. The owner, for example, would be entitled to demand arbitration of any cargo claims brought under the bill of lading. See, e.g., *Ibeto Petrochem Indts. Ltd. v. M/V Beffen*, 475 F. 3d 56 (2d Cir 2007); *Thyssen*, *Inc*. v. *Calypso Shipping Corp*., 310 F.3d

102, 2002 AMC 2332, 2339 (2d Cir. 2002); *Cont'l Ins. Co*. v. *M/V Nikos N*., 2002 AMC 1287, 1296 (S.D.N.Y. 2002); *Son Shipping Co*. v. *DeFosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952); *Duferco Steel Inc*. v. *M/V Kalisti*, 121 F.3d 221, 1998 AMC 171 (7th Cir. 1997); *Union Carbide Corp*. v. *M/T Monte Carmelo*, 2002 U.S.Dist. LEXIS 23925 (S.D.N.Y. 2002); *Lucky Metals Corp*. v. *M/V Ave*, 1996 AMC 265 (S.D.N.Y. 1995); *Lowry & Co*. v. *The Le Moyne d'Iberville*, 253 F. Supp. 396, 1966 AMC 2195 (S.D.N.Y. 1966); *Midland Tar Distillers Inc*. v. *The Lotos*, 362 F. Supp. 1311, 1973 AMC 1924 (S.D.N.Y. 1973); *Amoco Overseas Co*. v. *The Avenger*, 387 F. Supp. 589, 1975 AMC 782 (S.D.N.Y. 1975); *Alucentro Div. Dell'Alusuisse Italia S.p.A*. v. *The Hafnia*, 1992 AMC 267 (Fla. 1991). If the arbitration clause is expressly limited to disputes between "owner" and "charterer," however, instead of more generally requiring arbitration of all disputes arising out of the charter, other parties will not be bound by it. *Otto Wolff Handelsgesellschaft mbH* v. *Sheridan Transportation Co*., 1992 AMC 2646 (E.D. Va 1992), *dismissed on other grounds*, 800 F. Supp. 1359, 1993 AMC 406 (E.D. Va. 1992).

29A.12 But see *Maroc Fruit Board S.A*. v. *M/V Vinson*, 2012 WL 2989195 (D. Ma. 2012), in which a district court, relying on *Kahn Lucas Lancaster*, *Inc* v. *Lark Int'l Ltd*, 186 F.3d 210, 218 (2d Cir. 1999), held that an arbitration clause incorporated by reference into a bill of lading was not enforceable where the arbitration clause was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3 (June 10, 1958), because it was not "signed by the parties or contained in an exchange of letters or telegrams" as required by Art. II(2) of the Convention.

29A.13 In *Nissho Iwai Corporation* v. *M/V Thalia*, 1996 AMC 723 (E.D. La 1996), the court ruled that owner was not required to arbitrate a cargo loss claim based on the incorporation of an arbitration clause in the bill of lading. The arbitration clause referred to was in a sub-charter and required arbitration of disputes only between "owners and charterers." The court found that the reference to "owners" was actually to the time charterer and was not binding on the head owner.

29A.14 But see *Trade Arbed* v. *M/V Kandalaksha*, 2003 AMC 1732, 1736 (S.D.N.Y. 2003), where the arbitration clauses in the sub-charter and in the sub-sub-charter applied narrowly to disputes between the "owner" and the "charterer," but the court nevertheless ruled that the "charterer" under one charter should be deemed the "charterer" under the other charter as well. While the court noted the narrow language of the arbitration clauses, it was persuaded that the parties should be required to arbitrate under either agreement because both the sub-charter and the sub-sub-charter were fixed on the same terms and with the same riders. Because the head charter was fixed on different terms, however, the owner could not demand arbitration from the sub-charter claimants.

29A.15 The validity of foreign arbitration clauses in bills of lading governed by COGSA was upheld by the landmark decision of the United States Supreme Court in *Vimar Seguros y Reaseguros S.A*. v. *The Sky Reefer*, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed. 2d 462, 1995 AMC 1817 (1995). In *The Sky Reefer*, the court enforced a forum selection clause providing for arbitration in Japan. The majority opinion of the court flatly rejected the reasoning of *Indussa Corp*. v. *The Ranborg*, 377 F.2d 200, 1967 AMC 589 (2d Cir. 1967), which held that a forum selection clause in a bill of lading which provided for jurisdiction in a foreign court was invalid under COGSA. The majority opinion strongly indicates that any forum selection clause in a bill of lading, whether it provides for foreign arbitration or jurisdiction in a foreign court, will be enforced so long as the clause itself does not somehow lessen the carrier's liability for cargo loss or otherwise contravene Clause 3(8) of COGSA. For a more detailed analysis of *The Sky Reefer*, see discussion at paragraphs 34A.29 to 34A.33.

29A.16 The bill of lading will effectively incorporate an arbitration clause when it clearly refers to the charter and the bill of lading holder has either actual or constructive notice of the

incorporation. *Midland Tar Distillers Inc*. v. *The Lotos*, above. See, e.g., *F.D. Import & Export Corp*. v. *M/V Reefer Sun*, 2003 AMC 60, 66–67 (S.D.N.Y. 2003); *National Material Trading* v. *M/V Kaptan Cebi*, 1998 AMC 201 (D.S.C. 1997) and cases discussed therein. If the bill of lading contains a space where reference can be made to a charter and that space is left blank, ordinarily there would be no incorporation of the charter or the arbitration clause. *Southwestern Sugar & Molasses Corp*. v. *The Eliza Jane Nicholson*, 126 F. Supp. 666, 1955 AMC 746 (S.D.N.Y. 1954); *Tropical Gas Co*. v. *The Mundogas Caribe*, 388 F. Supp. 647, 1975 AMC 987 (D.P.R. 1974); *Cia Platamon de Navegacion S.A*. v. *Empresa Colombiana de Petroleos*, 478 F.Supp. 66, 1980 AMC 538 (S.D.N.Y. 1979); *United States Barite Corp*. v. *The Haris*, 1982 AMC 925 (S.D.N.Y. 1982). While it is preferable for the parties to fill in all of the blanks provided on the bill of lading, a court may still find the charterparty to be incorporated where only some of the blanks are filled in. See *Cont'l Ins. Co*. v. *Polish S.S. Co*., 346 F.3d 281, 283, 2003 AMC 2718 (2d Cir. 2003) ("While it would have been preferable to identify the charter party in more detail, i.e., by mentioning the location and parties involved, we find that the specification of the date of the charterparty, along with the references to charter parties made on the bill's face and overleaf, suffice to identify the relevant charter party with the specificity needed to give effect to the intended incorporation."). If the bill of lading is ambiguous, such as by making reference to a "charter" which is not further identified, the court may look to extrinsic evidence to determine the intent of the parties. In the example just given, if the charter negotiations indicate that the parties intended that bills of lading incorporate the charter and the consignee has actual or constructive notice of this intent, the arbitration clause of the charter should be deemed to have been effectively incorporated. See, e.g., *Steel Coils*, *Inc*. v. *Captain Nicholas I M/V*, 197 F. Supp. 2d 560 (E.D. La. 2002).

29A.17 The above rules and cases concerning whether a bill of lading has adequately incorporated a charterparty and its arbitration provisions are generally inapplicable when the bill of lading is in the hands of the charterer. The charterparty will govern the relations between its parties, including arbitration, even though the "blanks" provided for identification of the charterparty are left blank in a manner that might (were the bill of lading in the hands of a third party) fail to validly incorporate the terms of the charterparty. See *Cargill Ferrous Int'l* v. *Sea Phoenix MV*, 325 F.3d 695, 699–700, 2003 AMC 1027 (5th Cir. 2003); see also *Cont'l Ins. Co*. v. *Tradearbed*, *Inc*., 269 F. Supp. 2d 348, 352, 2003 AMC 2236 (S.D.N.Y. 2003).

29A.18 An arbitration clause inserted in bills of lading by the owner or charterer without the agreement of the shipper of the cargo was held to be invalid in *Pacific Lumber & Shipping Co*. *Inc*. v. *Star Shipping A/S*, 464 F.Supp. 1314, 1979 AMC 2137 (W.D. Wash. 1979). The court held in that case that the bills of lading were invalid contracts of adhesion because a London arbitration clause was never negotiated or discussed with the shippers.

29A.19 In *Keytrade USA*, *Inc*. v. *Ain Temouchent M/V*, 404 F.3d 891, 2005 AMC 948 (5th Cir. 2005), a bill of lading was issued to an affiliate of the sub-charterer, and the blanks for identifying the incorporated charterparty were left blank. While two charters were potentially applicable—a head time charter and a sub-voyage charter—the court found that the parties intended to incorporate the voyage charter. The court reasoned that it was the voyage charter that authorized the issuance and signing of the bills of lading at issue.

Staying suits pending arbitration

29A.20 The party having a claim may choose to assert it in a lawsuit rather than initiate arbitration. In such a case, the other party is nevertheless entitled to arbitration and may, under Section 3 of the Arbitration Act, obtain a stay of the lawsuit pending arbitration of the dispute. In addition, the claimant in a lawsuit may obtain a stay of its own action pending arbitration.

29A.21 In considering a Section 3 motion for a stay pending arbitration, the only issues for the court to consider concern the making and performance of the agreement to arbitrate. If the court finds that the dispute is subject to arbitration, it has no discretion to refuse to grant a stay under Section 3. In *Seguros Banvenez S.A*. v. *The Oliver Drescher*, 761 F.2d 855, 1985 AMC 2168 (2d Cir. 1985), the charter between owner and charterer provided for London arbitration of any disputes. Cargo sued the owner and charterer for the loss of five cranes. The district court ruled in favor of cargo. The owner and charterer filed cross claims for indemnity or contribution. Citing considerations of judicial economy, the court declined to grant the owner's motion for a stay under Section 3. The Court of Appeals reversed, holding that the district court had no discretion to decline to grant the stay. The Court of Appeals further vacated the district court's decision in favor of the owner granting it indemnification by the charterer for the cargo loss. See *Progressive Cas*. *Ins*. *Co*. v. *C.A*. *Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993).

29A.22 The practice of one or both parties initially utilizing the judicial process has not infrequently given rise to the issue of whether arbitration has been waived. It seems clear that the claimant does not automatically lose its right to arbitration merely by commencing suit, although it should expressly reserve the right to arbitration in the complaint. Likewise, the filing of an answer to the complaint, even one containing an affirmative defense or counterclaim which is arbitrable, or the filing of a third party complaint, will not amount to waiver, although again it would be imprudent not to expressly reserve the right to demand arbitration in the answer or third party complaint. The test of waiver is whether the other party would be prejudiced by permitting the case to go to arbitration, and is usually determined by the length of the delay in making the demand or by the extent of pre-trial discovery that has been conducted. See *Cotton* v. *Sloan*, 4 F.3d 176 (2d Cir. 1993); *Re Ballard Shipping Co*., 752 F. Supp. 546, 1991 AMC 721 (D.R.I. 1991), *later proceedings*, 772 F. Supp. 721, 1992 AMC 402 (D.R.I. 1991), *modified on other grounds* 32 F.3d 623, 1994 AMC 2705 (1st Cir. 1994); *Carcich* v. *Rederi A/B Nordie*, 389 F.2d 692, 1968 AMC 299 (2d Cir. 1968); *Demsey & Assoc*. v. *The Sea Star*, 461 F.2d 1009, 1972 AMC 1440 (2d Cir. 1972). Compare *Mages Foundation* v. *Thrifty Corp*., 916 F.2d 402 (7th Cir. 1990), and *Commercial Union Ins*. v. *Gilbane Building Co*., 992 F.2d 386 (1st Cir. 1993), in which arbitration was held not to have been waived.

29A.23 The issue of waiver arose in *Seguros Banvenez S.A*. v. *The Oliver Drescher*, above. The court held that a finding of prejudice was necessary to support a ruling that a party had waived its right to demand arbitration. The court noted that the party had pleaded its right to demand arbitration at the outset of the case when it filed an answer to the complaint and its cross-claim and participated in discovery and a trial only because the district court had refused to grant its motion for a stay of the action pending London arbitration. According to the Court of Appeals, "waiver may not be inferred on the basis of conduct relating to non-arbitrable issues." 1985 AMC at 2178.

29A.24 In *Thyssen*, *Inc*. v. *Calypso Shipping Corp*. *S.A*., 310 F.3d 102, 2002 AMC 2332 (2d Cir. 2002), *cert*. *denied*, 538 U.S. 922, 123 S.Ct. 1576, 155 L.Ed.2d 312 (2003), the court ruled there was no waiver of the right to arbitrate a cargo damage claim. Suit was filed against the owner in Texas and the action was later transferred to New York. The owner did not refer to the arbitration clause in the answer it filed. Subsequently, the owner moved for a stay pending London arbitration based on an arbitration clause which was incorporated by reference in the bills of lading. The court found no prejudice was suffered by claimant as a result of the owner's delay in demanding arbitration. As a result there was no waiver.

29A.25 See also *Louis Dreyfus Negoce* v. *Blystad Shipping & Trading, Inc*., 2000 AMC 1923, 1936–1937 (S.D.N.Y. 2000), *aff'd*, 252 F.3d 218, 229–230, 2001 AMC 1939 (2d Cir. 2001), *cert*. *denied*, 534 U.S. 1020, 122 S.Ct. 546, 151 L.Ed.2d 423 (2001); *Kaplan* v. *First Options of Chicago*, *Inc*., 19 F.3d 1503, 1510–1512 (3d Cir. 1994).

Compelling arbitration

29A.26 If a demand for arbitration has gone unanswered, or has been rejected by the other party, the claimant may, under Section 4 of the Arbitration Act, file a petition to compel arbitration and, under Section 5, demand that the court appoint an arbitrator on behalf of the defaulting party. Similarly, if the two arbitrators appointed by the parties are unable to agree on a third arbitrator, Section 5 permits the court to fill the vacancy on motion of either party. Where the existence of an agreement to arbitrate is denied, the court, under Section 4, can order a summary trial of the issue. See *Interocean Shipping Co*. v. *National Shipping & Trading Corp*., 462 F.2d 673 (2d Cir. 1972); *Interocean Shipping Co*. v. *National Shipping & Trading Corp*., 523 F.2d 527 (2d Cir. 1975), *cert*. *denied*, 423 U.S. 1054 (1976); *A/S Custodia* v. *Lessin Int'l Inc*., 503 F.2d 318 (2d Cir. 1974). In *Interbras Cayman Co*. v. *Orient Victory Shipping Co. S.A*., 663 F.2d 4, 1982 AMC 737 (2d Cir. 1981) (*per curiam*), the court held that where a party resisting arbitration submits evidence sufficient to raise a genuine issue of fact as to whether it is a party to an arbitration agreement, a summary trial is required. In *U.S. Titan, Inc*. v. *Guangzhou Zhen Hua Shipping Co*., *Ltd*., 241 F.3d 135, 145, 2001 AMC 2080 (2d Cir. 2001), *reh'g en banc denied*, the court held that the issue of arbitrability was tried based only on papers submitted by the parties. The parties did not request an evidentiary hearing.

29A.27 When a petition to compel arbitration is filed under Section 4, the only issues to be decided by the court are whether there is an arbitration agreement and, if so, whether and why one party has failed, refused or neglected to arbitrate. *Conticommodity Services Inc*. v. *Philipp & Lion*, 613 F.2d 1222 (2d Cir. 1980); *Hanskar Shipping Co*. v. *Iron Ore Co*. *of Canada*, 1980 AMC 1249 (S.D.N.Y. 1980). Issues relating to the merits of the underlying claim are left for decision by the arbitrators. As the court put it in *Conticommodity Services*, above:

> [A] court under Section 4 is limited to determining whether a party refused to arbitrate, not whether it rightfully refused. [613 F.2d at 1227.]

29A.28 Thus, for example, questions concerning the timeliness of an arbitration demand are to be decided by the arbitrators. *Conticommodity Services*, above, 613 F.2d at 1226. Accord, *Shearson Lehman Hutton Inc*. v. *Wagoner*, 944 F.2d 114 (2d Cir. 1991); *Soares Financial Group Inc*. v. *Nat'l Assoc*. *of Securities Dealers*, 1994 U.S. Dist. LEXIS 8245 (N.D. Cal 1994); *Mitsubishi Corp*. v. *The Oinoussian Strength*, 1994 U.S. Dist. LEXIS 2625 (S.D.N.Y. 1994), *New Zealand Insur*. v. *The Greenland Rex*, 1991 AMC 21 (S.D.N.Y. 1991).

29A.29 But see *Smith Barney*, *Harris*, *Upham & Co*. v. *Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800 (1995), where the New York Court of Appeals held that by including a New York choice of law clause in an arbitration agreement, the agreement was subject to New York law authorizing judicial resolution of statute of limitations issues. The court relied on *Volt Information Sciences* v. *Board of Trustees of the Leland Stanford Jr*. *University*, 489 U.S. 468 (1989), where the United States Supreme Court stated that where:

> the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that the arbitration is stayed where the Act would otherwise permit it to go forward.

29A.30 If the arbitration clause is broad enough to cover any issues arising under the agreement, however, the Federal Arbitration Act will pre-empt state law on the issue. See *Preston* v. *Ferrer*, 552 U.S.346, 128 S.Ct. 978, 169 L.Ed.2d 917, 2008 U.S. LEXIS 2011 (2008), holding that under broad arbitration clauses the FAA pre-empts any state law giving a judicial or administrative forum jurisdiction to resolve disputes under the agreement in question. In *Preston*, the Supreme Court distinguished its holding from *Volt Information Services*, above, on the basis that *Volt*

accommodated a litigation involving non-signatory third parties who were "strangers" to the arbitrations and the arbitration clause at issue was narrower than the clause in *Preston*.

29A.31 See also *Gov't of India* v. *Cargill*, 867 F.2d 130 (2d Cir. 1989); *Son Shipping Co*. v. *De Fosse & Tanghe*, 199 F.2d 687, 1952 AMC 1931 (2d Cir. 1952), holding that the question whether a claim for cargo damage was time-barred was for the arbitrators to decide when the claim was subject to arbitration; *Trafalgar Shipping Co*. v. *Int'l Milling Co*., 401 F.2d 568, 1969 AMC 1006 (2d Cir. 1968), holding that issues of laches and timeliness of suit are solely for the arbitrator; and *World Brilliance Corp*. v. *Bethlehem Steel Co*., 342 F.2d 362, 364, 1965 AMC 881, 882 (2d Cir. 1965), holding that the issue of whether the right to arbitrate has been lost by laches or waiver is for the arbitrators.

29A.32 In very narrow circumstances, the court may decide whether a demand for arbitration is so untimely that, under the doctrine of laches, it will be barred. See *Conticommodity Services Inc*. v. *Philipp & Lion* above, 613 F.2d at 1226. This will be limited to questions of delay that relate to the issues the court is required to decide under Section 4, namely, the making of an arbitration agreement and the failure, refusal or neglect to arbitrate. For example, if a party shows that its ability to present proof in relation to the demand for arbitration has been prejudiced by the delay of the other in making the demand, it would be within the court's power to determine whether the dilatory party should be permitted to use the Arbitration Act to compel an arbitration. In *Polar Shipping Ltd*. v. *Oriental Shipping Corp*., 680 F.2d 627, 1982 AMC 2330 (9th Cir. 1982), the charter was on the Shelldemise form and contained a clause providing either party with the right to elect London arbitration provided such election was made within 21 days of the receipt of written notice of a dispute. Because arbitration was not demanded within the prescribed time period, the court held that the right to arbitration was lost.

29A.33 It is within the court's power, however, to decide whether the arbitration agreement covers the particular dispute concerning which arbitration is sought. *John Wiley & Sons Inc*. v. *Livingston*, 376 U.S. 543, 546–547 (1964).

29A.34 In 1988 a new section dealing with appeals in arbitration cases was added to the Federal Arbitration Act and is codified as 9 U.S.C. § 16. As the court observed in *Stedor Enterprises Ltd*. v. *Armtex Inc*., 947 F.2d 727, 729 (4th Cir. 1991): "The rules governing the appealability of orders denying or granting motions to compel arbitration have always been somewhat intricate." The 1988 amendments were intended to implement a strong public policy in favor of arbitration. Thus, Section 16 does not allow appeals from interlocutory orders compelling arbitration, although appeals from final orders compelling arbitration are permitted. Orders denying arbitration are appealable, whether interlocutory or final.

29A.35 The distinction between "interlocutory" and "final" orders for the purpose of determining appealability is reasonably clear. If an action is brought for the sole purpose of obtaining an order to compel arbitration of a dispute, an order ruling on the application would be "final" because the court's only function is to rule on the issue of arbitrability. If the demand for arbitration arises in the course of a broader action which involves claims for substantive relief, such as an action for damages for breach of contract, an order directing the parties to arbitrate is considered interlocutory.

29A.36 In *McDermott Int'l Inc*. v. *Underwriters at Lloyd's*, 981 F.2d 744 (5th Cir), *cert. denied*, 508 U.S. 951, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993), the Fifth Circuit, quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945), stated that:

> In determining whether an order affecting arbitration is final or interlocutory, most courts distinguish between arbitration actions that are "independent" and those that are "embedded" among other claims. Generally, if the only issue before the court is the dispute's arbitrability, the action is considered independent and a court's decision on that issue constitutes a final decision.

29A.37 Accord, *Sphere Drake Ins*. v. *Marine Towing Inc*., 16 F.3d 666, 667–668, 1994 AMC 1581, 1583 (5th Cir. 1994), *cert*. *denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127, 1994 LEXIS 6329 (1994); and *Stedor Enterprises* v. *Armtex Inc*., above, and *American Casualty Co*. v. *L-J Inc*., 35 F.3d 133, 135 (4th Cir. 1994).

29A.38 District court orders confirming, vacating or modifying arbitration awards are generally appealable as final orders under Section 16(a)(1)(D) and (E). The rules concerning appeals from district court orders remanding arbitration awards to the arbitrators for correction or modification are less clear. Such orders are generally not appealable because they are interlocutory, depending on what the arbitrator is asked to do. *Landy Michaels Realty* v. *Local 32B–32J*, 954 F.2d 794 (2d Cir. 1992) (district court order remanding the case to arbitration held not appealable) and *CSX Transp*. *Inc*. v. *United Transp*. *Union*, 950 F.2d 872 (2d Cir. 1991) (allowing appeal from a district court order remanding case to arbitration because there was nothing more the arbitrator could properly do).

29A.39 See *Exportkhleb* v. *Maistros Corp*., 790 F. Supp. 70, 1992 AMC 1804 (S.D.N.Y. 1992), *aff'd w/o opin*., 979 F.2d 845, 1993 AMC 608 (2d Cir. 1992), an unusual case in which a shipowner was held to have waived its objection to the arbitrability of a cargo owner's counterclaim. See also *Limonium Maritime S.A*. v. *Mizushima Marinera S.A*., 2000 AMC 343 (S.D.N.Y. 1999), *aff'd w/o opin*., 201 F.3d 431, 2000 AMC 343 (2d Cir. 1999), where the court entered an order compelling arbitration against a corporate party. The court declined to conduct a hearing on the arbitrability of claims against the corporation's alleged *alter egos*. The court ruled that it would conduct a hearing concerning the alter ego claims only after the underlying arbitration against the corporate party was completed.

29A.40 Arbitrators generally conclude that they lack the power to determine whether the parties have agreed to arbitrate. See *Max Agro*, *Inc*. v. *Ferrochem Ltd*., SMA 3940 (Arb. at N.Y. 2006).

29A.41 A closely related issue is whether non-parties to a contract containing an arbitration clause can invoke that clause, or can be bound to the clause. See generally paragraphs 2A.43–2A.52.

Consolidated arbitration

29A.42 There has been a change in the law since prior editions of this book concerning the power of the federal courts to order consolidation of arbitration proceedings. The United States Supreme Court has not ruled on the issue, but the clear majority rule in federal circuit courts of appeal which have considered it is that the district courts may not order consolidation. It remains open to the parties to separate arbitrations to consent to a consolidated proceeding and, in many instances, this is a sensible approach which should be encouraged.

29A.43 There is nothing in the Federal Arbitration Act itself which confers power upon a district court to order consolidation of separate arbitrations which involve common issues of law and fact. Rather, it is a judicially created doctrine. The purposes of consolidation were summarized by Judge Haight:

> [T]he consolidated arbitration is a pragmatic procedural tool of the equity court, fashioned to deal with multi-party and mult-contract cases where to permit several arbitrations would bring about a clear and present danger of conflicting findings and resulting injustice.
>
> [*Re Transportacion Maritima Mexicana S.A*., 636 F. Supp. 474, 476 (S.D.N.Y. 1983).]

29A.44 The classic example of a situation where consolidation is useful to all concerned is when the ship has been sub-chartered and an occurrence gives rise to claims under all the charters in the chain.

29A.45 Prior to the decision in *Government of the United Kingdom of Great Britain* v. *Boeing*

Co., 998 F.2d 68, 1993 AMC 2913 (2d Cir. 1993), the rule followed in New York had been that the federal district courts had power to order consolidation of separate arbitrations which involved common issues of law and fact. There was a split among the circuit courts of appeal on this issue, with the majority of circuits holding that district courts lack the authority to order consolidation over the objection of a party to the arbitration agreement, when the arbitration clause of the parties' agreement is silent regarding consolidation. See *American Centennial Ins. Co*. v. *National Casualty Co*., 951 F.2d 107 (6th Cir. 1991); *Baesler* v. *Continental Grain Co*., 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins*. v. *Lincoln Nat'l Life Ins*., 873 F.2d 281 (11th Cir. 1989); *Del E. Webb Constr*. v. *Richardson Hosp. Auth*., 823 F.2d 145 (5th Cir. 1987); *Weyerhaeuser Co*. v. *Western Seas Shipping Co*., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).

29A.46 With its ruling in *Boeing*, the Second Circuit adopted the majority rule in prohibiting consolidation of arbitration proceedings arising from separate arbitration agreements without unanimous consent among the parties. The First Circuit, however, has so far adhered to the view that district courts may consolidate arbitrations. See *New England Energy Inc*. v. *Keystone Shipping Co*., 855 F.2d 1, 1989 AMC 537 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

29A.47 In joining the majority, the Second Circuit substantially overruled its decision in *Compania Espanola de Petroleos S.A*. v. *Nereus Shipping S.A*., 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). In *Compania*, the Second Circuit had upheld the power of a district court to consolidate, stating that the "liberal purposes of the Federal Arbitration Act clearly required that this Act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases." 527 F.2d at 975.

29A.48 In *Boeing*, the Second Circuit reversed the judgment of the district court which granted the United Kingdom's Petition to Compel Consolidated Arbitration. In doing so, it based its decision upon a review of Supreme Court decisions since *Nereus* which concluded that the Federal Arbitration Act intended to ensure the enforcement of privately negotiated arbitration agreements strictly in accordance with their terms, despite potential inefficiencies created by such enforcement. See *Volt Info. Sciences* v. *Board of Trustees*, 489 U.S. 468, 478–479 (1989); *Dean Witter Reynolds Inc*. v. *Byrd*, 470 U.S. 213, 217–219 (1985); *Moses H. Cone Memorial Hosp*. v. *Mercury Constr. Corp*., 460 U.S. 1, 20 (1983). Stating that these Supreme Court cases "have undermined our interpretation of the purposes of the FAA," 527 F.2d at 72, the Second Circuit held that *Nereus* was no longer good law to the extent that it is based on the Federal Rules of Civil Procedure and the "liberal purposes" of the Federal Arbitration Act. The Second Circuit left its holding in *Nereus* undisturbed, however, "to the extent it is based on the general equitable powers of the court and principles of contract law." 527 F.2d at 74. It remains to be seen whether the courts will find this statement to be an opening to order consolidation in circumstances different than those presented in *Boeing*.

29A.49 For post-*Boeing* Second Circuit district court cases, see, e.g., *North River Ins. Co*. v. *Philadelphia Reinsurance Corp*., 856 F. Supp. 850 (S.D.N.Y. 1994) (vacating award), and *Active Glass Corp*. v. *Architectural and Ornamental Iron Workers Local Union*, 580, 875 F.Supp. 245, 1995 U.S.Dist. LEXIS 1500 (S.D.N.Y. 1995) (denial of multiparty arbitration request).

29A.50 In *The Denise C*, SMA 3976 (Arb. at N.Y. 2007)(Busch, Martowski, Szostak), the panel declined to consolidate two arbitrations relating to damage to the ship's crane in the absence of agreement among the parties to do so.

29A.51 In response to *Boeing*, the Rules of the Society of Maritime Arbitrators ("SMA") were changed to allow consolidated arbitration by agreement.

29A.52 In *The Elise Schulte*, SMA 3918 (Arb. at N.Y. 2006), the panel concluded that it could not consolidate a head order's claims with a dispute that was already pending between the disponent owner and charterer. The two charterparties did not incorporate SMA Rules. The panel ruled that

the other parties' acquiescence to the application of SMA Rules to their dispute did not make the SMA Rules applicable with respect to the claim asserted by the head owner.

29A.53 An alternative to consolidation was utilized in *The Kostas Melas*, 1988 AMC 68 (S.D.N.Y. 1983). Disputes arose between the owner and charterer which were subject to arbitration before a panel constituted in accordance with the Rules of the Society of Maritime Arbitrators. A further dispute arose out of the same voyage between the charterer and the supplier of a grain cargo under a grain supply agreement. The grain supply agreement called for arbitration before the Grain Arbitration Panel of the American Arbitration Association. The court rejected the charterer's motion for a consolidated arbitration, but granted an order directing that the arbitration proceedings be conducted jointly. In its order, the court outlined a procedure to be followed by the prospective arbitration panels in conducting the hearings.

Class action arbitrations

29A.54 See discussion at paragraph 2A.52, above concerning class action arbitrations.

Appointment of arbitrators or umpire

29A.55 In certain circumstances which are enumerated in Section 5 of the Arbitration Act, the court has the power to appoint an arbitrator. Where the arbitration agreement itself provides for a method of appointing arbitrators, under Section 5 the court is obliged to follow the contract. The same is true if a vacancy arises in the arbitration panel due to death or other reasons. Where the agreement does not provide a method for the appointment of arbitrators, the court is to appoint a single arbitrator. See *Ore & Chem. Corp*. v. *Stinnes Interoil Inc*., 611 F. Supp. 237, 240–241 (S.D.N.Y. 1985).

29A.56 A particularly difficult issue arises in the case of the death of a party appointed arbitrator during the course of the arbitration. In *Marine Products Export Corp*. v. *The Globe Galaxy*, 1987 AMC 2310 (S.D.N.Y. 1987), *later proceedings*, 1992 AMC 1336 (S.D.N.Y. 1992), *aff'd*, 977 F.2d 66, 1993 AMC 190 (2d Cir. 1992), a dispute arose under a charter which provided for arbitration by "arbitrators experienced in the shipping business" with each side to appoint one arbitrator. The clause further stated "the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an admiralty lawyer." When disputes arose, both sides duly appointed their arbitrator and a chairman was appointed to serve as umpire. During the course of the arbitration, one of the party appointed arbitrators died. The party who had appointed the deceased made a motion to the district court under Section 5 for an order directing the parties to appoint new arbitrators and to commence the arbitration again from the beginning. According to the court, as provided in Section 5 of the Arbitration Act, there was a "lapse" in "filling the vacancy" on the panel due to the parties' disagreement as to what should happen following the death of the party appointed arbitrator. The court stated:

> Parties cannot be compelled to arbitrate commercial disputes unless they have agreed in a binding contract to do so. By the same token, they cannot be compelled to arbitrate in a manner contrary to their express agreement.

Thus, the district court ordered the parties to make new appointments of arbitrators and that the arbitration proceedings be started afresh and proceed "under the terms and conditions of the arbitration agreement." 1993 AMC at 192, citing 1987 AMC at 2314.

29A.57 After an unsuccessful appeal on this issue by the plaintiff, a new arbitration panel was appointed. After issuing an award in favor of the defendant, the plaintiff moved in the district court

for an order vacating the award, seeking an order reinstating the two surviving original arbitrators with the plaintiff to appoint one new arbitrator and requiring the dispute to be resolved by the original panel. 1993 AMC at 192.

29A.58 The plaintiff's motion was based primarily on the then recent decision in *Trade & Transport Inc*. v. *Natural Petroleum Charters Inc*., 931 F.2d 191 (2d Cir. 1991), where the Second Circuit affirmed the district court's order approving the replacement of an arbitrator who had died after the panel had made a unanimous ruling on liability, but before a ruling on damages was made. The arbitration agreement in that case was silent as to the method for replacing a deceased arbitrator. The award as to liability was considered a final decision on that issue, and the Second Circuit reasoned that, based on the principle of "*functus officio*," the panel's authority over that issue had ceased. Therefore, under the special circumstances of that case, the Second Circuit found that the district court could properly approve a replacement arbitrator to consider only the issue of damages, rather than appoint an entirely new panel to begin the entire arbitration anew.

29A.59 In *The Globe Galaxy*, on appeal from the district court's denial of the plaintiff's motion to reinstate, the Second Circuit held that the district court did not exceed its authority in requiring the parties to begin the arbitration anew after the death of the plaintiff's chosen arbitrator because, unlike the situation in *Trade & Transport*, there were no circumstances justifying deviation from the general rule that if one member of a panel dies before the panel issues an award, a new arbitration must commence with an entirely new panel.

29A.60 The problem which arose in *The Globe Galaxy*, above, can be avoided by incorporating in the charterparty or any written submission agreement the rules of the Society of Maritime Arbitrators which include a provision for the appointment of a replacement arbitrator in the event of a vacancy.

29A.61 See *Cargill* v. *Empresa Nicaraguense Dealimentos*, 25 F.3d 223 (4th Cir. 1994), where the Fourth Circuit vacated an arbitration award which was granted by arbitrators not chosen by mutual agreement of the parties.

"Commercial Men"

29A.62 Clause 17 of the New York Produce form requires that the arbitrators be "commercial men." Other charter forms are less restrictive and allow the appointment of attorneys. The question what is meant by "commercial men" has proved to be more difficult than might have been expected. We submit, however, that in this day and age the better term would be "commercial person," as there obviously would be no reasonable basis to contest the appointment of an arbitrator based on gender.

29A.63 In *W. K. Webster & Co*. v. *American President Lines Ltd*., 32 F.3d 665, 1995 AMC 134 (2d Cir. 1994), the court held that a person can be a "commercial man" and a lawyer at the same time. In doing so, the court expressed its disagreement with the holding in *Aramco Servs*. *Co*. v. *EAC Bulk Transp*. *Inc*., 1993 AMC 1885, 1886 (Fla. 1993), which held that "[a] 'commercial man' could be anyone employed in or familiar with, the commercial shipping industry." Although both cases conclude that the challenged arbitrator is not disqualified simply because he is a practising lawyer, the *Webster* court disagreed with the *Aramco* holding to the extent the latter holds that familiarity with the industry gained from law practice is sufficient to qualify one as a "commercial man." Instead, the Second Circuit adopted the distinction made in *Pando Compania Naviera S.A*. v. *Filmo S.A.S*. [1975] 1 Lloyd's Rep. 560 (Q.B.), which excludes persons whose experience is *solely* as a lawyer. *Webster*, 32 F.2d at 668. Lawyers who have acquired the necessary practical experience on the commercial side of the maritime industry, however, would be qualified as "commercial men" according to *Pando* and *Webster*.

Pre-arbitration discovery

29A.64 The court generally will decline to grant pre-trial discovery when the parties have agreed to arbitrate the dispute. See *Hay Group*, *Inc*. v. *E.B.S. Acquisition Corp*., 360 F.3d 404, 407 (3d Cir. 2004); *COMSAT Corp*. v. *Nat'l Science Found*., 190 F.3d 269, 275 (4th Cir. 1999); *Odfjell Asa* v. *Celanese AG*, 328 F. Supp. 2d 505, 507, 2005 AMC 18 (S.D.N.Y. 2004). In certain exceptional circumstances, however, the courts have allowed pre-trial discovery to proceed even though the dispute was to be arbitrated. In *Koch Fuel* v. *South Star*, 1988 AMC 1226 (E.D.N.Y. 1987), the charterer contended that the shipowner had converted part of the cargo of fuel oil. The charterer's claim was subject to London arbitration under the charter. Because the ship was about to leave port and it was believed that crew members having knowledge of facts related to the alleged conversion would be unavailable to act as witnesses in the London arbitration, the court granted the charterer's application for leave to take depositions in conjunction with its action to arrest the ship for security in aid of the London arbitration. The court found that the circumstances relating to the likely unavailability of witnesses were exceptional enough to permit its intervention to order depositions.

29A.65 See also *Oriental Commercial & Shipping* v. *Rosseel N.V*., 125 F.R.D. 398 (S.D.N.Y. 1989); *In the Matter of Deiulemar Di Navigazione S.p.A*., 1994 AMC 2250 (E.D. La. 1994).

29A.66 In *In re Meridian Bulk Carriers*, *Ltd*., 2003 AMC 2532, 2533 (E.D. La. 2003), the court refused to compel testimony and evidence relating to the grounding of a ship in Columbia under Rule 27 of the Federal Rules of Civil Procedure. Because the charterparty required arbitration, the court ruled that it was "highly unlikely" that the petitioners would become parties to a United States action, a necessary requisite for relief under Rule 27. In contrast, in *In re Compania Chilena de Navegacion*, 2004 AMC 443, 447 (E.D.N.Y. 2004), the court concluded that Rule 27 allowed for pre-arbitration depositions, reasoning "that to allow this discovery to proceed would ultimately aid the arbitration and that if this testimony is not perpetuated, there may be a delay or a denial of justice here."

29A.67 Section 7 of the Act authorizes arbitrators to summon "any person" to provide testimony or other evidence and provides for the compulsion of uncooperative witnesses in a United States District Court. See 9 U.S.C. § 7. In *Stolt-Nielsen SA* v. *Celanese Chemicals Europe GmbH*, 430 F.3d 567, 2005 AMC 2777 (2d Cir. 2005), where the Court of Appeals for the Second Circuit held that an arbitration panel can subpoena and compel testimony and production of records from non-parties at an arbitration hearing. The arbitration at issue involved a dispute between different groups of chemical carriers concerning alleged price fixing. The claimants asked the panel to issue subpoenas to a non-party chemical company and its attorneys. The non-parties petitioned the panel to quash the subpoenas, but the United States District Court for the Southern District of New York ordered the non-parties to comply. The Second Circuit affirmed and held that non-parties may be compelled to testify and produce documents before an arbitration panel.

Disputes subject to arbitration

29A.68 Because the right to arbitrate is created by contract, the parties are free to make the arbitration agreement as broad or narrow as they wish, subject only to public policy limitations. Perhaps the most striking examples of this latitude are cases in which the parties have agreed to arbitrate disputes over the existence of an arbitration agreement.

29A.69 In *First Options of Chicago Inc*. v. *Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), *aff'g*, 19 F.3d 1503 (3d Cir. 1994), the United States Supreme Court affirmed the Court of Appeals' judgment that individual investors did not consent to arbitration, and did not waive

their jurisdictional objections by participating in arbitration. In doing so the court held that the Court of Appeals was correct in finding that the issue of arbitrability was subject to independent review by the courts. In this case, in addition to disagreeing about whether or not they had agreed to arbitrate the merits of their dispute, the parties disagreed on whether the arbitrator had the power to decide the arbitrability of their dispute. The court cautioned that in deciding whether parties have agreed to submit an arbitrability issue to arbitration, courts should not assume that parties agreed to this without clear and unmistakable evidence of such agreement. If the parties agreed to arbitrate arbitrability, the arbitrator's decision should be set aside in only "certain narrow circumstances." If the parties did not agree to arbitrate arbitrability, then courts should decide this issue just as they would decide any other issue which the parties did not submit to arbitration. Emphasizing once again that the basic objective of arbitration law is to enforce the contract according to the intentions of the parties, the court stated that arbitrators may decide only those disputes which the parties agreed to resolve by arbitration, nothing less and nothing more. See also *BS Sun Shipping Monrovia* v. *Citgo Petroleum Corp*., 509 F. Supp. 2d 334, 346, 2007 AMC 2544 (S.D.N.Y. 2007) (where a voyage charter made by the time charterer inadvertently named the head owner as a party, the owner was not obligated to arbitrate).

29A.70 The language used in the New York Produce form, "any dispute. . . between owners and charterers," has been broadly construed. *Re Canadian Gulf Line*, 1938 AMC 1123, 98 F.2d 711 (2d Cir. 1938); *Caribbean Steamship Co. S.A.* v. *Sonmez Denizcilik ve Ticaret A.S.*, 598 F.2d 1264, 1979 AMC 1270 (2d Cir. 1979). The clause, of course, covers any disputes between the owner and charterer concerning their respective rights and obligations under the charter. In addition to contractual disputes, it has been held to cover other disputes arising by operation of law.

29A.71 In *Boyle* v. *Rederij Shipmair VI*, 1979 AMC 2844 (E.D. Pa. 1979), a longshoreman brought an action against the owner for personal injuries he sustained while he was assisting in loading cargo. The owner impleaded the charterer, who, in turn, moved for a stay pending arbitration of the indemnity claims asserted against it by the owner. The owner opposed the motion for arbitration on the grounds that its claims against the charterer for indemnity and/or contribution arose not out of the charter but by reason of duties and obligations imposed by operation of law. The court held that the claims were subject to arbitration, and stated:

> . . . [T]he broad language of the arbitration clause covers the present dispute between the vessel owner and the charterer. Since the provision expressly applies to any dispute, the arbitration clause is not limited to purely contractual disputes but also covers those arising out of operation of law. [1979 AMC at 2845–2846.]

29A.72 In *Caribbean Steamship Co. S.A.* v. *Sonmez Denizcilik ve Ticaret A.S.*, above, the court held on the "unusual set of circumstances" presented that the owner was required to arbitrate with the charterer a subrogated cargo claim it obtained by assignment from the insurer of its parent company. The facts were that the owner chartered the ship to Caribbean, and the ship loaded cargo which was owned by Caribbean's parent company, Reynolds. In the course of the voyage, the ship sank and there was a total loss of cargo. Reynolds did not have an arbitration agreement with the owner, and the court held that it could not "pierce its own subsidiary's corporate veil" and demand arbitration with the owner under the charter with Caribbean. Reynold's subrogated insurer, however, assigned the cargo claim to Caribbean. Under the terms of the assignment, any recovery made by Caribbean was to be for the account of its assignor, the insurer. Having obtained this "assignment," Caribbean then demanded arbitration with the owner, and the court held that it was entitled to do so.

29A.73 The court stated that the charterer could not force the owner to arbitrate Reynold's cargo claim. As the court observed:

One cannot make an arbitrable claim out of a non-arbitrable one by assigning it to a person having a broad "any dispute" arbitration contract with the party against whom the claim lies, at least in the absence of evidence showing that the parties to the arbitration contract intended such a result. [1979 AMC at 1273.]

29A.74 The court, however, went on to find that there was a "dispute" between the owner and charterer which was subject to arbitration. According to the court, by accepting the assignment from the insurer, the charterer caused what was "in effect, a claim for indemnity to be somewhat accelerated." While the charterer had not been held liable to Reynolds for the cargo loss, the court concluded that in the circumstances, its claim against the owner was sufficiently akin to a true indemnity claim that it was entitled to arbitrate it with the owner, subject, of course, to whatever defenses the owner might have.

29A.75 *Caribbean Steamship Co*. was certainly an unusual case and, for this reason, it may be of limited significance as a precedent. If nothing else, however, it plainly demonstrates the strong policy followed by the court in resolving doubts in favor of arbitration.

29A.76 In *Halcot Navigation Ltd. Partnerhship* v. *Stolt-Nielsen Transportation Group*, *BV*, 491 F. Supp. 2d 413, 415, 2007 AMC 1660 (S.D.N.Y. 2007), the owner sought to vacate an arbitration award on the ground that it was not bound by the arbitration agreement contained in a sub-charter. The panel refused to consider the owner's claim. According to the court, the owner waived the right to oppose the award when it asked the panel to determine the issue, rather than "forcefully objecting" to the arbitrators' authority to decide the issue, as was the case in *First Options*.

29A.77 In *Stolt-Nielsen Transportation Group B.V*. v. *Edible Oil Trading Corp*., 2007 AMC 946, 952–953 (S.D.N.Y. 2007), the court declined to confirm an arbitration award issued on the ground that the respondent was not a party to the agreement to arbitrate. In that case, the respondent had refused to appoint an arbitrator or to otherwise participate in the arbitration, but it had not specifically objected to the arbitrators' authority.

29A.78 The courts have struggled with charterparties that provide that "Arbitration, if any" will proceed in a specified location, but most have concluded that the clause requires arbitration. Compare *Usinor Steel Corp*. v. *M/V Marilis T*, 2005 AMC 338, 343 (D. Minn. 2004) and *Usinor Steel Corp*. v. *M/V Koningsborg*, 2004 AMC 438, 441 (S.D.N.Y. 2004) with *Eurosteel Corp*. v. *M/V Millennium Falcon*, No. 01 C 8817, 2002 U.S. Dist. LEXIS 15905, *7–8, 2002 WL 197226 (N.D. Ill. Aug. 26, 2002).

Abandonment of arbitration

29A.79 The failure to prosecute an arbitration can result in an award dismissing the claim on the grounds of abandonment. In *The Marathon*, SMA 2425 (Arb. at N.Y. 1987), the arbitrators granted an award dismissing an arbitration with prejudice against the party who initiated it because of its failure to prosecute the claim over a period of 13 years. While the delay involved in *The Marathon* was extraordinary, the principle established by the decision is sound and certainly applicable to delays in prosecution of shorter time periods depending upon the facts of each case. Claims were also dismissed for lack of prosecution in *The Agios Nikolaos III*, SMA 2540 (Arb. at N.Y. 1988), *The Archangelos III*, SMA 2541 (Arb. at N.Y. 1988), and *The Rafael*, SMA 3579 (Arb. at N.Y. 1999). In *The Commuter*, SMA 3949 (Arb. at N.Y. 2006), the panel awarded fees and costs to the owner after the charterer failed to prosecute its claim in arbitration. The panel had previously issued an interim award directing the charterer to pay withheld hire to the owner, and the charterer had thereafter abandoned its pursuit of the arbitration.

29A.80 In *The Pharos*, SMA 3972 (Arb. at N.Y. 2007)(Hearn, Arnold, Siciliano), the panel dismissed charterer's claim for failure to prosecute. The arbitration commenced in 1999, but by

2007, the charterer had failed to produce documents requested in 1999. In addition, the charterer's counsel withdrew in 2006 because it had received no instructions for over two years.

Power to award interest, fees and costs

29A.81 It has been held that arbitrators have inherent power to award interest and may, in their discretion, set the rate of interest at an amount which exceeds statutory limits for interest on judgments. *Finagrain Compagnie Commerciale Agricole et Financiere S.A*. v. *Federal Commerce & Navigation* (1974) *Ltd*., 80 Civ. 0839 (S.D.N.Y., 3 September 1980) (*slip opinion*). In that case, the court held that an award of interest at the rate of 17 per cent was within the power of the arbitrators.

29A.82 In *Re Telfair Shipping Co*. v. *Institute Rio*, 1978 AMC 1120 (S.D.N.Y. 1978), the court confirmed an award allowing interest at the rate of 8.5 per cent. In *Oceania Shipping Corp*. v. *Thos. P. Gonzalez Corp*., 442 F.Supp. 997 (S.D.N.Y. 1977), an award of 8 per cent interest was upheld. In *Peoples' Security Life Insur*. v. *Monumental Life Insur*., 991 F.2d 141 (4th Cir. 1993), pre-award interest at the rate of 7 per cent was allowed.

29A.83 In *M/T Perla*, SMA 4152 (Arb. at N.Y. 2011)(Blake, Textor, Siciliano), Charterer sought 9 per cent interest on the grounds that that was the New York statutory rate; however, the Panel rejected this and instead ruled that interest should only be at prevailing prime rates. On the other hand, in *The M/T Liberia*, SMA No. 4153 (Arb. At N.Y. 2011)(Ring, Fox, Frost), the Panel rejected Petitioner's claim for 11.60% interest but held that interest at 9%, based on reference to New York C.P.L.R. § 5004, was appropriate.

29A.84 In *The Horizon Edge*, SMA 4011 (Arb. at N.Y. 2008)(Berg, Martowski, Szostak), the panel awarded the owner damages for the charterer's premature termination of the charter. The damages awarded included pre- and post-award interest, and the panel noted: "It is customary for arbitrators acting under the auspices of the SMA Rules to award interest at the average prime rate on principal amounts for periods relevant for the contract under dispute." Thus, pre-award interest was allowed based on the average prime-rate. The panel also awarded post-award interest at the rate of 5.00 per cent per annum.

29A.85 Arbitrators have power to order the parties to bear the costs of the proceeding, and may direct whatever apportionment of the costs they consider fair in the circumstances of the case. In *Oceania Shipping Corp*. v. *Thos. P. Gonzalez Corp*., above, the court upheld an award where costs were apportioned 75 per cent to one party and 25 per cent to the other.

29A.86 There has been a significant change in the law concerning the power of arbitrators to award attorneys' fees in the absence of an express clause giving them this power. Older cases discussed in prior editions of this book held that unless the arbitration clause so provided, the arbitrators had no authority to award attorneys' fees. The United States Court of Appeals for the Second Circuit held in *Painewebber Inc*. v. *Bybyk*, 81 F.3d 1193 (2d Cir. 1996), however, that arbitrators have authority under the Federal Arbitration Act to include an allowance for attorneys' fees in their award, even if there is no express provision to this effect in the arbitration clause.

29A.87 Arbitrators in New York have taken this development to heart and now it is common for New York awards to include awards of attorneys' fees to the prevailing party.

29A.88 See *Atlantic Power*, SMA 3886 (Arb. at N.Y. 2005); *M/V Kandalaksha*, SMA 3883 (Arb. at N.Y. 2005) ("It is also well-established that even though an arbitration clause does not specifically provide for the awarding of attorneys' fees, the panel has discretion to do so in cases . . . where both parties have requested such relief. . .").

29A.89 One panel explained this change of approach as follows:

We agree that the COA does not specifically address the issue of the Panel's authority to award attorneys' fees. While the lack of such explicit authority until recently has generally been considered to preclude an allowance for fees, both the law and relevant public opinion have been changing. Firstly, the *Bybyk* decision provides arbitrators with a firm and straightforward legal basis to make such an allowance should they consider it appropriate. Secondly, there is a growing ground swell of support within both the maritime commercial and legal communities for the proposition that the prevailing party in arbitration is entitled to compensation for legal fees incurred. The latter is based on the recognition that an allowance for attorneys' fees to the prevailing party is compensatory, rather than punitive, in its nature. The cost of legal representation is part and parcel of most arbitral proceedings these days, and it serves no appreciable purpose to exclude it from the final accounting.

Jebsen Carriers Ltd. v. *Gravetal Bolivia S.A*., SMA No. 3525 [Arb. at N.Y. 1999].

29A.90 For examples of cases awarding fees, see *The M/V Rubin Ace*, SMA No. 3646 (Arb. at N.Y. 2000); *The Independence*, SMA 3099 (Arb. at N.Y. 1994); *The Aristidis*, SMA 3686, 2001 AMC 1954 (Arb. at N.Y. 2001); *The Adamastos*, SMA 3416 (Arb. at N.Y. 1998); *The Olympic Sponsor*, SMA 3711 (Arb. at N.Y. 2001); and *The Punica*, SMA 3513 (Arb. at N.Y. 1999). See also *IMC Maritime Group*, *Inc*. v. *Russian Farm Community Project*, 2005 AMC 440, 447 (S.D.N.Y. 2004), where the court confirmed the arbitrators' award of fees, but declined to award fees for the confirmation proceedings pursuant to the American Rule.

29A.91 Where the court confirming the award has never obtained *in personam* jurisdiction over the defendant, and instead is acting *in rem*, one court held that arbitrators do not have the power to award attorney's fees, and that any fee award made is subject to *vacatur*. See *Offshore Marine Towing*, *Inc*. v. *MR23*, 412 F.3d 1254, 1258, 2005 AMC 1800 (11th Cir. 2005).

Punitive damages

29A.92 There is nothing in the Federal Arbitration Act itself which expressly empowers arbitrators to award punitive damages. Rather, the courts which have so held have found the arbitration agreement at issue in the particular case before them broad enough to include punitive damage claims. *Raytheon Co*. v. *Automated Business Systems Inc*., 882 F.2d 6 (1st Cir. 1989), holding that commercial arbitrators have the power and authority to award punitive damages pursuant to a general contractual arbitration clause which does not expressly provide for such award; *Baravati* v. *Josephthal*, *Lyon & Ross Inc*., 28 F.3d 704 (7th Cir. 1994) (arbitration under the rules of the American Arbitration Association); *Todd Shipyards Corp*. v. *Cunard Lines Ltd*., 943 F.2d 1056, 1992 AMC 328 (9th Cir. 1991); *Bonar* v. *Dean Witter Reynolds Inc*., 835 F.2d 1378 (11th Cir. 1988); and *Willoughby Roofing & Supply Co*. v. *Kajima International*, 598 F. Supp. 353 (N.D.Ala. 1984), *aff'd per curiam*, 776 F.2d 269 (11th Cir. 1985).

29A.93 Punitive damages have been awarded under the general maritime law in cases involving maritime torts and for breach of contract where the conduct constituting the breach was also a tort. See generally *Thyssen Inc*. v. *The Fortune Star*, 777 F.2d 57, 1986 AMC 1318 (2d Cir. 1985); *Protectus Alpha Navigation Co. Ltd*. v. *North Pacific Grain Growers Inc*., 767 F.2d 1379, 1986 AMC 56 (9th Cir. 1985); *Muratore* v. *The Scotia Prince*, 663 F. Supp. 484, 1988 AMC 859 (D.Me. 1987). Punitive damages must conform to a "due process" framework developed by the federal courts, which particularly looks at the ratio between actual damages and punitive damages and the reprehensibility of the defendant's conduct. See generally *State Farm Mut. Auto. Ins. Co*. v. *Campbell*, 538 U.S. 408 (2003). In addition, there are United States statutes which might apply in an arbitration and which provide for awards of punitive or exemplary damages.

29A.94 The United States Supreme Court considered the issue of punitive damages under the general maritime law in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), a case involving the 1989 Exxon Valdez oil spill in Alaska. The plaintiffs were awarded $507.5 million in compensatory

damages and $5 billion in punitive damages. After two remands, the Ninth Circuit Court of Appeals remitted the punitive award to $2.5 billion. On appeal, the Supreme Court considered three questions: (1) whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents; (2) whether the Clean Water Act forecloses the award of punitive damages in maritime spill cases; and (3) whether the punitive damages awarded against Exxon were excessive as a matter of maritime law. On the first question, the court was evenly divided, and thus the Ninth Circuit's ruling that punitive damages could be premised on the acts of managerial agents was left undisturbed, but with the express admonition that the disposition "is not precedential on the derivative liability question." *Id*. at 484. On the second issue, the court ruled that the Clean Water Act did not preclude an award of punitive damages. On the third issue, the court exhaustively analyzed cases and state models for punitive damages awards and concluded that, under maritime law, the ratio between compensatory and punitive damages should not exceed 1:1. *Id*. at 513. Consequently, the court remanded the matter to the lower court to remit the award accordingly.

29A.95 The parties to an arbitration agreement may certainly limit the power of the arbitrators to award punitive damages. Where there is a broad arbitration agreement such as the one in the printed New York Produce form, however, there is no reason to suppose that the scope of relief available to a claimant is any less broad than the governing law itself.

29A.96 In *The Octonia Sun*, 1988 AMC 832 (Arb. at N.Y. 1987), a sole arbitrator awarded the claimant punitive damages where he found that the owner's conversion of cargo was "part and parcel of an ongoing practice of diverting cargo to ship's bunkers. Such conduct cannot and should not be considered acceptable practice and, in fact, should be vigorously condemned."

29A.97 In *The Ellis Pontos*, SMA 2116 (Arb. at N.Y. 1985), the panel declined to award punitive damages but appears to have assumed that it had power to award them. Similarly, in *The Kapetan Antonis*, 1989 AMC 551 (Arb. at N.Y. 1988), the arbitrators stated that they had power to award punitive damages, but declined to exercise it.

29A.98 If the arbitration agreement is governed by New York State law, arbitrators are not permitted to award punitive damages. *Garrity* v. *Lyle Stuart Inc*., 40 N.Y.2d 354, 386, N.Y.S.2d 831 (1976).

29A.99 See *Fahnestock & Co*. v. *Waltman*, 935 F.2d 512 (2d Cir. 1991), *cert. denied*, 502 U.S. 942 (1991), and *cert. denied*, 502 U.S. 1120 (1992), *later proceeding* 792 F. Supp. 31 (E.D. Pa. 1992), *aff'd without opinion*, 989 F.2d 490 (3d Cir. 1993), and *Barbier* v. *Shearson Lehman Hutton Inc*., 948 F.2d 117 (2d Cir. 1991). In both cases, the Second Circuit held that the arbitrators exceeded their authority under 9 U.S.C. § 10(a)(4) in awarding punitive damages where the parties chose New York law. Finding no conflict between the Federal Arbitration Act and the rule pronounced in *Garrity*, the Second Circuit noted in both cases that "state law relating to the propriety of a punitive damages award by arbitrators in the absence of an agreement on the subject is not pre-empted by any federal substantive law bearing on the subject." *Fahnestock*, 935 F.2d at 518; *Barbier*, 948 F.2d at 121.

29A.100 In the light of the conflicting decisions on the issue of "whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper," the United States Supreme Court reviewed the question in *Mastrobuono* v. *Shearson Lehman Hutton Inc*., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). Because *Mastrobuono* involved securities law, it is submitted that the same rule should apply in charterparty cases governed by the general maritime law.

29A.101 In *Mastrobuono*, petitioners alleged that their securities trading account had been mishandled by respondent brokers. The arbitration panel awarded petitioners punitive damages in the amount of $400,000 and compensatory damages in the amount of $159,327. On review,

the district court and the Court of Appeals disallowed the punitive damages award because of the *Garrity* rule. The Supreme Court reversed, holding that the New York choice-of-law provision was not ". . . in itself, an unequivocal exclusion of punitive damages claims." 115 S.Ct. at 1212. When viewing the arbitration clause, including the NASD's Code of Arbitration Procedure and a manual provided to NASD arbitrators which addressed punitive damages, the court found that it contradicted the conclusion that the parties agreed to foreclose claims for punitive damages. Thus, as the court saw it, "the best way to harmonize the arbitration and choice of law provisions is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice of law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." 115 S.Ct. at 1219.

Specific performance

29A.102 The panel in *Jim Walter Resources*, *Inc*. v. *Oldendorff Carriers GmbH & Co*., SMA 3931 (Arb. at N.Y. 2006), issued a partial final award requiring the owner to specifically perform a contract of affreightment by agreeing with the charterer on appropriate laycan dates within 90 days of the award. The charterer had requested that the panel award either money damages or specific performance, while the owner had maintained that specific performance was not available because the charterer had an action for money damages available to it. The panel concluded that, by virtue of the Rules of the Society of Maritime Arbitrators, it had the authority to award specific performance. The panel considered it appropriate to award specific performance because the charterer's own damages were "a not yet quantified contingent claim from its down-line contract partner," which claim could be mitigated by performance of the balance of the contract of affreightment.

29A.103 With regard to enforcement, the panel retained jurisdiction and stated in its decision that in the event the owner failed to timely nominate substitute ships, the charterer would be permitted to arrange its own transportation and to then recover all "reasonable" costs in excess of the freight rate provided under the contract of affreightment. After the owner failed to nominate substitute ships with laycans acceptable to the charterer, the panel ordered the owner to nominate ships with laycans in narrowly defined date ranges (e.g. the last half of December 2006). Again, the panel stated that the charterer could arrange transport on its own and recover the difference in costs in the event the owner failed to nominate ships within the designated laycans. See *Jim Walter Resources*, *Inc*. v. *Oldendorff Carriers GmbH & Co*., SMA 3950 (Arb. at N.Y. 2006).

Security in aid of award

29A.104 One of the more important features of U.S, maritime arbitration law is contained in Section 8 of the Arbitration Act, which permits a claimant to obtain security for his claim by arresting or attaching the ship or other property of the defendant. Arrest or attachment of the defendant's property gives the court jurisdiction to order arbitration, and to retain jurisdiction over the parties to enter a decree on the arbitration award. In the usual Section 8 case, the action is commenced by "process of maritime attachment" or an arrest of the ship, cargo or freight. It has been held, however, that state law attachment may also be used to initiate a Section 8 action. See *Murray Oil Products Co*. v. *Mitsui & Co*., 146 F.2d 381 (2d Cir. 1944). Thus, Section 8 permits attachment for the dual purpose of providing the aggrieved party with security for its claim and giving the court jurisdiction over the defendant to order it to proceed to arbitration. See *The Anaconda* v. *American Sugar Refining Co*., 322 U.S. 42 (1944); *Schoenamsgruber* v. *Hamburg*

American Line, 294 U.S. 454 (1935); and *The Belize*, 25 F. Supp. 663 (S.D.N.Y. 1938), *appeal dismissed*, 101 F.2d 1005 (2d Cir. 1939). In the latter case, the court summarized the purpose of Section 8 in the following way:

> The purpose of Section 8 is to give an aggrieved party in a maritime controversy the benefit of jurisdiction *in rem* or by foreign attachment and at the same time to save his right to an arbitration. . . . Under this section, libel and seizure of a vessel or other property may be the initial step in a proceeding to enforce an agreement for arbitration. . . .A person who commences suit in admiralty "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings" does not repudiate the arbitration clause and is not foreclosed from later demanding an arbitration. The statute is explicitly to that effect. [25 F.Supp. at 665.]

Accord *Mitsubishi* v. *The Oinoussian Strength*, 1994 U.S. Dist. LEXIS 2625 (S.D.N.Y. 2 March 1994) (but holding plaintiff's *in rem* action time-barred).

29A.105 Section 8 does not itself create a right of arrest or maritime attachment. Instead, a claimant seeking to obtain security must have a maritime lien justifying an arrest of the property under Supplemental Rule C on grounds for a maritime attachment under Supplemental Rule B.

29A.106 An action may be commenced by attachment or arrest under Section 8 even if the arbitration clause provides for arbitration in London or some other foreign jurisdiction. In *Winter Storm Shipping, Ltd*. v. *TPI*, 310 F.3d 263, 2002 AMC 2705 (2d Cir. 2002), in a case brought under 9 U.S.C. § 8 to obtain security for an arbitration in London, the court held that funds held by an intermediary bank in the process of an electronic funds transfer were subject to a maritime attachment. The decision, written by Judge Haight, held that maritime law under Rule B of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, pre-empts U.C.C. § 4–A–503 which, as a matter of state law, prohibits courts from restraining wire transfers in the hands of an intermediary bank.

29A.107 In the wake of *Winter Storm*, the number of Rule B attachment actions initiated in New York increased exponentially. Four years later, in *Aqua Stoli Shipping Ltd*. v. *Gardener Smith Pty Ltd*., 460 F.3d 434 (2d Cir. 2006), the Second Circuit again addressed the scope of Rule B, ultimately streamlining the test for when a Rule B attachment is appropriate. It also implicitly acknowledged the right to attach electronic funds transfers ("EFT") passing through intermediary banks under the precedent established in *Winter Storm*. In its much-discussed "footnote 6" of the opinion, however, the *Aqua Stoli* court observed as follows:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett*, 6 F.3d at 55, to hold that EFTs are property of the beneficiary or sender of an EFT. Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. UCC Law §§ 4–A–502 to 504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the beneficiary while present in an intermediary bank. *Id*. §§ 4–A–502 cmt. 4, 4–A–504 cmt. 1.
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> [*Aqua Stoli*, 460 F.3d at 446 n. 6 (citing *United States* v. *Daccarett*, 6 F.3d 32 (2d Cir. 1993)).]

29A.108 In October 2009, the Second Circuit overruled *Winter Storm*, and held electronic funds transfers may not be attached. *The Shipping Corp. of India* v. *Jaldhi*, 585 F.3d 58 (2d Cir. 2009), *cert. denied*, 559 U.S. 1030 (2010). The *Jaldhi* Court ruled that *Winter Storm* was "erroneously decided and therefore should no longer be binding precedent in our Circuit." The rule announced in *Jaldhi* was held to have "retroactive effect to all cases open on direct review" in *Hawknet, Ltd*. v. *Overseas Shipping Agencies*, 590 F.3d 87, 91 (2d Cir. 2009). See also *Calais Shipholding Co*. v. *Bronwen Energy Trading Ltd*., No. 07 Civ. 10609 (PKL), 2009 U.S. Dist. LEXIS 112648, 2009 WL 4277246, at *4 (S.D.N.Y. Nov. 24, 2009) ("This Court is bound by the Second Circuit's

determination that EFTs are not attachable property under Rule B and that this change in the law applies retroactively.").

29A.109 There has been a change of law which affects the discussion in paragraph 29.150 of the fifth edition of this book. New York State law attachments may be used as an alternate route for obtaining security for claims which are subject to arbitration. CPLR § 7502(*c*).

29A.110 As a matter of good practice, in an arrest action, the complaint should name not only the property which is the subject of the *in rem* proceeding, but also the owner of the property. It has been held under Section 8, however, that the court may compel the shipowner to arbitrate even where the complaint named only the ship *in rem* as a defendant. *E.A.S.T. Inc*. v. *Alaia*, 1988 AMC 1396 (E.D. La. 1987). See also *Industrial y Frutera Colombiana S.A*. v. *The Brisk*, 195 F.2d 1015, 1952 AMC 738 (5th Cir. 1952).

29A.111 The right to obtain security is unaffected by the commencement of arbitration prior to the attachment or arrest. See *Unitramp Ltd*. v. *Mediterranean Brokerage*, 1994 AMC 476 (E.D. La. 1993); *West of Eng*. v. *McAllister*, 829 F. Supp. 122, 1993 AMC 2559 (E.D. Pa. 1993), *motion to vacate denied*, 829 F. Supp. 125, 1993 AMC 2563 (E.D. Pa. 1993); *Siderbulk Ltd*. v. *Nagos Maritime Inc*., 1993 AMC 2566 (S.D.N.Y. 1992); but see *Continental Chartering and Brokerage Inc*. v. *T.J. Stevenson & Co*., 678 F. Supp. 58, 1988 AMC 617 (S.D.N.Y. 1987) (holding to the contrary).

29A.112 In *Thyssen*, *Inc*. v. *Calypso Shipping Corp*., 310 F.3d 102, 2002 AMC 2332, 2337 (2d Cir. 2002), *cert. denied*, 538 U.S. 922, 123 S.Ct. 1576, 155 L.Ed. 2d 312 (2003), the court dismissed a cargo claimant's *in rem* claim after London arbitrators dismissed the claimant's *in personam* claim as time-barred. The court stated that the purpose of Section 8 is to enable claimants to obtain security in aid of their claims. The court ruled that allowing an *in rem* claim to proceed after the *in personam* claim had been dismissed would violate the goals of Section 8:

> The *in rem* claim serves as a way of making sure that a plaintiff can recover if it wins in arbitration. Any interpretation of the fact that allowed an *in rem* claim to proceed after the failure of an *in personam* claim would undermine the purpose of the Act with respect to maritime proceedings.
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> [2002 AMC at 2338.]

29A.113 Along the same lines, a party to arbitration must be careful in structuring the terms of security posted in a Letter of Undertaking. In *Petroleos Mexicanos Refinacion* v. *M/T KING A*, 554 F.3d 99 (3d Cir. 2009), an oil company chartered a ship in 1992 to carry diesel oil and unleaded gasoline to Mexican ports. The cargoes were contaminated during the voyage, and the charterer salvaged the contaminated cargoes and withheld $530,320 of charter hire as security for its anticipated claim for damages. The owner demanded arbitration to recover the amount withheld, and its underwriting association issued an LOU to secure a possible award in Charterer's favor. Sometime during arbitration, the charterer learned that the owner had sold the ship to another company. In March 2002, it filed an *in rem* action against the ship to recover money it was awarded in arbitration that was not covered by the LOU. The Third Circuit found that the charterer's action against the ship was barred by the one-year statute of limitations contained in the Carriage of Goods by Sea Act, 46 U.S.C.S. § 30701.

29A.114 Can an arbitration claimant obtain security for an indemnity claim that has not yet fully accrued? The answer is not entirely consistent and depends on the precise nature of the indemnity claims that are being asserted. Ordinarily, a breach must have occurred before an action for security may be brought; in the absence of a ripened dispute, a maritime lien would not exist and an arrest would be premature. *Marubeni America Corp*. v. *The Unity*, 802 F.Supp. 1353, 1993 AMC 141 (D.Md. 1992). The leading case is *Greenwich Marine*, *Inc*. v. *S.S. Alexandra*, 339 F.2d 901 (2d Cir. 1965), where the Second Circuit considered whether to permit a ship arrest.

The plaintiff was an intermediate charterer of the ship and asserted claims against the owner and the ship *in rem* for indemnification from any liability that it might be found to have to its sub-charterer for cargo damage. The sub-charterer did not assert a counterclaim against the plaintiff, but instead directly sued the owner and the ship in a separate action, claiming direct recovery for the cargo damage. The Second Circuit affirmed the lower court's *vacatur* of the arrest of the owner's ship on the ground that the claim was unripe, noting that "[a]t the time [owner] moved to dismiss the libel, it was possible, and exceedingly probable that [plaintiff] would never need to sue [owner] for indemnification, since [the sub-charterer] decided to sue [owner] directly." The court acknowledged the "inherent power to adapt an admiralty rule to the equities of a particular situation is entrusted to the sound discretion of the district judge sitting as an admiralty judge . . ." *Id*. at 905. It noted, however, that "[t]he prematurity objection has been ignored only in isolated situations under peculiar factual circumstances and, to be sure, in some cases it has been sustained." *Id*. Under the guidance of *Greenwich Marine*, the district courts have been inconsistent in deciding when to allow an arrest or maritime attachment in respect of a claim for indemnity. In *Sonito Shipping Co*. v. *Sun United Maritime Ltd*., 478 F. Supp. 2d 532, 543, 2007 AMC 1018 (S.D.N.Y. 2007), the court ruled that under English law (incorporated by the charterparty) the owner could not attach the property of the charterer because, while cargo damage claims had been asserted, the owner had not satisfied any of those claims, making the claim for indemnity under the Inter-Club Agreement unripe. In contrast, in *Navalmar* (*U.K.*) *Ltd*. v. *Welspun Gujarat Stahl Rohren*, *Ltd*., 485 F.Supp.2d 399, 404, 2007 AMC 1033 (S.D.N.Y. 2007), the court concluded that the owner's claim for indemnity, again asserted under the Inter-Club Agreement and English law, was ripe. The distinguishing factor, according to the court, was that in *Navalmar* the ship had been arrested, and the owner had a ripe claim for the damages it had incurred to secure the release of the ship. See *id*. at 405. In *Mediterranea di Navigazione SpA* v. *International Petrochemical Group S.A*., 2007 AMC 1748, 1754–1755 (S.D.N.Y. 2007), the court declined to apply English procedural law to the issue of whether an attachment in aid of a London arbitration was proper. The court found that the requirements of U.S. procedural law had been satisfied, and that this was sufficient to uphold the attachment. See *id*.

29A.115 See also *J.K. Int'l Pty Ltd* v. *Agriko S.A.S*., 2007 U.S. Dist. LEXIS 10074 (S.D.N.Y. 2007) (vacating attachment); *Bottiglieri Di Navigazione SpA* v. *Tradeline LLC*, 472 F. Supp. 2d 588 (S.D.N.Y. 2007) *aff'd*, 293 Fed. Appx. 36 (2d Cir. 2008); *Daeshin Shipping Co*. v. *Meridian Bulk Carriers*, *Ltd*., 2005 U.S. Dist. LEXIS 22409 (S.D.N.Y. 2005) (upholding attachment); *Eitzen Sealift A/S* v. *Cementos Andinos Dominicanos*, *S.A*., 2005 U.S. Dist. LEXIS 19876 (S.D.N.Y. 2005); and *Staronset Shipping Ltd*. v. *North Star Navigation Inc*., 659 F.Supp. 189 (S.D.N.Y. 1987) (upholding attachment).

Power of arbitrators to award security

29A.116 Another way of obtaining security for the satisfaction of an arbitration award in that party's favor is for the party to apply to the arbitrators for a partial final award requiring the opposing party to post security. It is beyond dispute that arbitrators have the power to order parties to post security. Judicial recognition of the broad grant of equitable powers enjoyed by commercial arbitrators originated with *Sperry International Trade Inc*. v. *Government of Israel*, 689 F.2d 301 (2d Cir. 1982), where the Second Circuit affirmed the arbitrators' order requiring the proceeds of a disputed $15 million letter of credit to be placed in escrow, noting that arbitrators "have power to fashion relief that a court might not properly grant." *Id*. at 306. See also *Compania Chilena de Navigacion Interociania* v. *Norton, Lilly & Co*., 652 F. Supp. 1512, 1987 AMC 1565 (S.D.N.Y. 1987), holding that maritime arbitrators did not exceed their legal authority by ordering respondent

to post a $123,000 bond; *Konkar Maritime Enterprises S.A*. v. *Compagnie Belge d'Affretement* (*The Konkar Pioneer*), 668 F. Supp. 267, 1989 AMC 182 (S.D.N.Y. 1987), confirming the authority of the arbitrators to order the charterer to deposit $202,889.29 into an interest-bearing escrow account as security for the owner's claims; *Arbitration between East Asiatic Co. and Transamerican Steamship Corp*. (*The Camara and Cinchoma*), 1988 AMC 1086 (S.D.N.Y. 1987), confirming two preliminary awards which directed the charterer to deposit $84,183.62 and $142,584.66 into an interest-bearing joint escrow account as security for claims asserted by the owner; *Blue Sympathy Shipping Co*. v. *Serviocean International S.A*., 1994 AMC 2522 (S.D.N.Y. 1994), confirming an award directing charterer to place $194,796.06 in an escrow account in favor of the plaintiff, and requiring the plaintiff to post a letter of undertaking in the amount of $175,000 plus accrued interest in charterer's favor; and *Southern Seas Navigation Ltd. of Monrovia* v. *Petroleos Mexicanos of Mexico City* (*The Messiniaki Floga*), 606 F.Supp. 692, 1985 AMC 2190 (S.D.N.Y. 1985), where the court confirmed the arbitrators' partial final award ordering charterer to remove its notice of lien claims on a ship, noting that the award was "in effect, a grant of a preliminary injunction."

29A.117 The decision to order security will depend upon the arbitrators' assessment of the particular circumstances of the case. While some arbitrators view the power to order security as an exceptional remedy, others have ordered security on a showing of less than special circumstances justifying the award. The amount of proof which the applicant must submit to satisfy the panel that security is warranted, and that the amount sought is appropriate, is left to the sound commercial judgment of the arbitrator. See, e.g., *The Cosmar*, SMA 3944 (Arb. at N.Y. 2006); *The Hallborg*, SMA 2639 (Arb. at N.Y. 1990); *The Eurogas*, SMA 3005 (Arb. at N.Y. 1993); *The Liberty Bell Venture*, SMA 3147 (Arb. at N.Y. 1992); *The Lilliana Dimitrova*, SMA 3075 (Arb. at N.Y. 1994); *The Bermuda*, SMA 3097 (Arb. at N.Y. 1994); and *The Maaslot*, SMA 3074 (Arb. at N.Y. 1994). For awards denying security, see *The Enerchem Avance*, SMA 2907 (Arb. at N.Y. 1992) and *The Cheshire*, SMA 3129 (Arb. at N.Y. 1994).

29A.118 In *The Mustafa Nevzat*, SMA 3784 (Arb. at N.Y. 2003), the panel concluded that it had the power to issue a preliminary award for security without any finding of irreparable harm and without a finding that the movant had demonstrated a probability of success on the merits. The panel noted, however, that the probability of success and the other party's ability to satisfy an award are factors that arbitrators may consider in making their decision.

29A.119 In contrast, in *The Cosmar*, SMA 3944 (Arb. at N.Y. 2006), the panel wrote that arbitrators could not grant security "with impunity" and that the decision to award security should normally be based on the fiscal status and responsibility of the party against whom security is sought. In that case, the panel found that there was no evidence that the other party's financial condition had materially changed since the time the charter was fixed, and it denied security to the movant.

29A.120 In 2006, the United States Court of Appeals for the Second Circuit ruled that a plaintiff seeking a writ of maritime attachment in a federal district court need only satisfy the *prima facie* requirements set forth in the Admiralty Rules, and so long as those requirements are met, it is improper for a district court to engage in a balancing test to determine whether security is justified or proper. See *Aqua Stoli Shipping Ltd*. v. *Gardner Smith Pty Ltd*., 460 F.3d 434, 444–447, 2006 AMC 1872 (2d Cir. 2006).

29A.121 Arbitrators have generally required a showing of good cause before they will direct a party to post security. On the other hand, they have not been reluctant to issue such an order where they conclude the facts merit it. In *The MT Tradewind Sun*, SMA 4094 (Arb. At N.Y. 2010) (Siciliano), for instance, the arbitrator opined that a party seeking security must "show good cause for that equitable arbitral remedy" but found that the owner had met that burden and directed the charterer to post $650,000 in security.

In *The M/V Samho Dream*, SMA 4154 (Arb. at N.Y. 2011)(Arnold, Berg, Martowski), the owner commenced arbitration seeking $11.8 million in damages arising from the ship's eight-month detention by Somali pirates. The charterer counterclaimed for $13.4 million for hire reimbursement and other costs associated with the seizure. The charterer requested the panel to direct the owner to post security for its counterclaims, and the owner objected on the ground that the arbitrators are not specifically empowered to rule on security under Section 30 of the SMA Rules, which provides: "The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance." The panel unanimously rejected this contention and directed the owner to post $14.2 million in security on the ground that the charterer had demonstrated it was reasonably insecure about the owner's ability to satisfy any eventual arbitration award. The owner failed to post the security, and the panel ultimately granted the charterer's request to stay the proceedings until the owner did so. The owner thereupon petitioned the District Court to compel the arbitration to proceed or to vacate the ruling staying the action. But in *SH Tankers Ltd. v. Kock Shipping Inc*., 2013 A.M.C. 2096 (S.D.N.Y. 2012), the District Court ruled that the charterer had not "failed, neglected or refused to arbitrate" within the meaning of 9 U.S.C. § 4 merely because it had obtained a stay of the proceedings pending the owner's posting of security. The court also found that the ruling was an interlocutory one not subject to immediate judicial review and thus denied the owner's motion to vacate.

In *The MV GENCO CARRIER*, SMA 4167 (Arb. at N.Y. 2012)(Arnold, Bulow, Mordhorst), the panel exercised its discretion under SMA Rule 30, quoted above, to direct charterer to post approximately $725,000 in security based on the owner's showing of reasonable insecurity in view of the charterer's recent corporate and financial restructuring.

In *The Neptune Dorado*, SMA 3962 (Arb. at N.Y. 2007)(McCormack, Martowski, Sheinbaum), the panel declined to order the American Club to post a bond under a Club Letter of undertaking based on its ruling that the American Club was not a party to the arbitration. The dispute was between owner and charterer, and the American Club issued a LOU to prevent the arrest of a ship in connection with claims arising under the charter. The LOU had standard wording regarding the posting of a bond if demanded: "Upon demand by you, to cause to be filed a bond in form and sufficiency of surety satisfactory to you or the Court in the above amount securing your claim against the ship in said proceeding." The panel ruled that only a court could direct the Club to establish a bond.

29A.122 A partial final award ordering a party to post security is not self-executing and, unless the other party complies voluntarily, the award will not be immediately effective. If the opposing party refuses to comply with the order, a party may seek confirmation as a partial final award in court pursuant to Section 9 of the Federal Arbitration Act. See *Compania Chilena*, 652 F. Supp. at 1516–1517; *East Asiatic*, 1988 AMC at 1089–1090; *Blue Sympathy*, 1994 AMC at 2522–2524, where the court also cautioned that if the charterer did not comply with the order confirming the award, the court would entertain a contempt motion, and a mere plea of financial inability would not be a successful defense against contempt.

Confirmation of the award

29A.123 Section 9 of the Arbitration Act provides for the confirmation of an arbitration award. The award may be confirmed under the Act, however, only if the arbitration agreement expressly provides that a judgment of the court may be entered upon the award. In the New York Produce form, this requirement is fulfilled by the words "may be made a rule of the Court." The failure to include these or words of equivalent import in the arbitration agreement could create unnecessary difficulties in enforcing the award, since it has been held that the absence of such a provision precludes the courts

from entering a judgment on the award. *Varley* v. *Tarrytown Associates Inc*., 477 F.2d 208 (2d Cir. 1973); *Splosna Plovba of Piran* v. *Agrelak S.S. Corp*., 381 F. Supp. 1368 (S.D.N.Y. 1974). In some cases the court has found that the parties intended that the arbitration agreement should allow the entry of a judgment on the arbitration award, even without explicit language to that effect. See *I/S Stavborg* v. *National Metal Converters Inc*., 500 F.2d 424 (2d Cir. 1974).

29A.124 In *Daihatsu Motor Co*. v. *Terrain Vehicles Inc*., 13 F.3d 196 (7th Cir. 1993), the court found that in assessing in totality the parties' conduct they intended judicial confirmation of any arbitral award despite the fact that Japan Commercial Arbitration Association rules which were incorporated into the agreement did not expressly provide for confirmation. Similarly, in *Rainwater* v. *National Home Ins*. *Co*., 944 F.2d 190, 194 (4th Cir. 1991), the court found that language in an agreement to arbitrate which stated that arbitration was "a condition precedent to the commencement of any litigation. . .," did not undermine the binding nature of arbitration; that "magic words" such as "final" are unnecessary requirements in an agreement in order for the award to be subject to confirmation by a federal court; and that "resort to AAA arbitration will be deemed both binding and subject to entry of judgment unless the parties expressly stipulate to the contrary."

29A.125 It is possible to obtain judicial enforcement of the award without resorting to Section 9 of the Arbitration Act. The usual procedure would be to commence an action and seek summary judgment based on the award.

29A.126 Only a final award can be confirmed. *E. B*. *Michaels* v. *Mariforum Shipping S.A*., 624 F.2d 411, 1980 AMC 1901 (2d Cir. 1980). Thus, an interim award dealing, for example, with only the issue of liability where damages questions have been reserved cannot be confirmed.

29A.127 A partial final award or an interim award, however, that finally and definitively disposes of an independent claim may be confirmed even if other separate claims remain before the panel. *Eurolines Shipping Co*. *S.A*. v. *Metal Transp*. *Corp*., 491 F. Supp. 590, 1980 AMC 2445 (S.D.N.Y. 1980). An award which is valid only in part may be confirmed in part, so long as the valid portion concerns claims that are separable from the invalid section. This exception to the general rule, that in order to be "final" the award must resolve all the issues submitted to arbitration, was explained by the court in *Puerto Rico Maritime Shipping Authority* v. *Star Lines Ltd*., 454 F. Supp. 368 (S.D.N.Y. 1978), as follows:

> [I]f an award is valid in part and invalid in part, and the valid portion concerns claims that are "separate" from and "non-dependent" on claims covered by the invalid portion, the valid portion of the award is confirmable, notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration.

29A.128 Partial final awards to shipowners for withheld freight were confirmed in *Unimarine S.A*. v. *Interessentslskapet Wind Endeavor*, 1984 AMC 405 (S.D.N.Y. 1981), and *Marabueno Compania Naviera S.A*. v. *Cayman Caribbean Carriers*, 1984 AMC 1849 (S.D.N.Y. 1984). Similarly, in *Southern Seas Navigation Ltd*. v. *Petroleos Mexicanos*, 606 F. Supp. 692, 1985 AMC 2190 (S.D.N.Y. 1985), an interim ruling setting an upper limit on the charterer's claim and requiring that the charterer reduce the amount stated in a Notice of Claim of Lien which the charterer had filed on the owner's Liberian registry to such limit was an award which could be confirmed by a court.

29A.129 However, where a court refuses to confirm a partial final award, such refusal is not a final decision which is subject to an immediate appeal. *Liberian Vertex Transports Inc*. v *Associated Bulk Carriers Ltd*., 738 F.2d 85, 1984 AMC 2841 (2d Cir. 1984).

29A.130 An application to confirm an award may be brought within one year after the award is made, 9 U.S.C. § 9, although this apparently is not treated as a time-bar. *Sverdrup Corp* v. *WHC Constructors*, 989 F.2d 148 (4th Cir. 1993). See also *Kerr McGee Refining Corp* v. *The Triumph*,

924 F.2d 467 (2d Cir. 1991). Where both parties to an arbitration are foreign, even if the award is rendered in the U.S., it will be subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201, *et seq*., and may be confirmed within three years pursuant to 9 U.S.C. § 207. *Bergesen* v. *Joseph Muller Corp*., 710 F.2d 928, 1983 AMC 1960 (2d Cir. 1938).

29A.131 Once the panel has issued a final award, it becomes *functus officio* and no longer has any power to reconsider its decision. *Ottley* v. *Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Proodos Marine Carriers Co*. v. *Overseas Shipping & Logistics*, 578 F. Supp. 207, 211 (S.D.N.Y. 1984). Accord, *Domino Group* v. *Charlie Parker Mem. Foundation*, 985 F.2d 417 (8th Cir. 1993) (arbitrator's clarification of award purported to award alternative damage relief, violating the principle of *functus officio* and thus exceeding his authority); *Colonial Penn Insur. Co*. v. *Omaha Indemnity Co*., 943 F.2d 327 (3d. Cir. 1991) ("*functus officio*" doctrine precluded arbitrator from attempting to clarify first order).

29A.132 The court is authorized under the Arbitration Act, however, to correct obvious mathematical errors, 9 U.S.C. § 11. In addition, where the court finds that the panel has rendered an indefinite, incomplete or ambiguous award, the court may remand the case to the arbitrators for clarification. See discussion at paragraph 29A.191. In one case, the district court had confirmed the arbitrators' award, but the court's judgment did not include a portion of the award that provided for payment of additional amounts in the event certain contracts were renewed. See *Robert Lewis Rosen Assocs., Ltd*. v. *Webb*, 473 F.3d 498, 502 (2d Cir. 2007). The Court of Appeals for the Second Circuit held that the district court had in fact confirmed the arbitrator's entire award, including the contingent relief, and that the district court accordingly had the power to amend its judgment over a year later under Rule 60 of the Federal Rules of Civil Procedure. See *id*. at 504–505.

Vacating the award

"Final Award"

29A.133 The power of the court to overturn a final arbitration award is quite deliberately circumscribed by the Arbitration Act. Section 10 of the Arbitration Act specifies a number of grounds upon which an arbitration award may be vacated. Just as only a final award may be confirmed under Section 9 of the Act, only a "final award" properly can be the subject of a motion to vacate under Section 10.

29A.134 In *E.B. Michaels* v. *Mariforum Shipping S.A*., 624 F.2d 411, 1980 AMC 1901 (2d Cir. 1980), the charterer moved under Section 10 for an order vacating a "Decision & Interim Award" which dealt with issues of liability only and left certain claims for later decision. The court held that the motion was premature because the decision of the arbitrators was not "final." According to the court:

> In order to be "final," an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them. . .
>
> Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages.

29A.135 See also *Kerr-McGee Refining Corp*. v. *The Triumph*, 924 F.2d 467, 1991 AMC 1051 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991) (partial final award did not finally dispose of a separate independent claim); *Mobil Oil Indonesia Inc*. v. *Asamera Oil* (*Indonesia*) *Ltd*., 43 N.Y. 2d 276, 281–282, 401 N.Y.S. 2d 186, 187–188 (1977); *Finagrain Compagnie Commerciale Agricole et Financiere S.A*. v. *Federal Commerce & Navigation* (*1974*) *Ltd*., 80 Civ. 0839 (S.D.N.Y., 3 September 1980) (*slip opinion*); *Golden Eagle Liberia Ltd*. v. *Amoco Transport Company*, 1979 AMC 698 (N.Y. County, Special Term, Part I, 1979).

29A.136 The district court does not have power under the Arbitration Act to review interlocutory rulings by arbitrators or to supervise the arbitration proceedings. *Compania Panemena Maritima San Gerassimo S.A*. v. *J.E. Hurley Lumber Co*., 244 F.2d 286, 1957 AMC 1759 (2d Cir. 1957); *SH Tankers Ltd* v. *Koch Shipping Inc*., 2012 U.S. Dist. LEXIS 85729 (S.D.N.Y. Jun. 19, 2012). Thus, rulings by the arbitrators on such matters as discovery, the issuance of subpoenas, objections to evidence and the limitless miscellany of procedural and substantive matters that arise in the course of an arbitration are not subject to review by the district court except to the extent such rulings might provide grounds for attacking the final award. See generally *Complaint of Koala Shipping & Trading Inc*., 587 F. Supp. 140 (S.D.N.Y. 1984); *SH Tankers Ltd* v. *Koch Shipping Inc*., 2012 U.S. Dist. LEXIS 85729 (S.D.N.Y. Jun. 19, 2012). Even challenges to the qualifications or partiality of the arbitrators cannot be entertained by the district court until a final award is rendered. *E.B. Michaels* v. *Mariforum Shipping S.A*., above, 624 F.2d at 414 n. 4. See also *Florasynth Inc*. v. *Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984).

29A.137 As the court stated in *Commonwealth Oil Refining Co. Inc*. v. *The Grand Commonwealth*, 1978 AMC 975, 976 (M.D. Fla. 1978):

> Once the District Court determines that the matter in dispute should be settled by arbitration, then it should not interfere with the work of the arbitrators during the course of their proceedings. To intervene would place this court in a position of reviewing the acts of the arbitrators in "midstream." This would open up a Pandora's Box for delaying tactics. The plaintiff will have ample opportunity for review of its grievances at the proper time. Any award by the arbitrators is subject to review by this Court in accordance with law.

An award of prejudgment security is a final disposition of a separate issue, however, and thus reviewable and subject to confirmation. See *SH Tankers Ltd* v. *Koch Shipping Inc*., 2012 U.S. Dist. LEXIS 85729 (S.D.N.Y. Jun. 19, 2012).

"Time Limits"

29A.138 Under 9 U.S.C. § 12, a motion to vacate, modify or correct an award must be served within three months after the award is filed or delivered.

29A.139 In *Florasynth Inc*. v. *Pickholz*, 750 F.2d 171 (2d Cir. 1984), the court held that the failure to move to vacate the award within three months precludes a party from later seeking that relief in opposing a motion to confirm the award. A motion to confirm filed within the three-month period prior to the filing of a motion to vacate imposes an obligation on the other party to move to vacate the award if he intends to do so. *Id*.; *The Hartbridge*, 57 F.2d 672 (2d Cir. 1932), *cert. denied sub nom*; *Munson S.S. Line* v. *North England S.S. Co*., 288 U.S. 601 (1933). The three-month time limit is treated as a statute of limitations. In *Foster* v. *Turley*, 808 F.2d 38, 41 (10th Cir. 1986), the court stated that since the time limit in Section 12 is in the nature of a statute of limitations, it is subject to waiver. See also *Domino Group* v. *Charlie Parker Mem. Foundation*, 985 F.2d 417 (8th Cir. 1993).

"Grounds of Attack"

29A.140 Section 10 of the Arbitration Act specifies the grounds upon which an arbitration award may be vacated, and it has been held that, with one exception, these are the *only* grounds upon which an award can be challenged. *Bell Aerospace Co. Division of Textron Inc*. v. *Local 516*, 500 F.2d 921 (2d Cir. 1974). There is a federal policy which strongly favors arbitration, and it is for this reason that Congress has limited the opportunities for successful attacks on awards emerging from that process. Indeed, it has been noted that arbitration awards are presumed to be valid, and the burden of persuasion on the party moving to vacate is a very heavy one. See *McIlroy* v. *Paine*

Webber Inc., 989 F.2d 817 (5th Cir. 1983) (motion to vacate arbitration award denied based on failure to meet any of the grounds for attacking an award listed in 9 U.S.C. § 10).

29A.141 In *Hall Street Assoc*., *L.L.C*. v. *Mattel*, *Inc*., 552 U.S. 576 (2008), the United States Supreme Court declined to enforce a provision in an arbitration agreement by which the parties had stipulated to giving the district court expanded authority to vacate, modify or correct any award "(i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Id*. at 579. Following arbitration, the district court granted the petitioner's application to reverse the award on the basis that the panel had committed legal error within the meaning of the above clause. The Ninth Circuit reversed, and the Supreme Court affirmed the Ninth Circuit's ruling, finding that where the Federal Arbitration Act applies, Sections 10 and 11 of the Act provide the exclusive bases for vacating an arbitration award and cannot be expanded by contract.

29A.142 The statutory grounds for challenging an award include the following:

10.(a)(1) where the award was procured by corruption, fraud or undue means.

29A.143 As the plain language of this section indicates, it was designed to allow for the vacating of awards obtained by bribery, blackmail, duress and other forms of corruption.

29A.144 In *Bonar* v. *Dean Witter Reynolds Inc*., 835 F.2d 1378, 1383 (11th Cir. 1988), the court set forth a three-part test to determine whether an award should be vacated under Section 10(a):

(1) The movant must establish the fraud by clear and convincing evidence.
(2) The fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration.
(3) The person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration.

Bonar is in accord with *Foster* v. *Turley* 808 F.2d 38 (10th Cir. 1986); *Karpinnen* v. *Karl Kiefer Machine Co*., 187 F.2d 32 (2d Cir. 1951); *Mobil Oil Indonesia Inc*. v. *Asamera Oil* (*Indonesia*) *Ltd*., 487 F. Supp. 63 (S.D.N.Y. 1980); and *Newspaper Guild of New York* v. *New York Post Corp*., 1983 U.S. Dist. LEXIS 15466 (S.D.N.Y., 14 July 1983).

29A.145 It has been argued that "undue means" has a broader context and should apply where the conduct of one of the parties in the arbitration, while not "corrupt" in nature, nonetheless has been prejudicial to the other. In *Drayer* v. *Krasner*, 572 F.2d 348 (2d Cir. 1978), *cert. denied*, 436 U.S. 948 (1978), a disgruntled former employee of a securities concern brought an action for damages allegedly caused by the wrongful termination of his employment. The employee had been fired as the result of his alleged negligence in connection with a securities fraud. He was indicted for his involvement in the alleged fraud but was acquitted, although others who were involved were convicted. During the course of the arbitration, the securities company offered the indictment and a court decision affirming the conviction of the other participants in the fraud in evidence. While the arbitrators declined to accept these materials in evidence, apparently some or all of the arbitrators read them. The arbitration award went against the employee, who moved to vacate it on the grounds that he had been prejudiced by the arbitrators' reading of the indictment and the court decision.

29A.146 The court denied the motion to vacate and held that the open offer by the other party of prejudicial evidence did not fall within the meaning of "undue means" The court purposely confined its holding to the particular facts before it, however, and did not rule out the possibility that a panel's acceptance of highly prejudicial evidence resulting in an adverse award might be deemed "undue means" under Section 10(a)(1).

29A.147 In another case involving an attack on an arbitration award under Section 10(a)(1), *Catz American Co*. v. *Pearl Grange Fruit Exchange Inc*., 292 F. Supp. 549 (S.D.N.Y. 1968), the

court rejected the contention that the submission in evidence of a related court decision involving the petitioner's refusal to arbitrate, wherein the court stated that its defenses were "insubstantial" and a "sham," was "undue means."

29A.148 See also *National Bulk Carriers Inc*. v. *Princess Management Co*. *Ltd*., 597 F.2d 819, 825 (2d Cir. 1979), where the court held that the introduction of evidence concerning a settlement offer did not cause prejudice that would justify vacating the award.

10.(a)(2) where there was evident partiality or corruption in the arbitrators, or either of them.

29A.149 It is not sufficient under this section that there is an "appearance of bias" on the part of one or more of the arbitrators to render the award open to attack. Rather, there must be proof of actual bias. In *International Produce Inc*. v. *A/S Rosshavet*, 638 F.2d 548, 1981 AMC 472 (2d Cir. 1981), *cert*. *denied*, 451 U.S. 1017 (1981), there was a dispute between the owner and charterer of the *Ross Isle* arising out of a grounding. Each side appointed an arbitrator, and the two so chosen selected Hammond Cederholm as third arbitrator and chairman. The owners were represented in the arbitration by firm A; the charterers by firm B. Cederholm had no financial interest in either the owner or the charterer. He was, however, directly involved in another dispute in which the parties were different, but law firms A and B were again involved on opposite sides. Cederholm was involved in the second case for a customer of the brokerage company he was employed by and which was represented by firm A. His role in the dispute was such that he was called to testify on direct examination by firm A, and was subjected to cross-examination by lawyers from firm B.

29A.150 *The Ross Isle* award was favorable to the clients of firm A, and the clients of firm B moved to vacate it, claiming that Cederholm's relationship with firm A in the second case created an appearance or presumption of partiality. The district court agreed, and vacated the award.

29A.151 The Court of Appeals reversed, and held that the mere appearance of bias is not sufficient to overturn an award. Rather, the act requires proof of actual bias.

29A.152 The burden of proving "actual bias" is a heavy one. Indeed, as the court observed in *Merit Ins*. *Co*. v. *Leatherby Ins*. *Co*., 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983), "of course actual bias might be present yet impossible to prove." It will be the very rare case where an ostensibly neutral arbitrator will admit that he is biased in favor of one of the parties. In recognizing the difficulties of proving bias, the court in *Merit Ins*. *Co*. concluded that "evident partiality" within the meaning of Section 10(b) could be shown "if circumstances are such that a man of average probity might reasonably be suspected of partiality. . . ." The court cautioned, however, that "the circumstances must be powerfully suggestive of bias. . . ."

29A.153 A similar approach was taken in *Morelite Const*. *Corp*. v. *New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984), where the court stated that "evident partiality" will be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."

29A.154 In *Morelite*, the court vacated an arbitration award where the arbitrator was the son of the Vice President of one of the parties. The court found that the father–son relationship alone was sufficient to demonstrate "evident partiality." Without inquiring into how close the father and son were or how divergent their views were on the issues giving rise to the arbitration, the court nonetheless concluded:

> And without knowing more, we are bound by our strong feeling that sons are more often loyal to their fathers, partial to their fathers, and biased on behalf of their fathers. We cannot in good conscience allow the entering of an award grounded in what we perceive to be such unfairness. [748 F.2d at 84].

29A.155 Accord, *Peoples Sec*. *Life Ins*. v. *Monumental Life Ins*., 991 F.2d 141 (4th Cir. 1993). See also *Standard Tankers* (*Bahamas*) *Co*. *Ltd*. v. *The Akti*, 438 F. Supp. 153, 1978 AMC

181 (E.D.N.C. 1977), holding that "to constitute evident partiality, some overt misconduct or demonstration or partiality is required."

29A.156 An arbitration award was vacated on the grounds of evident partiality in *Applied Industrial Materials Corp*. v. *Ovalar Makine Ticaret Ve Sanayi*, *A.S*., 492 F.3d 132 (2d Cir. 2007). The chairman of the arbitration panel was the Chairman, President and CEO of a company which had a business relationship with one of the parties which was not fully disclosed to the parties. The arbitrator knew of the relationship, but declined to look into it or explain to the parties the details of the relationship. According to the court:

> It follows that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate. [*Id*. at 138 (citing *Com*. *Coatings Corp*. v. *Cont'l Cas*. *Co*., 393 U.S. 145 (1968)).]

The arbitrator could not impose a "Chinese Wall" around himself without the consent of the parties.

29A.157 An award was vacated in *Commonwealth Coatings Corp*. v. *Continental Casualty Co*., 393 U.S. 145 (1968), on the basis of a finding that there was "evident partiality" on the part of the arbitrator. There, the arbitrator had earned some $12,000 in fees for consulting services rendered to the prevailing party over a period of about four years, and had even provided services on the dispute he was arbitrating. These facts were not disclosed to the losing party, and the court held that his failure to disclose required that the award be vacated. It appears from the decision that an arbitrator who "has a substantial interest in a firm which has done more than trivial business with a party" to the arbitration has an obligation to disclose that fact or risk a challenge on grounds of evident partiality when the award is issued.

29A.158 An award was vacated in *Schmitz* v. *Zilveti*, 20 F.3d 1043 (9th Cir. 1994), on the basis of a finding that the arbitrator was "evidently partial." In determining the motion to vacate, the court had to determine how to apply *Commonwealth Coatings* in a nondisclosure case, which was an issue of first impression for the Ninth Circuit. Concurring with other courts who have adopted the *Commonwealth Coatings* standard that evident partiality is present when undisclosed facts show a reasonable impression of partiality, the Ninth Circuit found that the arbitrator, whose law firm had represented the parent company of appellee in at least 19 cases during a period of 35 years, did not fulfil his duty under the NASD Code to make a reasonable effort to inform himself of his firm's representation of appellee's parent. Although he lacked actual knowledge, he had constructive knowledge of this information. Given this constructive knowledge and the presence of the conflict, the court held that the arbitrator's failure to inform the parties to the arbitration supported a finding of evident partiality. See *Middlesex Mut*. *Ins*. *Co*. v. *Levine*, 675 F.2d 1197 (11th Cir. 1982); *Sanko S.S*. *Co*. v. *Cook Indus*. *Inc*., 495 F.2d 1260 (2d Cir. 1973); *Sheet Metal Wkrs*. *Int'l Ass'n*, *Local 420* v. *Kinney Air Cond*. *Co*., 756 F.2d 742, 746 (9th Cir. 1985); and *Toyota of Berkeley* v. *Automobile Salesmen's Union*, *Local 1095*, 834 F.2d 751, 755–756 (9th Cir. 1987), *cert*. *denied*, 486 U.S. 1043, *amended*, 856 F.2d 1572 (9th Cir. 1988).

29A.159 See also *Arbitration between Sun Refining & Marketing Co*. v. *Statheros Shipping Corp*., 761 F.Supp. 293, 1991 AMC 1874, (S.D.N.Y. 1991), *aff'd w/o opin*., 948 F.2d 1277, 1992 AMC 1216 (2d Cir. 1991), where the challenged arbitrator's company was involved in a separate, but ongoing, arbitration with one of the parties. The court found that a reasonable person would have to conclude that the challenged arbitrator was partial and the arbitration award was vacated.

29A.160 So, in *Miseroachi & Co*. *S.p.A*. v. *Peavy Int'l Inc*., 78 Civ. 1571 (S.D.N.Y., 15 September 1978), an award was vacated where the arbitrator's company received commissions totalling $41,073.33 from one of the parties. The court stated that:

. . . an arbitrator's receipt of income in amounts like those involved here from one of the parties to the arbitration is a matter which (1) must be disclosed and (2) is disqualifying upon objection unless waived or otherwise rendered immaterial.

29A.161 See also *Transmarine Seaways Corp*. v. *Marc Rich & Co*. *A.G*., 480 F. Supp. 352, 1979 AMC 1496 (S.D.N.Y. 1978), *aff'd w/o opin*., 614 F.2d 1291, 1979 AMC 2906 (2d Cir. 1980), *cert*. *denied*, 445 U.S. 930 (1980), where the court rejected a motion to vacate an award which complained that one of the arbitrators was employed by a company which, in turn, acted as agent for another company which had asserted unrelated claims against the party. The court held that the arbitrator's own relationship with the party did not require vacation of the award.

29A.162 In *Sunkist Soft Drinks Inc*. v. *Sunkist Growers Inc*., 10 F.3d 753 (11th Cir. 1993), the contract between the parties incorporated American Arbitration Association rules which recognize a distinction between a "neutral" and a "party-appointed arbitrator" with less exacting duties and less burdensome disclosure rules imposed upon the latter category. The court held that the fact that the arbitrator may have been predisposed toward his nominator was an insufficient ground to vacate the award. See also *Arbitration between National Shipping Co. of Saudi Arabia and Transamerican Steamship Corp*., 1993 AMC 684 (S.D.N.Y. 1992); *Employers Ins*. v. *National Union Fire Ins*., 933 F.2d 1481 (9th Cir. 1991).

10.(a)(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

29A.163 It is fundamental that the arbitrators must conduct the proceedings in a manner which provides both parties with a fair and full opportunity to be heard and submit evidence on all issues before them. *Standard Tankers* (*Bahamas*) *Co*. *Ltd*. v. *The Akti*, 438 F. Supp. 153, 1978 AMC 181 (E.D.N.C. 1977). Section 10(a)(3) of the Arbitration Act provides that an award may be vacated if one of the parties is prejudiced by the manner in which the arbitration is conducted.

29A.164 In *Totem Marine Tug & Barge Inc*. v. *North American Towing Inc*., 607 F.2d 649, 1980 AMC 1961 (5th Cir. 1979), the award was vacated because of the arbitrators' *ex parte* communication with counsel for one of the parties which was prejudicial to the other party. The arbitrators had decided to award damages to the owner for a wrongful cancellation by the charterer and measured the quantum of damages in part on the owner's loss of hire. After the close of the hearings and without advising the charterer's counsel, the arbitrators contacted the attorney representing the owner by telephone to ascertain the ship's earnings. The reason for the call was that while all of the arbitrators had notes concerning the damages, each had a different figure written down. The number supplied by the owner's counsel differed from all of the numbers the arbitrators had noted, but it was accepted by the panel and incorporated in the award. The court found that the damages issue was clearly subject to dispute, and that the panel's *ex parte* communication with the owner's counsel constituted misbehaviour sufficiently prejudicial to warrant vacation of the award under Section 10(a)(3).

29A.165 The award was also vacated in *Cofinco Inc*. v. *Bakrie & Bros*. *N.V*., 395 F. Supp. 613 (S.D.N.Y. 1975). That case involved disputes under contracts for the sale of green coffee which were arbitrated under the Rules of the Green Coffee Association. Under those rules, the case initially came before a three-person panel whose rulings were subject to appeal to a five-member panel. At the initial hearing, the claimant submitted only a partial record of evidence concerning its claim, and the respondent raised a threshold defense that the claim was time barred. The respondent submitted no evidence concerning the merits of the claim. The three-member panel adjourned the portion of the arbitration concerning the merits of the claim in order to first decide

the time bar issue, which it later resolved in the respondent's favor. The claimant then took an appeal to the five-person panel, which reversed on the time bar question. Moreover, based on the only incomplete evidence offered by the claimant in support of its claim, the five-person panel entered an award on the merits which was in favor of the claimant. The respondent moved to vacate the award and contended that it had been deprived of its opportunity to defend the claim on the merits. The court held in favor of the respondent and vacated the award. According to the court, the five-person panel fell afoul of 9 U.S.C. § 10(a)(3) "in refusing to hear evidence pertinent and material to the controversy" and was guilty, therefore, of misconduct. The court stated that:

It makes no difference that the appellate panel may have acted only in neglectful disregard rather than by explicitly "refusing" to hear the evidence. The fundamental right to be heard was grossly and totally blocked. [395 F.Supp. at 615].

29A.166 See also *Chevron Transport Corp*. v. *Astro Vencedor Compania Naviera S.A*., 300 F. Supp. 179, 1969 AMC 1582 (S.D.N.Y. 1969), where an award was vacated because of the failure of the arbitrators to make ship's logbooks in the possession of one of the parties available to the other: *Katz* v. *Uvegi*, 18 Misc. 2d 576, 583, 187 N.Y.S. 2d 511, 518 (Sup. Ct. 1959), *aff'd*, 11 A.D.2d 773, 205 N.Y.S. 2d 972 (App. Div. 1960), holding that:

Arbitrators cannot conduct *ex parte* hearings or receive evidence except in the presence of each other and of the parties, unless otherwise stipulated.

29A.167 In *Standard Tankers* (*Bahamas*) *Co*. *Ltd*. v. *The Akti*, above, the owner contended that the panel's refusal to allow it a second opportunity to cross-examine a key witness was a procedural error which deprived it of a fair hearing. The court denied the owner's motion to vacate the award and stated that "to amount to a procedural error which mandates vacation of the award, the actions of the panel must deprive the defendant of a fair hearing when viewed as a whole." 1978 AMC at 185.

29A.168 See generally *The Konkar Pioneer*, 668 F. Supp. 267, 271–272 (S.D.N.Y. 1987).

10.(a)(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

29A.169 In *Dieulemar Compagnia di Navigacione*, *S.p.A*. v. *Transocean Coal Co*., 2005 AMC 388, 396 (S.D.N.Y. 2004), the court ruled that two arbitrators' exclusion of the third arbitrator from deliberations was not misconduct that justified vacating the award.

29A.170 The vague standards provided for in Section 10(a)(4) have been given a degree of plain meaning in the case decisions interpreting them.

"Where the Arbitrators Exceeded Their Powers. . ."

29A.171 An award may be vacated if the arbitrators decide a claim that has not been submitted to them. This section of the Act, however, has been strictly interpreted, and any doubts about the scope of the submission agreement will be resolved in favor of coverage. As the court stated in *Andros Compania Maritima S.A*. v. *Marc Rich & Co*. *A.G*., 579 F.2d 691, 703 (2d Cir. 1978):

We have consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards '[W]here the arbitrators exceeded their powers', 9 U.S.C. § 10[(a)(4)], especially where that language has been invoked in the context of arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance.

29A.172 In *Stolt-Nielsen S.A*. v. *Animalfeeds Intl*. *Corp*., 559 U.S. 662 (2010), the Supreme

Court held that an arbitration panel "exceeded its powers" by imposing class arbitration where the parties concurred that they had reached "no agreement" on that issue. The court observed that "instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers."

29A.173 *Peoples Sec. Life Ins.* v. *Monumental Life Ins.*, 991 F.2d 141 (4th Cir. 1993), which involved an appeal from an order and judgment of the district court, which refused to vacate an arbitration award finding Monumental Life Insurance Co. liable to Peoples Security in the amount of $9,424,651.00 for violation of an agreement which prohibited the parties from hiring or soliciting agents away from one another for a period of three years. Monumental argued that the award should have been set aside based on "evident partiality" of one of the arbitrators and that the arbitrators exceeded their authority by finding Monumental liable for the tort of unfair competition and by awarding Peoples Security treble damages and 7 per cent pre-award interest. The Fourth Circuit affirmed the judgment in favor of the sales agent. In doing so it found: (*a*) no evidence of actual bias; (*b*) that the scope of the arbitration included a claim for unfair competition under the North Carolina Unfair Trade Practices Act which included treble damages under the statute; (*c*) that the award did not exceed the scope of the arbitration or the powers of the arbitrators; and (*d*) that the 7 per cent pre-award interest which was added only to the compensatory portions of the award was within the boundaries of the law.

29A.174 Accord, *Lyeth* v. *Chrysler Corp.*, 929 F.2d 891, 900 (2d Cir. 1991).

29A.175 As stated at the beginning of this section, arbitration is a creature of agreement between the parties. And, as the court stated in *Western Electric Co. Inc.* v. *Communication Workers of America*, *AFL-CIO*, 450 F.Supp. 876, 881 (S.D.N.Y. 1978), *aff'd w/o opin.*, 591 F.2d 1333 (2d Cir. 1978):

> The powers of an arbitrator are defined by the agreement of the parties: the question they submit both establishes and limits the arbitrator's jurisdiction. It is the reviewing court's duty to determine whether the arbitrator has acted within that jurisdiction.

29A.176 Where an arbitration is held pursuant to a submission agreement, that agreement will specify the claims to be decided by the panel and will then set the bounds of the proceedings. It is the custom in New York maritime arbitrations for the parties to sign a submission agreement which outlines the disputes and incorporates the arbitration clause of the charter. However, if the charter contains an arbitration clause, that is sufficient in itself to bind the parties to arbitrate any disputes covered by the clause. In this situation, the power of the arbitrators will be determined by the arbitration clause and the statement of claims submitted to them for decision.

29A.177 See *Yasuda Fire & Marine Ins.* v. *Continental Cas. Co.*, 37 F.3d 345, 351 (7th Cir. 1994), where the Seventh Circuit held that the arbitration panel's order requiring Yasuda to post a letter of credit in the amount of $2,549,660 as interim security pending final arbitration derived its authority from the essence of the contract and was not in excess of the arbitration panel's authority. *Flender Corp.* v. *Techna-Quip Co.*, 953 F.2d 273 (7th Cir. 1992), concerned an action filed by a manufacturer seeking to enjoin arbitration of a sales agent's claim that the manufacturer had wrongfully terminated its sales agency agreement. The manufacturer challenged the determination that the dispute was arbitrable and the arbitrators' award itself. The Seventh Circuit found that the district court was correct in its determination that the broad wording of the arbitration clause included controversies or claims related to any change in the distributor's legal structure. See also *Warth Line* v. *Merinda Marine*, 1992 AMC 1406 (S.D.N.Y. 1991), where the court found that a dispute concerning underperformance was properly submitted to arbitration and was to be determined by the arbitrators, who did not exceed their powers in deciding this question.

29A.178 In *Totem Marine Tug & Barge Inc.* v. *North American Towing Inc.*, 607 F.2d 649, 1980

AMC 1961 (5th Cir. 1979), the arbitrators ruled that Totem wrongfully terminated the charter. North American had claimed damages of $45,000 by reason of Totem's failure to redeliver the ship at the agreed port. The claim covered the cost of returning the ship. In its claim, North American did not seek to recover damages for charter hire due for the balance of the charter period. The panel nonetheless awarded North American damages which included the balance of hire due under the charter. Totem then moved to vacate the award on the grounds that the arbitrators exceeded their powers in rendering an award on a matter not submitted to them.

29A.179 The court agreed with Totem that the arbitrators exceeded their powers by awarding damages for unpaid charter hire to North American. The court noted that the statement of claim submitted by North American made no reference to the claim for unpaid hire, and that the case had been argued and briefed by the parties without reference to that claim. Moreover, the court rejected the contention that the damage claim was "naturally intertwined in the general scope of the breach of contract claim."

29A.180 The arbitrators also were held to have exceeded their powers in *The Matter of Cephalonian Shipping Co. S.A*., 1979 AMC 1451 (S.D.N.Y. 1979). There, the district court vacated an interim award because the arbitrators addressed the issue of failure to mitigate damages when all damages issues had been reserved by the parties for later submission following the panel's ruling on specified issues relating to the validity and performance of a settlement agreement.

29A.181 The arbitrators are entitled to go beyond a specific issue, however, if in deciding that issue it is necessary to resolve other questions of law or fact. In *Federal Commerce & Navigation Co*. v. *Kanematsu-Gosho Ltd*., 457 F.2d 387, 1972 AMC 946 (2d Cir. 1972), there was a master charter providing for 10 voyages. The first two voyages were not performed and a dispute arose. The parties were in disagreement on whether the arbitrators should decide just the dispute concerning the failure to perform the first two voyages, or whether they should deal with the validity of the master charter. It was finally agreed that they should submit for decision the question whether the master charter had been voided by reason of various actions taken by the owner. The arbitrator nonetheless ruled on both the continuing validity of the master charter and the effect of the cancellation of the first two voyages. The owner then moved to vacate the award on the ground that the arbitrator had exceeded his powers.

29A.182 The court upheld the award. It found that to decide the question submitted concerning the continuing validity of the master charter, the arbitrator had to deal also with the circumstances which led to the cancellation of the first two voyages. The court reasoned that the owner was on notice that the arbitrators would have to decide this subordinate issue in order to resolve the main question. According to the court, "an arbitrator is entitled to pass on every question of law or fact necessary to the disposition of the issue submitted to him." Id. at 389.

29A.183 The court further observed that it would be inappropriate to circumscribe the powers of the arbitrators so as to require that they treat the narrow issue submitted as an all or nothing proposition precluding consideration of anything else. To do so, the court observed, "would deny the power of the arbitrators to compromise the dispute in a manner which to them seemed appropriate and fair, as their knowledge of commercial practices qualified them to be." Id. at 390.

29A.184 As the court stated in *The Matter of Cephalonian Shipping Co. S.A*., above:

> [A]s long as the award reflects a decision on issues either actually or necessarily before the arbitrator or as long as the award reflects a compromise on those issues, the award is entitled to affirmance.

29A.185 See *Kerr-McGee Refining Corp*. v. *The Triumph*, 924 F.2d 467 (2d Cir. 1991), where the Second Circuit found that the arbitrators acted within the scope of their powers when they awarded treble damages under RICO for the wrongful conversion of cargo. See also *Kanuth* v.

Prescott, *Ball & Turben Inc*., 949 F.2d 1175 (D.C. Cir. 1991), where the court confirmed an arbitral award of $38,233,079 in favor of employee for breach of an employment contract.

29A.186 In *The Machitis*, 1978 AMC 1120 (S.D.N.Y. 1978), the court held that the arbitrators did not exceed their powers in interpreting a *force majeure* clause, notwithstanding the contention that the clause was so clear on its face that no interpretation was required.

29A.187 In *The Evryalos*, 1980 AMC 296 (S.D.N.Y. 1979), the court upheld the award even though the arbitrators did not answer the question submitted in the specific terms in which it was phrased.

29A.188 In *The Konkar Pioneer*, 668 F. Supp. 267 (S.D.N.Y. 1987), the court held that arbitrators had authority to order a charterer to deposit the withheld charter hire which was in dispute in an interest-bearing jointly-held escrow account. According to the court, while there was no submission agreement which explicitly gave the panel authority to establish an escrow account, the arbitrators had implicit authority to order the deposit of funds in escrow.

29A.189 In *Sun Ship Inc*. v. *Matson Navigation Co*., 785 F.2d 59 (3d Cir. 1986), the court rejected as frivolous the argument that arbitrators exceeded their powers in awarding prejudgment interest at the prime rate rather than at the statutory rate prescribed by Pennsylvania law.

29A.190 In *Gov't of India* v. *Cargill Inc*., 867 F.2d 130 (2d Cir. 1989), the court held that arbitrators did not exceed their powers in exercising the discretion to extend the time for the issuance of the award.

". . . [A] mutual, final and definite award"

29A.191 An award may be vacated if it is not "final" and "definite" in deciding the issues submitted. In *Cofinco Inc*. v. *Bakrie & Bros*. *N.V*., 395 F. Supp. 613, 616 (S.D.N.Y. 1975), for example, the award was vacated because the arbitrators failed to make a definite award of a sum certain. Without specifying amounts the arbitrators had simply awarded the claimant various "accrued expenses" and interest "at the average prime rate." As the court stated: "The goal of the proceeding was, and remains, a sum certain." Id. at 616.

29A.192 See *Flender Corp*. v. *Techna-Quip Co*., 953 F.2d 273, 280 (7th Cir. 1992), where the court declined to overturn the arbitration award on the ground that it was not final and definite, finding that the arbitrator had "resolved all claims before him leaving to the district court only the ministerial computation of the amount owed to" sales agent.

29A.193 However, the courts have generally preferred to exercise their power to remand the case to the arbitrators to provide them with an opportunity to clarify the award. In *Americas Ins*. *Co*. v. *Seagull Compania Naviera S.A*., 774 F.2d 64, 67 (2d Cir. 1985), the court stated that an ambiguous award should be remanded to the arbitrators to enable the court to know what it is being asked to enforce. An award was also remanded in *Olympia & York Florida Equity Corp*. v. *Gould*, 776 F.2d 42 (2d Cir. 1985), for the same reason. But see *Ottley* v. *Schwartzberg*, 819 F.2d 373 (2d Cir. 1987), holding that it was improper to remand to the arbitrators for the purpose of having the panel monitor compliance with their award.

Manifest disregard of the law

29A.194 Until the United States Supreme Court issued its decision in *Hall Street Associates*, *L.L.C*. v. *Mattell*, *Inc*., 552 U.S., 2008 576 2008), it had become an accepted principle that in addition to the grounds set out in Sections 10(a)–(d), an award may be vacated if it was made in "manifest disregard of the law." In *Wilko* v. *Swan*, 346 U.S. 427, 436–437 (1953), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/Am*. *Express*, *Inc*., 490 U.S. 477 (1989), the Supreme Court implied that awards rendered in "manifest disregard" of applicable law are subject

to review. In *First Options of Chicago*, *Inc*. v. *Kaplan*, 514 U.S. 938, 942 (1995), the court cited *Wilko* as setting forth one of the very limited grounds for vacating an arbitration award.

29A.195 In *Hall Street Assoc*., *L.L.C*. v. *Mattel*, *Inc*., 552 U.S. 576 (2008), the United States Supreme Court declined to enforce a provision in an arbitration agreement by which the parties had stipulated to giving the district court expanded authority to vacate, modify or correct any award "(i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Id*. at 579. Following arbitration, the district court granted the petitioner's application to reverse the award on the basis that the panel had committed legal error within the meaning of the above clause. The Ninth Circuit reversed, and the Supreme Court affirmed the Ninth Circuit's ruling, finding that where the Federal Arbitration Act applies, Sections 10 and 11 of the Act provide the exclusive bases for vacating an arbitration award and cannot be expanded by contract. In making this ruling, the court specifically rejected petitioner's argument that *Wilko* had previously recognized "manifest disregard of the law" as an additional ground for *vacatur* in addition to those listed in Section 10. Some have since suggested that the ruling in *Hall* meant the end of manifest disregard of the law as a grounds for *vacatur*.

29A.196 In *Stolt-Nielsen S.A*. v. *AnimalFeeds Intl. Corp*., 559 U.S. 662 (2010), however, the Supreme Court expressly declined to decide "whether 'manifest disregard' survives our decision in [*Hall*] as an independent ground for review or as a judicial gloss on the enumerated grounds for *vacatur* set forth [in the FAA]." *Id*. at 671 n. 3. Thus, the "manifest disregard" doctrine currently remains a valid ground for vacating arbitration awards in the Second Circuit. See *T. Co. Metals*, *LLC* v. *Dempsey Pipe & Supply Inc*., 592 F.3d 329, 340 (2d Cir. 2010).

29A.197 See also *Rich* v. *Spartis*, 516 F.3d 75, 82 (2d Cir. 2008) (articulating "manifest disregard" standard); *Duferco Int'l Steel Trading* v. *T. Klaveness Shipping A/S*, 333 F.3d 383, 389–390, 2003 AMC 1521 (2d Cir. 2003) (characterizing this test as a three-part test that additionally considers whether the erroneous application of the law led to an erroneous outcome).

29A.198 New York State courts have adopted manifest disregard as a basis for vacating an arbitration award. See, e.g., *UBS Warburg LLC* v. *Auerbach, Pollak & Richardson*, *Inc*., 2001 N.Y. Misc. LEXIS 1324 (Sup. Ct., N.Y. Co. 2001), where an arbitration award was vacated because it was irrational and exhibited a manifest disregard for well-established public policy.

29A.199 In *Sawtelle* v. *Waddell & Reed*, *Inc*., 754 N.Y.S.2d 264, 2003 N.Y. App. Div. LEXIS 1243 (Sept. 1st 2003), a New York State appellate court vacated a $25 million punitive damages award on the grounds that it was in manifest disregard of the law. The case involved an employment dispute and was heard by a NASD panel. The employee was awarded compensatory damages of $1.1 million and punitive damages of $25 million. The court vacated the punitive damages portion of the award because it ignored case law decided by the United States Supreme Court concerning the outer limits of what is permitted by the United States Constitution.

29A.200 An award cannot be vacated merely because the arbitrators have not stated the reasons for their decision. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp*., 363 U.S. 593, 598 (1960), the Supreme Court reaffirmed the principle that "arbitrators have no obligation to the Court to give their reason for an award."

29A.201 In *OneBeacon America Insurance Co*. v. *Turner*, 2007 AMC 605, 607–608 (5th Cir. 2006), the court ruled that because there was no record of the proceedings, the movant could not show that the arbitrators had shown manifest disregard of the law.

29A.202 In *Rich* v. *Spartis*, 516 F.3d 75 (2d Cir. 2008), the court remanded the case to the District Court with instructions to remand the matter to the arbitration panel for clarification of the award. The case involved claims by investors against stockbrokers and their employer in an arbitration under the rules adopted by the National Association of Securities Dealers ("NASD").

The District Court vacated the arbitration award on the grounds that the arbitrators exceeded their authority. The Second Circuit, however, reversed that decision and remanded to the District Court to require that the arbitration panel clarify its decision. The Second Circuit noted that the lack of clarity in the award did not permit it to determine whether the arbitrators exceeded their powers or, alternatively, whether the award was issued in manifest disregard of the law. In a concurring opinion, circuit Judge Straub noted as follows:

> I also emphasize that in ordering a remand here, we do not require that arbitrators to state the reasons for their award, but only to state the precise amount of the award attributable to WorldCom losses as well as the precise amount of the award attributable to non WorldCom losses. . . . Remand for the limited purpose of asking the arbitration panel to provide a breakdown of the award will ensure that the District Court will know exactly what it is being asked to enforce: *Id*. at 85 [Quotations omitted].

Violation of public policy

29A.203 A variation on the judicially-created doctrine of manifest disregard of the law was fashioned in *Re Sea Dragon Inc*., 574 F. Supp. 367, 1984 AMC 699 (S.D.N.Y. 1983). The District Court vacated an award on the ground that it was against the public policy of the United States. The award directed the charterer to pay freight to the owner, which payment had been enjoined by a Netherlands court sequestration order obtained by a creditor of charterer. The court found that the effect of the award was to direct the charterer to violate the Dutch decree. Such a result would have placed charterer in an untenable position and, more importantly, was contrary to the doctrine of comity. Because the award compelled a violation of Dutch law, it was found to be contrary to American public policy.

29A.204 In *Karen Maritime Ltd*. v. *Omar Int'l Inc*., 322 F. Supp. 2d 224, 230, 2004 AMC 2489 (E.D.N.Y. 2004), the court concluded that confirmation of an arbitral award would not violate public policy because the charterparty on which it was based included a clause stating that the ship had not sailed to Israeli ports. Although the United States has a strong public policy of opposing the Arab boycott, the basis for the award was unrelated to the boycott.

Contractual expansion of grounds for vacating arbitration awards

29A.205 As discussed above, the grounds for vacating an arbitration award are narrow. In 2008, the United States Supreme Court resolved a split between the federal circuit courts of appeal on the question of whether parties can expand the scope of judicial review of arbitration awards contractually by allowing *vacatur* of an arbitration award on grounds other than those listed in the Federal Arbitration Act.

29A.206 The United States Supreme Court has ruled plainly that the statutory grounds for vacating awards under the Federal Arbitration Act, 9 U.S.C. § 10, are exclusive and may not be supplemented by contract. *Hall Street Assocs*., *L.L.C*. v. *Mattel*, *Inc*., 552 U.S. 576, 2008. The arbitration clause at issue in *Hall* included the following provision:

> The court should vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

The court ruled that this clause was not enforceable.

29A.207 In *The Jo Maple*, SMA 3947 (Arb. at N.Y. 2007), the panel determined it had authority to issue a corrected final award which changed the name of the party against whom the original award was issued. As often happens, there was some confusion in the fixture recap as to the correct name of the charterer and, as a result, when the original award was issued, it used a trading name

rather than the full name of the charterer. The panel concluded it was authorized to issue a corrected award under Section 30 of the Society of Maritime Arbitrators Rules, which states: "The Panel shall retain jurisdiction to modify the award for the sole purpose of correcting obvious clerical and/or arithmetical errors."

29A.208 *Hoeft* v. *MVL Group*, *Inc*., 343 F.3d 57, 64 (2d Cir. 2003) involved an attempt by the parties to further limit by contract the scope of judicial review of an arbitration award, and the court held that "[p]arties seeking to enforce arbitration awards through federal court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with [FAA] § 10(a) and the manifest disregard standard." *Id*. at § 66.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

29A.209 Sections 201–208 of the Arbitration Act implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and include provisions by which an aggrieved party may compel the other to proceed to arbitration or enforce an award rendered abroad. In addition to the United States, most of the major maritime nations, including the United Kingdom, are parties to the Convention. The text of the New York Convention may be found at Appendix D.2.

29A.210 With respect to written agreements to arbitrate, compare *Sphere Drake Ins*. v. *Marine Towing Inc*., 16 F.3d 666, 1994 AMC 1581 (5th Cir. 1994), *cert*. *denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed. 2d 127 (U.S. 1994), where the Fifth Circuit held that the parties had an "agreement in writing" within the meaning of the Convention, in that their insurance contract, although not signed, contained an arbitral clause with *Kahn Lucas Lancaster*, *Inc* v. *Lark Int'l Ltd*, 186 F.3d 210, 218 (2d Cir. 1999)(interpreting Art. II(2) of the Convention to require both "an arbitral clause in a contract" and "an arbitration agreement" to be "signed by the parties or contained in an exchange of letters or telegrams."). In *Maroc Fruit Board S.A*. v. *M/V Vinson*, 2012 WL 2989195 (D. Mass. 2012), a district court, following *Kahn Lucas*, held that an arbitration clause incorporated by reference into a bill of lading was not enforceable because it was not signed by the shipper and "does not amount to an 'exchange of letters or telegrams'."

29A.211 With respect to motions to compel arbitration under the Convention, it has been held that "the Convention contemplates a very limited inquiry by courts." *Sedco* v. *Petroleos Mexicanos*, 767 F.2d 1140, 1986 AMC 706 (5th Cir. 1985). In *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184, 185–186 (1st Cir. 1982), the court outlined four questions to be answered in deciding whether a motion to compel arbitration under the Convention should be granted:

1. Is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
2. Does the agreement provide for arbitration in the territory of a convention signatory;
3. Does the agreement to arbitrate arise out of a commercial legal relationship;
4. Is a party to the agreement not an American citizen?

29A.212 The Convention requires that District Courts compel arbitration if these criteria are met.

29A.213 See *Riley* v. *Kingsley Underwriting Agencies Ltd*., 969 F.2d 953, 959 (10th Cir. 1992), *cert*. *denied*, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992), where the Tenth Circuit stated that an affirmative response to the inquiry framed by *Ledee*, above, requires a court to order arbitration under the Convention. The Tenth Circuit agreed with the Third Circuit and its reasoning that the "null and void" exception in the Convention which allows courts to act to the contrary is to

be construed narrowly, citing *Rhone Mediterranee Compagnia* v. *Lauro*, 1984 AMC 1575, 1580, 712 F.2d 50, 53 (3d Cir. 1983).

29A.214 In *Brier* v. *Northstar Marine Inc*., 1993 AMC 1194 (D.N.J. 1992), the plaintiff argued that its LOF agreement with a salvage company, which included a London arbitration clause, was an invalid contract of adhesion. In addition, the plaintiff asserted that the court could not compel arbitration overseas because the case fell outside the scope of the Convention which the court was bound to follow. The District Court held that the agreement was not an invalid contract of adhesion, and that the plaintiff had not met his burden of proof that the contract was the product of fraud, coercion, or "such grounds as exist at law or in equity for the revocation of [the] contract" pursuant to 9 U.S.C. § 2. However, the court held that the proper place for arbitration was in New Jersey, and not London. It did so based on an analysis of the requirements outlined in *Ledee* above, finding that the fourth requirement was not met because all the parties were U.S. citizens, in addition to the fact that there was no connection abroad beyond the situs and law set forth in the LOF agreement. Thus, the court held that the Convention was not applicable.

29A.215 Accord, *Jones* v. *Sea Tow Services*, 1994 AMC 1107, 828 F. Supp. 1002 (E.D.N.Y. 1993), *rev'd and remanded*, 1994 AMC 2661, 30 F.3d 360 (2d Cir. 1994), where the Second Circuit reversed the decision of the District Court finding that it exceeded its jurisdiction in directing arbitration to proceed in England, where the parties to the action were all U.S. citizens engaged in a purely domestic salvage dispute, and there was no relationship with a foreign state in order to come within the scope of the Convention.

29A.216 Foreign arbitration awards governed by the Convention can be enforced in the District Courts of the United States. To advance the objectives of the Convention, under 9 U.S.C. § 208, a summary procedure in the form of a motion can be utilized to obtain confirmation. Thus, a number of awards have been confirmed upon motions supported by affidavits. See, e.g., *Imperial Ethiopian Gov't* v. *Baruch-Foster Corp*., 535 F.2d 334, 335 n. 2 (5th Cir. 1976).

29A.217 Under Section 207, an action to enforce an arbitral award falling under the Convention must be made within three years after the award was issued. In order to bring an enforcement action in the United States, however, the respondent must be subject to *in personam* jurisdiction in the court in which the action is brought in the United States. In *Transatlantic BulkShipping Ltd*. v. *Saudi Chartering S.A*., 1985 AMC 2432 (S.D.N.Y. 1985), the court declined a petition for confirmation of a London arbitration award because the respondent was not subject to personal jurisdiction in New York.

29A.218 The Convention also applies to commercial arbitration awards rendered in the United States. *Bergesen* v. *Joseph Muller Corp*., 710 F.2d 928 (2d Cir. 1983). There, the court noted that the fact that the award might also have been enforced under the Arbitration Act was of no significance. According to the court, "there is no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act." Id. at 934. The point was of considerable importance to the party seeking to enforce the award because, while the one-year limitation on actions to enforce awards under the Arbitration Act had run, the three-year period provided for in the Convention had not.

29A.219 Only the limited grounds set out in Article V are available under the Convention to oppose confirmation of an award which falls under the Convention. The defense that the arbitrators exceeded their powers is available under Article V(1)(c). This section is similar in scope to Section 10(d) of the Arbitration Act, discussed above. This defense is to be construed narrowly, but allows a party "to attack an award predicated upon arbitration of a subject-matter not within the agreement to submit to arbitration." *Parsons & Whittemore Overseas Co*. *Inc*. v. *Société Generale de L'Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974).

29A.220 The defense that a party was unable to present its case is available under Article V(1)

(b). See *Iran Aircraft Industries* v. *Avco Corp*., 980 F.2d 141 (2d Cir. 1992), where enforcement of the arbitral award was denied on this basis.

29A.221 In *Waterside Ocean Navigation* v. *Int'l. Nav. Ltd*., 737 F.2d 150, 1985 AMC 349 (2d Cir. 1984), the party opposing confirmation of London arbitration awards relied upon the public policy defense set out in Article V(2). It was argued that the awards on damages were based on perjured testimony and that confirmation would be contrary to the public policy against fraud. The court rejected this argument. While agreeing that in order to maintain the integrity of the judicial system "it is important that a litigant not be encouraged to 'blow hot and cold' in a series of proceedings,'" (737 F.2d at 152), the court stated that it would be contrary to the purposes of the Convention were the court to inquire into the record to determine the significance of alleged inconsistencies in the evidence reviewed by the arbitrators. The court suggested that the forum in which the alleged inconsistent testimony was given should be looked to for whatever remedies were available to rectify any injury arising therefrom. The court adhered to its prior ruling in *Fotochrome Inc*. v. *Copal Co*., 517 F.2d 512 (2d Cir. 1975), that "the public policy defense should be construed narrowly. . . [and] should apply only where enforcement would violate our 'most basic notions of morality and justice.'" 737 F.2d at 152. See also *Parsons & Whittemore Overseas Co. Inc*. v. *Société Generale de L'Industrie du Papier*, above; *Fertilizer Corp. of India* v. *IDI Mgt. Inc*., 530 F. Supp. 542 (S.D. Ohio 1982).

29A.222 Accord, *Halcoussis Shipping Ltd*. v. *Golden Eagle Liberia Ltd*., 1989 U.S. Dist. LEXIS 11401 (S.D.N.Y. 1989).

29A.223 The judicially-created ground of "manifest disregard of the law" discussed above for seeking to vacate an arbitration award is not available under the Convention. *Brandeis Intsel Ltd*. v. *Calabrian Chemicals Corp*., 656 F. Supp. 160, 165 (S.D.N.Y. 1987). The court further ruled in that case that "manifest disregard" of law was not the equivalent of contravening public policy within the meaning of Article V of the Convention. The issue was discussed, but not decided, in *Parsons & Whittemore Overseas Co. Inc*. v. *Société Generale de L'Industrie du Papier*, above.

29A.224 Under Article VI of the Convention, the court asked to enforce the award may, in its discretion, adjourn decision on the enforcement of the award if an application to have the award set aside or suspended has been made to the court or other competent authority in the country where the award was made.

29A.225 There is an important provision in Article VI which gives the court the power to order the other party to give suitable security to the party seeking to enforce the award. The district court relied upon Article VI in adjourning enforcement proceedings in *Spier* v. *Calzaturificio Tecnica S.p.A*., 663 F. Supp. 871 (S.D.N.Y. 1987), pending resolution of a challenge to the award before the Italian court. The court observed that adjourning the enforcement action was preferable to the possible alternative course of granting a judgment on the award, only to find out later that the award was set aside by the court of the country where it was issued. 663 F. Supp. at 875.

29A.226 See also *Fertilizer Corp. of India* v. *IDI Management Inc*., 517 F.Supp. 948, 962 (S.D.Ohio 1981), *reconsideration denied* 530 F. Supp. 542 (S.D. Ohio 1982), where the court adjourned its decision on enforcement of an award rendered in India until the Indian courts decided with finality whether the award was valid. The court directed that security be posted under Article VI pending the outcome of the Indian proceedings.

29A.227 United States courts will allow actions under Section 8 to obtain security in aid of an arbitration agreement which is enforceable under the Convention even though the Convention itself does not expressly authorize attachments or arrests. In *Paramount Carriers Corp*. v. *Cook Industries Inc*., 465 F. Supp. 599, 1979 AMC 875 (S.D.N.Y. 1979), the court upheld a maritime attachment under Section 8 in connection with a demurrage dispute which was subject to arbitration

under the Convention. The issue was raised but not decided in *Polar Shipping Ltd*. v. *Oriental Shipping Corp*., 680 F.2d 627, 1982 AMC 2330 (9th Cir. 1982).

29A.228 Post-award, pre-judgment interest can be awarded by the district court in enforcing awards covered by the Convention. *Waterside Ocean Nav*. v. *Int'l Nav. Ltd*., above, 737 F.2d at 153–155.

29A.229 Attorneys' fees and costs were awarded in *Jamaica Commodity Trading Co*. v. *Connell Rice*, 1991 U.S. Dist LEXIS 8976 (S.D.N.Y., 3 July 1991), where the District Court held that defendant's motion to vacate the foreign award as contrary to public policy pursuant to Article V(2)(b) of the Convention was totally devoid of merit.

Vouching-in and binding effect of arbitration award on third parties

29A.230 In certain situations, an arbitration award may be binding on third parties who did not participate in the arbitration. In *SCAC Transport* (*USA*) *Inc*. v. *The Danaos*, 845 F.2d 1157 (2d Cir. 1988), the court held that a stevedore was bound by the results of an arbitration between the owner and charterer after the stevedore had been properly vouched into the proceeding. The underlying claim was for damage to a truck which occurred while it was being loaded aboard the ship. The owner settled with cargo interests and demanded arbitration with the charterer to seek indemnity. The charter provided for London arbitration. The charterer then tendered defense of the London arbitration to the stevedore, but the stevedore declined to accept it. The arbitration then proceeded and an award was entered in favor of the owner and against the charterer. The charterer then sued the stevedore for indemnity in New York and prevailed. The court held that, because of its declination of the tender of defense, the stevedore was bound by the finding of the London arbitrators that its negligence caused the accident. The court noted that, in a case of this type, arbitration provided an effective and efficient remedy for all concerned, and held that "absent a particularized showing of prejudice, a stevedore may be vouched into arbitration under a charter party by a charterer where the stevedore is the charterer's indemnitor." 845 F.2d at 1158. See discussion at paragraphs 20A.47 et seq.

29A.231 See also *Universal American Barge Corp*. v. *J.-Chem*, *Inc*., 1993 AMC 1888, 1895–1896, 946 F.2d 1131, 1138 (5th Cir. 1991), where the court described vouching-in as follows:

> Vouching is a common-law device whereby a defendant notifies the vouchee, a non-party alleged indemnitor, (a) of the pendency of the suit against him; (b) that if liability is found, the defendant will look to the vouchee for indemnity; (c) that the notice constitutes a formal tender of the right to defend the action; and (d) that if the vouchee refuses to defend, it will be bound in any subsequent litigation between them to the factual determinations necessary to the original judgment. Vouching helps to avoid duplicative litigation and the risk of inconsistent results in adjudicating indemnification claims. Vouching is reserved primarily for cases in which the vouchee cannot be impleaded because the vouchee is not subject to personal jurisdiction.

29A.232 *T. Klaveness Shipping* v. *Duferco International Steel Trading*, 2001 AMC 1954, SMA 3686 (Arb. at N.Y. 2001), is an example of how the vouching-in procedure works. A claim was made by the ship's owner against the time charterer for damages caused by an unsafe berth. The claim was subject to London arbitration. The time charterer tendered defense of the London arbitration to the voyage charterer who had directed the ship to load at the berth. The voyage charterer declined to accept the tender and the London arbitration proceeded in its absence. The owner prevailed and the time charterer then sought indemnity from the voyage charterer in a New York arbitration. The panel majority ruled that the time charterer had properly vouched-in the voyage charterer to the London arbitration and awarded indemnity. The New York award was confirmed by the court over the voyage charterer's contention that it was in manifest disregard of the law. See *Duferco Int'l*

Steel Trading v. *T. Klaverness Shipping A/S*, 184 F. Supp. 2d 271 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 383, 2003 AMC 1521 (2d Cir. 2003).

29A.233 In *The Fomalhaut*, SMA 4211 (Arb. at N.Y. 2013)(Arnold, Sheinbaum, Martowski), the panel held that the disponent owner had timely and properly vouched in the charterer, who nevertheless had declined to participate in the disponent owner's arbitration with the head owner. The charterer was consequently bound by the other panel's partial and final awards and was obliged to indemnify the disponent owner.

Time to commence proceedings

29A.234 In *Howsam* v. *Dean Witter Reynolds*, *Inc*., 537 U.S. 79, 123 S.Ct. 588 (2002), the Supreme Court of the United States considered whether the applicability of a time limit rule for demanding arbitration under a securities contract was to be decided by the court or arbitrators. The court noted that as a general principle, the question of arbitrability, i.e., whether the parties have submitted a particular dispute to arbitration, is an issue to be decided by the court. The court ruled that the time limit issue was a procedural matter to be decided by the arbitrators rather than the court. In so ruling, the court gave examples of issues that clearly are questions of arbitrability. These include whether an arbitration contract binds parties who did not sign the agreement or whether an arbitration agreement survived a corporate merger and bound the resulting corporation. By contrast, the court noted that the applicability of a time limit rule was not the type of "gateway issue" the parties ordinarily would expect the court to decide. Based on this analysis, the court ruled that the arbitrators should decide whether the demand for arbitration was timely. Because *Howsam* involved a securities dispute governed by NASD rules, it remains to be seen how the holding will be applied. It seems clear that *Howsam* would dictate that issues concerning the timeliness of an arbitration demand under a charter would be for the arbitrators to decide. The same would be true of the timeliness of claims for cargo damage or loss which are subject to arbitration. Indeed, there are numerous pre-*Howsam* decisions so holding. See, e.g., *Conticommodity Services*, *Inc*. v. *Philipp & Lion*, 613 F.2d 1222 (2d Cir. 1980); *Office of Supply*, *Government of the Republic of Korea* v. *N.Y. Navigation Co*., *Inc*., 469 F.2d 377, 1973 AMC 1238 (2d Cir. 1972).

29A.235 In *Smith Barney*, *Harris Upham & Co*. v. *Luckie*, 85 N.Y.2d 193, 203, 623 N.Y.S.2d 800, 805, 647 N.E.2d 1308, *cert*. *denied*, 116 S.Ct. 59 (1995), the New York Court of Appeals held that where a contract requiring arbitration of disputes incorporated New York law, the question whether a claim is time barred is to be decided by the court and not by the arbitrators. The court noted that it was adopting a different rule than had been adopted by some federal courts with respect to disputes governed by the Federal Arbitration Act. *Luckie* remains the law in New York, and it has been adopted by some federal courts applying that law. See, e.g., *Ins*. *Co*. *of North America* v. *ABB Power Generation*, *Inc*., 925 F.Supp. 1053 (S.D.N.Y. 1996). The United States Court of Appeals for the Second Circuit in *Painewebber Inc*. v. *Bybyk*, 81 F.3d 1193 (2d Cir. 1996), declined to follow *Luckie* and stated that its reasoning was inconsistent with the Federal Arbitration Act and was overturned by the Supreme Court in *Mastrobuono* v. *Shearson Lehman Hutton*, *Inc*., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). *Luckie* has nonetheless continued to be applied by New York courts and in cases governed by New York law. See, e.g., *Coleman & Co*. *Securities Inc*. v. *Giaquinto Family Trust*, 2000 LEXIS 16125 (S.D.N.Y. 2000), a case where the arbitration agreement expressly provided for New York law.

29A.236 In *Stolt-Nielsen SA* v. *Celanese Chemicals Europe GmbH*, 430 F.3d 567 (2d Cir. 2005), the Court of Appeals for the Second Circuit held that an arbitration panel could subpoena

and compel testimony and production of records from non-parties at an arbitration hearing notwithstanding the non-parties' claim that the arbitrators really sought "pre-hearing" discovery. The arbitration at issue involved a dispute between different groups of chemical carriers involving alleged price fixing. The claimants asked the panel to issue subpoenas to a non-party chemical company and its attorneys. The non-parties petitioned the panel to quash the subpoenas, but the United States District Court for the Southern District of New York ordered the non-parties to comply. The Second Circuit affirmed and held that non-parties may be compelled to testify and produce documents before a hearing held before an arbitration panel even if that hearing is not the panel's "final" hearing.

CHAPTER 30

Liens

"110. 18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Aver-
111. age contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess
112. deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which
113. might have priority over the title and interest of the owners in the vessel."

Owners' security for charterers' obligations

30.1 Clause 18 of the New York Produce form gives the owners two rights of 'lien' with which they can enforce their rights to hire and other sums due under the charter: first, a lien over the cargo on board and second, a 'lien' over any freights earned by charterers or sub-charterers during the period of the charter.

30.2 In addition to these rights under Clause 18, the owners also have a separate right to intercept the freights payable under bills of lading, where they, the owners, are the carriers under the bills. This right of interception is discussed in paragraphs 30.67 *et seq*., below.

For what are the liens security?

"any amounts due under this Charter"

30.3 The owners' liens can be exercised in respect of hire and other sums due from the charterers under the charter. This will include disbursements made by the owners which, by the terms of the charter, are the responsibility of the charterers and in respect of which the owners are entitled to reimbursement. However, whether the owners' claim is for hire or for other amounts, the liens secure only sums accrued due at the time when the liens are exercised.

The *Lindenhall* was employed under a time charter which provided that the owner should have a lien upon all cargoes and all sub-freights for any amounts due under the charter. Hire was payable in advance. The ship was ordered to load cargo in the U.S. for Japan. The charterers issued bills of lading (to which the owners were not a party) under which part of the freight was payable on delivery. In the course of the voyage the charterers became insolvent and the owners had to pay for fuel and incur other disbursements which were the charterers' responsibility under the terms of the charter. At the port of discharge, the master collected (in one sum) the balance of freight and then sought to set-off the cost of fuel and disbursements incurred on the voyage as well as an amount of charter hire which became due after the balance of bill of lading freight had been paid.

Walton, J., held that:

(1) As the bill of lading contract was with the charterers and not the owners, the master received the freight by virtue only of the right of lien under the charter.
(2) The owners' lien covered the cost of fuel and other disbursements incurred on the voyage since these were the responsibility of the charterers and thus "amounts due under this Charter".
(3) The lien could be exercised in respect of any advance hire which had accrued due at the time the

balance of the bill of lading freight was paid. It could not be exercised in respect of hire which did not accrue due until after that time.

(4) The owners were obliged to account to the charterers for the excess of the freight they had collected over the amounts in respect of which they had a valid lien under (2) and (3) above: but they were entitled to set-off in this account the hire that had accrued due after the bill of lading freight was collected and also their claim for damages for the failure of the charterers to carry out the charter.

Samuel v. *West Hartlepool* (1906) 11 Com. Cas. 115 and (1907) 12 Com. Cas. 203.
(See also *The Lakatoi Express* (1990) 19 N.S.W.L.R. 285.)

30.4 It is uncertain whether the phrase 'amounts due under this Charter' is apt to include claims for damages, as well as debts: see the (inconclusive) discussion in *The Western Moscow* [2012] 2 Lloyd's Rep. 163, at [29] – [30]. It probably embraces, at least, claims for liquidated damages: see *Lyle Shipping* v. *Corporation of Cardiff* (1899) 5 Com. Cas. 87, where a claim for demurrage was a sum 'due under charter' for the purposes of the lien clause in a voyage charter. However if, after the owner has withdrawn his ship from the service of the time charterer, he becomes entitled to *quantum meruit* payments from a sub-time charterer in exchange for being allowed to continue to use the ship, these payments are not "amounts due under" the head charter: see *The Lakatoi Express* (1990) 19 N.S.W.L.R. 285, at page 304.

"including General Average contributions"

30.5 At common law, the shipowner has a possessory lien over any cargo that has been preserved as a result of general average expenditure or sacrifice; the lien attaches at the time when the sacrifice is made or the expenditure incurred; the lien is exercisable against the consignee of the cargo, whether or not the consignee was the owner of the cargo at the time of the relevant expenditure and must be exercised not only for the shipowner's benefit, but for the benefit of any other interest which may have suffered general average loss: see *Castle Insurance* v. *Hong Kong Islands Shipping* [1984] A.C. 226 (P.C.), at page 234. Clause 18 provides the owners with an additional contractual right of lien for general average contributions.

The owners' lien upon cargoes

30.6 English and United States law differ significantly as to the nature of the liens given by Clause 18 of the New York Produce form. Under U.S. law, this clause will generally create maritime liens enforceable by an action *in rem* against the cargo (see paragraphs 30A.1 *et seq*., below). Under English law the liens are possessory and contractual only, as explained below.

Possessory lien

30.7 Under English law, the right given to owners by Line 110 of the New York Produce form or Line 220 of the Baltime form is a right to retain possession of cargo until monies owed to them by the charterers have been paid. That is, it is a possessory lien. It carries with it, as a corollary, a right to refuse to comply with the charterers' order for the delivery of the cargo: in other words, the lawful exercise of the lien excuses the owners from having to perform the charter service of delivering the cargo. In *The Boral Gas* [1988] 1 Lloyd's Rep. 342 (a voyage charter case), at page 349, Evans, J., said that the owners' right to a lien over cargo operates "as a qualification of the undertaking to give discharge" of the cargo. In general, a possessory lien is lost once the owners – the lienees – give up possession of the cargo.

Contractual only

30.8 The lien of the owners over cargoes, given by Line 110 of the New York Produce form or Line 220 of the Baltime form, is a contractual lien only. That is, it is created by the parties' contract and has no independent root in Admiralty, common law, equity or statute. In general, a contractual lien creates a right only as between the parties to the contract.

30.9 For that reason, where the cargo on the ship does not belong to the charterers, the Clause 18 lien does not, by itself, give the owners any right, as against the owners of the cargo, to refuse to give delivery to them (the position is different if the cargo owners have consented to the lien: see paragraph 30.10, below).

The *Bombay* was time chartered for six months with an option to sublet. The charter provided that bills of lading were to be signed at any rate of freight the charterers or their agents might direct, without prejudice to the charter. The charter further provided that the owners were to have a lien "upon all cargoes for freight or charter money due under this charter". Shortly afterwards, she was sub-chartered for a round voyage starting and ending in Bombay. The ship loaded a cargo of sugar in Mauritius for delivery in Bombay. The sub-charterers paid freight in Mauritius and the master issued them with bills of lading stating that freight had been pre-paid. When the ship arrived in Bombay, the owners sought to exercise a lien on the sub-charterers' cargo for time charter hire. It was held by the Privy Council that the owners had no right of lien on the sub-charterers' sugar. Lord Lindley said: "as regards. . . [the clause of the time charter] giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance. But this clause does not override or limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods of persons who have come under no contract with them conferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of justice can be expected to recognise it."

Turner v. *Haji Goolam* [1904] A.C. 826 (P.C.).

30.10 On the other hand, the cargo owners will usually be bound by the owners' lien over cargo, if they have consented to it. Usually there are two circumstances in which that may occur. One is where there is a contract – typically a bill of lading – between the owners and the cargo owners which gives the owners a right of lien for time charter hire: see further the discussion below at paragraphs 30.16 *et seq*.. Another is where the owners have possession of the cargo as sub-bailees on the terms of the time charter and the cargo owners have consented to the sub-bailment on those terms: see *The Pioneer Container* [1994] 1 Lloyd's Rep. 593 (P.C.). For an example of a case where the cargo owners were bound by a lien clause in the terms of the sub-bailment, see *Jarl Trä* v. *Convoys* [2003] 2 Lloyd's Rep. 459, at pages 464–466.

30.11 In all events, even where the owners have no right to retain possession of the cargo as against its owners, they may still be entitled, as against the charterers, to refuse to perform the charter service of delivering the cargo, relying on Clause 18. In other words, even if they have no contractual rights against the cargo owners, Clause 18 may still operate as a qualification of the owners' obligation under the charter to give discharge.

30.12 There are conflicting decisions on this point. Mocatta, J., in *The Agios Giorgis* [1976] 2 Lloyd's Rep. 192 (see paragraph 16.86, above) held that the owners were not, even as against the charterers, justified in detaining cargo under Line 110 of the New York Produce form charter where the charterers had failed to pay hire and the cargo detained belonged to other parties. But the contrary conclusion was reached shortly thereafter by Donaldson, J., in *The Aegnoussiotis* [1977] 1 Lloyd's Rep. 268. In both the above cases, payments of time charter hire were overdue and the owners instructed their masters not to discharge the cargo until the hire was paid. The cargoes in both cases belonged to parties other than the charterers. In *The Agios Giorgis*, Mocatta, J., took the view that even assuming the right to lien was governed by the proper law of

the charter (as opposed to the law of the place where the supposed lien was exercised), English law required for the valid exercise of a contractual lien that the owner of the cargo held should be a party to the contract. Since that was not the case the owners had no right of lien to justify their refusal to discharge the cargo. In *The Aegnoussiotis*, Donaldson, J., was aware of the decision of Mocatta, J., but took a different view. He said: "In my judgment, cl. 18 is to be construed as meaning what it says, namely, that the time charterers agree that the owners shall have a lien upon all cargoes. In so far as such cargoes are owned by third parties, the time charterers accept an obligation to procure the creation of a contractual lien in favour of the owners. If they do not do so and the owners assert a lien over such cargo, the third parties have a cause of action against the owners. But the time charterers themselves are in a different position. They cannot assert and take advantage of their own breach of contract. As against them, the purported exercise of the lien is valid." It is suggested that the approach of Donaldson, J., is to be preferred, being consistent with the basic principle that a contract will not be construed in a way that allows a party to take advantage of his own breach. It is also, perhaps, more consistent with assumptions made by the Court of Appeal in *Tonnelier* v. *Smith* (1897) 2 Com. Cas. 258. However, the law on this point is not yet fully developed and care may be needed not to take Donaldson, J.'s view too far (see paragraph 30.14, below).

The charterers' promise to procure a lien

30.13 At all events, it is suggested that Donaldson, J., was right to say in *The Aegnoussiotis*, above, that Clause 18 contains an undertaking by the charterers to procure for the owners a right of lien over the cargo (whether or not it is owned by the charterers). However, other things being equal, the owners are not entitled to refuse to sign bills of lading on the ground that the bills do not give them a right of lien: see paragraph 30.80, below.

30.14 But what is the position if the owners detain the cargo where the charterers have promised by Clause 18 that they should have a lien, but in fact no or no sufficient lien has been created under the bills of lading? In these circumstances, are the owners entitled to damages or an indemnity from the charterers in respect of any liability incurred to the bill of lading holders for wrongful detention of their cargo? It is thought that the answer must depend on whether the owners knew they had no right against the cargo owners. If they did not know, it would seem that a right to damages or an indemnity should arise. If, on the other hand, the owners detained cargo when they knew that they had no right to do so, then no such right should arise. Such detention would be manifestly wrong: see, by way of analogy, *Strathlorne Steamship* v. *Weir* (1934) 50 Ll.L.Rep. 185, paragraph 19.15, above, and generally on the owners' rights where bills of lading fail to conform to the requirements of the time charter, see paragraphs 21.30 to 21.70, above.

Baltime form

30.15 It is clear from Lines 220 and 221 of the Baltime form that the owners are given a right to lien only those cargoes which belong to the charterers: "The Owners shall have a lien upon all cargoes and sub-freights belonging to the Time-Charterers." See *The Mihalios Xilas* [1978] 2 Lloyd's Rep. 186.

Where the owners' lien over the cargo is incorporated into the bills of lading

30.16 Where owners' bills of lading incorporate (expressly or by reference) the time charter lien clause, the owners will have a contractual right against the bill of lading holders to lien the

cargo in respect of sums owed under the time charter: see the judgment of Mocatta, J., in *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, at page 165.

30.17 General words of incorporation in a bill of lading, such as those of the Congenbill form – "All terms and conditions, liberties and exceptions of the Charter Party" – are probably sufficient to incorporate the lien clause in a time charter. In two voyage charter cases, general words were held sufficient to incorporate into a bill of lading a lien clause giving the owners a lien for demurrage: see *Fidelitas* v. *V/O Exportchleb* [1963] 2 Lloyd's Rep. 113 (C.A.), at pages 125 to 126 and *The Miramar* [1983] 2 Lloyd's Rep. 319, *per* Mustill, J., at page 324 (a point which was not appealed to the Court of Appeal [1984] 1 Lloyd's Rep. 142 or House of Lords [1984] 2 Lloyd's Rep. 129). However, it is possible that a different approach would be taken where the bills seek to incorporate the terms of a time charter: see the comments of Kerr, J., in *The Nanfri* [1978] 1 Lloyd's Rep. 581, at page 591.

30.18 In all events, the incorporation of the lien clause will be effective only if the bills sufficiently identify the charter whose terms are intended to be incorporated. Where, as often occurs, the bill of lading refers only to the charterparty, without more specific identification, the normal presumption is that it is referring to the head charterparty, to which the owners are party, if that is a voyage charter: *The San Nicholas* [1976] 1 Lloyd's Rep. 8, at page 11, *The Sevonia Team* [1983] 2 Lloyd's Rep. 640, *The Nai Matteini* [1988] 1 Lloyd's Rep. 452 (which were all voyage charter cases). It is unclear whether this presumption applies in a case where the head charterparty is a time charter, because a time charter may not be an appropriate set of terms to incorporate into a bill of lading contract: see the discussion in *Bills of Lading*, paragraphs 7.101 *et seq*.

Where and how the lien on cargoes may be exercised

Exercise of the lien on board the ship

30.19 The lien over cargo is exercised at, off or at least reasonably close to the discharge port and the owners exercise it by telling the charterers they are doing so.

30.20 The owners cannot usually exercise their lien by halting the laden ship en route to the port of discharge. In *The Mihalios Xilas* [1978] 2 Lloyd's Rep. 186, the owners halted the ship at a bunkering port on the voyage. Donaldson, J., said: "I do not think that a shipowner can usually be said to be exercising a lien on cargo simply by refusing to carry it further. . . It may be possible to exercise a lien by refusing to complete the carrying voyage, but I think that this can only be done when, owing to special circumstances, it is impossible to exercise a lien at the port of destination and any further carriage will lead to loss of possession of the cargo following arrival at that port."

30.21 It seems, however, that it will usually be proper, and qualify as the exercise of the right of lien, for the ship to anchor off the declared port of discharge and not proceed all the way to the berth or other discharging place where the discharge would otherwise have been effected. Mocatta, J., so held in *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159. He rejected an argument by the charterers that, on the basis of the above judgment of Donaldson, J., the owners could not exercise their lien "unless the vessel was at a discharging spot, whether wharf or buoy", saying: "To require this might involve unnecessary expense and in certain cases cause congestion in the port."

30.22 Whilst the owners are lawfully exercising their lien, the owners continue to earn and the charterers remain liable for hire: see *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, at page 166. See also *The Boral Gas* [1988] 1 Lloyd's Rep 342, at page 349, where Evans, J., held that demurrage under a voyage charter did not cease to accrue where the owners lawfully and reasonably exercised a lien over cargo.

Exercise elsewhere

30.23 It is not, however, necessary that the owners retain possession of the cargo on board the chartered ship, or detain her at the original discharge port, indefinitely. Having exercised their lien, that is to say having once refused at or off the intended discharge port to give possession to the cargo interests who want it, the owners may then land the cargo to their own order (see *Mors-Le-Blanch* v. *Wilson* (1873) L.R. 8 C.P. 227) or, if that is not possible, even take the ship to another port in order to do so (see *Cargo ex Argos* (1873) L.R. 5 P.C. 134). The key to maintaining the lien, once exercised, is to retain actual or constructive possession, to the exclusion of those who, but for the lien, would have been entitled to receive the goods from the ship.

30.24 In those circumstances, whether or not the charter has come to an end, the owners continue to be bailees of the cargo and owe the charterers a duty to take reasonable care of the cargo. On the other hand, they are entitled to recover from the charterers the costs of storing and safeguarding the cargo: see *The Lehmann Timber* [2013] 2 Lloyd's Rep. 541 (C.A.), at [133]. That is so irrespective of whether the charter has been terminated: if it has been, the owners have the right of a gratuitous bailee to recover their costs: see *The Winson* [1982] A.C. 939; if it has not, then they are entitled to their expenses as damages for the charterers' failure to discharge the cargo.

Loss of the owners' lien over cargo

30.25 The circumstances in which the owners can lose their lien were summarised by Popplewell, J., in *The Lehmann Timber* [2012] 2 Lloyd's Rep. 73, at [21] – [24]. In short, the lien is lost if the owners – the lienees – do something which is inconsistent with the continuing existence of the lien. Taking security for the charterers' liability may be inconsistent with the continuing existence of the lien: the critical question is whether one can infer from the terms of the security or the conduct and position of the lienee an intention to waive the lien. In *The Lehmann Timber* the owners had demanded security for the charterers' liability for general average contribution in the customary form of a general average bond and guarantee. The guarantee was provided, but not the bond. Popplewell, J., held that the owners had not waived their lien by accepting the guarantee, in circumstances where they were maintaining their demand for the bond. The Court of Appeal agreed: [2013] 2 Lloyd's Rep. 541, at [46].

The owners' lien upon sub-freights

30.26 The owners' lien upon sub-freights gives them an alternative form of security for amounts due under the time charter. The lien gives the owners a right to claim freight owed to the charterers or to their sub-charterers and apply it in payment of hire. "It is well established that a lien over sub-freights gives to the shipowner a right, where his time charterer has defaulted, to step in and claim payment of such sub-freights for himself, provided they have not already been paid": see Rix, L.J.'s judgment in *The Spiros C* [2000] 2 Lloyd's Rep. 319, at [11].

30.27 The owners' lien can be exercised over freights owing under either charters or bills of lading, although in the latter case the lien applies only where the bill of lading freight is owed to a charterer or sub-charterer. Where the bills are 'owners' bills' – that is, where they have been issued on behalf of the owners as carriers – the bill of lading freight is owed to the owners (and so is not a *sub*-freight) and different principles apply: see paragraphs 30.67 *et seq*., below.

The meaning of "sub-freights": do they include sub-hire?

30.28 There are conflicting judgments from the Commercial Court as to whether "sub-freights" in Clause 18 of the New York Produce form are restricted to bill of lading and voyage charter freights or whether they also cover any remuneration earned by the charterers from the employment of the ship, including sub-time charter hire.

30.29 In *The Cebu* [1983] 1 Lloyd's Rep. 302, Lloyd, J., held that the wider interpretation was correct, following *Inman Steamship* v. *Bischoff*, below. He also held that in the context of the New York Produce form "sub-freights" include all sub-freights, including sub-sub-freight and sub-time charter hire, whether due to the charterers directly or not: see paragraph 30.46, below. He considered that they might also include any monies which could be regarded as monies derived from the employment of the ship by the time charterers.

The *City of Paris* was time chartered for a monthly hire, the owners having effected an insurance "on freight outstanding". A claim under the policy proceeded on the footing, which was accepted by the House of Lords, that 'freight' included time charter hire. Lord Blackburn said, quoting Lord Tenterden in *Flint* v. *Flemying*, 1 B. & Ad. 48: "Freight as used in the policy of insurance, imports the benefit derived from the employment of the ship"; so that description covers the monthly hire of the ship for time."

Inman Steamship v. *Bischoff* (1882) 7 App. Cas. 670 (H.L.).

(See also *Seven Seas* v. *Atlantic Shipping* [1975] 2 Lloyd's Rep. 188 and the judgments of the Court of Appeal in *The Nanfri* [1978] 2 Lloyd's Rep. 132, in which divergent views were expressed on whether "hire" was to be treated as "freight", but in the context of the application of the rule as to deductions from freight.)

30.30 But when a virtually identical dispute under the same chain of time charters came before the Commercial Court in *The Cebu* (*No. 2*) [1990] 2 Lloyd's Rep. 316, Steyn, J., reconsidered and differed from the conclusion of Lloyd, J., on this question. He was satisfied, after fuller argument than had been addressed to Lloyd, J., that by 1979, when the first of the relevant chain of charters was entered into, the shipping market had differentiated clearly between "freight" and "hire", restricting the former to bill of lading and voyage charter freight and the latter to time charter hire. *Inman Steamship* v. *Bischoff*, above, not only reflected the less specific nineteenth-century usage but, more importantly, the wider meaning then and subsequently given to "freight" in marine insurance terminology. Bearing in mind also the consistent use of the word 'hire' elsewhere in the New York Produce form, Steyn, J., came to the conclusion that "sub-freights" in Clause 18 did not extend to sub-time charter hire. He thought this view was strengthened by consideration of the burden that could otherwise be placed upon a sub-time charterer, called upon to pay hire to the head owner but fearful of having the ship withdrawn from him by the disponent owner and possibly lacking sufficient time to interplead. The question still awaits resolution at appellate level, but it is suggested that this decision of Steyn, J., represents the better view.

NYPE 93

30.31 Line 260 of the 1993 revision of the New York Produce form adds to "all sub-freights" in the 1946 version the words "and/or sub-hire".

The nature of the owners' lien upon sub-freights

30.32 The nature of the owners' lien on sub-freights has been the subject of debate. Although referred to as 'a lien', the right given to the owners does not fit into any of the generally recognised categories of lien. As a result, the nature of the owners' right has been a matter of speculation. However it now seems reasonably clear that the lien constitutes a floating charge over freight debts

owed to the charterers from time to time, as well as over any security interest which the charterers may have in freight debts owed to their sub-charterers.

A charge over sub-freights or a sui generis contractual right?

30.33 The orthodox analysis of the owners' lien is that it involves an assignment of freight debts, as security for what the charterers owe the owners. This assignment is said to constitute a charge, i.e. a proprietary right or interest in the debts, given to the owners by way of security (see the definition of a charge in *Gough* at page 8).

30.34 In *The Ugland Trailer* [1985] 2 Lloyd's Rep. 372, at page 374 rhc, Nourse, J., analysed the lien as follows. He held: first, that the owners' lien on sub-freights is intended to give the owners the right to claim payment of sub-freights from the sub-charterer or shipper directly; second, that in order to allow this, the lien must operate as an assignment, transferring the charterers' right of action to the owners; and third, that the assignment is "obviously" made only as security for the performance of charterers' obligations under the charter. In those circumstances, he said, the lien must be a charge. Indeed, as the judge noted, an assignment of trade debts as security for the assignor's obligations to the assignee is a classic form of charge.

30.35 The assignment and charge analysis is supported by a number of decisions. The owners' lien was described as a charge by Lord Russell in *The Nanfri* [1979] 1 Lloyd's Rep. 201 (H.L.), at page 210, and held to constitute a charge created by way of assignment in *The Ugland Trailer*, above, at page 374 rhc, by Nourse, J., in *The Annangel Glory* [1988] 1 Lloyd's Rep. 45, at page 49 lhc, by Saville, J., and in *The Attika Hope* [1988] 1 Lloyd's Rep. 439, at page 441 lhc, by Steyn, J..

30.36 However, this analysis was rejected by Lord Millett in *Agnew* v. *Commissioners of Inland Revenue* (*Re Brumark Investments*) [2001] 2 A.C. 710 (P.C.), who suggested *obiter* that the lien was a purely personal right to intercept a debt: that is, a right which, unlike an assignment, produced no proprietary effects. He suggested that the lien was something akin to the seller's right of stoppage in transit in sale of goods cases, a right which allows an unpaid seller to intercept goods in the hands of a carrier and prevent them from being delivered to the buyer.

30.37 Nevertheless, in *The Western Moscow* [2012] 2 Lloyd's Rep. 163, Christopher Clarke, J., preferred the earlier analysis, holding, at [52], that the owners' lien over sub-freights operates as an assignment by way of charge. The discussion below assumes that that conclusion is correct.

Charge or mortgage?

30.38 Classically there are two forms of contractual, non-possessory security: the charge and the mortgage. The distinction between them is often blurred because the terms 'charge' and 'mortgage' are often used interchangeably, and in some contexts the word 'charge' serves as a catch-all term intended to embrace both charges and mortgages (as is the case, for example, in those sections of the Companies Act 2006 which deal with the registration of charges: see Section 861 of that Act and paragraph 30.65 below). Whether the owners' lien constitutes a floating mortgage or a floating charge is probably of no practical importance, as long as it is understood that, unlike the charge in its classical form, the owners' lien, once exercised, gives the owners, as assignees of the sub-freight, an immediate right of action against the relevant freight debtor.

The lien as a floating charge

30.39 The parties' intention is that, until the owners exercise their lien, the charterers should be free to collect the sub-freights and to deal with what they collect as their own: see *The Annangel*

Glory [1988] 1 Lloyd's Rep. 45, at page 48 rhc. To allow this, the assignment of sub-freights to the owners cannot take effect immediately: until the owners choose to exercise their lien, it must remain dormant or in suspense. For this reason, the lien should be regarded as a floating charge: see *The Annangel Glory*, pages 48–49, *per* Saville, J., and *Cosco Bulk* v. *Armada Shipping* [2011] 2 All E.R. (Comm) 481, where Briggs, J., said, at [32], the lien on sub-hire could "only have been a floating rather than a fixed charge, since it plainly permitted [the sub-charterers] to continue to pay, and [the charterers] to receive, sub-hire pending the exercise of the lien".

30.40 In very broad outline, a floating charge operates as follows. The charge is given over a class of assets, such as trade debts, whose composition changes from time to time as the chargor carries on business: see *re Spectrum Plus* [2005] 2 A.C. 680, at [99]. It is initially dormant or floating, and whilst that is so, the chargor is free to deal with the assets in question and dispose of them in the ordinary course of business: see *re Spectrum Plus*, above, at [111]. (Yet, even whilst dormant, the charge gives the chargee some kind of equitable right or security interest in the class of charged assets: see *re Spectrum Plus*, at [139].) Once the chargor defaults, however, the charge will 'crystallise', attaching as a fixed charge to the specific assets which are at that moment within the relevant class: see *re Spectrum Plus*, at [100].

30.41 In the case of the lien over sub-freights, the class of assets subject to the charge is, primarily, any outstanding freight debts owed to the charterers by their sub-charterers (although as explained below, if the charterers have security rights in their sub-charterers' sub-freights, those security rights are also subject to the charge). The charged debts include future debts – i.e. debts which do not yet exist at the date of the charter. These which are treated as being subject to the charge as soon as they come into existence: see *The Annangel Glory*, above, at page 50 lhc *per* Saville, J., ("once a relevant debt comes into existence, equity treats the assignee as having a beneficial interest in it by way of security because the assignor is bound by the agreement that he has made with the assignee"). However, until the lien is exercised, the charterers are free to collect their freight debts and, on collection, the monies received are outside the charge and at the charterers' free disposal: *The Annangel Glory*, above, and *The Western Moscow*, at [49]. (That is the case whether the freight is paid to the charterers themselves or to an agent authorised to collect on their behalf: *per* Greer, J., in *Molthes Rederi* v. *Ellerman's Wilson Line* (1926) 26 Ll.L.Rep. 259, at page 262 lhc.) The charge crystallises when the lien is exercised. That occurs when the owners serve notice on a freight debtor claiming to exercise their lien: see *The Annangel Glory*, pages 48 to 49 and *The Western Moscow*, at [50]. That notice has the effect of perfecting an equitable assignment of the relevant sub-freights: see *The Spiros C* [2000] 2 Lloyd's Rep. 319, at [11]. The perfected assignment takes effect as an equitable charge: see paragraph 30.33 above.

30.42 The decision in *Tagart*, *Beaton & Co* v. *James Fisher & Sons* [1903] 1 KB 391 is consistent with this analysis.

The *Askehall* was chartered under a time charter which provided that the owners should have a lien upon all sub-freights for any amount due under the charter. Freight was paid by the consignees to agents appointed by the time charterers to collect the freight on their behalf. After the consignees had paid the freight, but before the agents had parted with it, the owners purported to exercise a lien on the freight in the hands of the agents. It was held by the Court of Appeal that payment to the time charterers' agents was payment to the time charterers themselves and the owners' right of lien was lost. The Lord Chancellor, the Earl of Halsbury, said, at page 394, "I am clear that right over the freight must be exercised at a time when there is freight to be paid as such, and that when the freight has once been paid the lien upon it has gone."

Tagart, *Beaton* v. *James Fisher* [1903] 1 K.B. 391 (C.A.).

30.43 *Tagart* stands as authority for the proposition that only outstanding freight debts are lienable, i.e. within the class of assets subject to the owners' charge. If a debt is paid before the lien has been exercised, it is removed from the charge and the proceeds are outside it. The money

received belongs to the charterers. *Tagart* does not address the case where the sub-charterer pays the charterers *after* the owners have given him notice of their lien. In that case, it is suggested, a payment to the charterers would not discharge the debt owed the sub-charterer, which would remain both outstanding and subject to the lien.

The nature of the perfected assignment

30.44 As discussed above, the notice of lien perfects an equitable assignment of the debts over which the owners exercise their lien, as security for charterers' debts to the owners: see paragraph 30.33 above and *The Ugland Trailer* [1985] 2 Lloyd's Rep. 372, at page 374 rhc and *The Attika Hope* [1988] 1 Lloyd's Rep. 439, at page 441 rhc.

30.45 Even after notice of the exercise of the lien is given, the assignment is not a legal assignment. A legal assignment must satisfy the requirements of Section 136 of the Law of Property Act 1925. The assignment brought about by Clause 18 does not do so for a number of reasons, principally (i) the clause purports to assign future choses, i.e. sub-freights which do not exist at the date of the charter and (ii) the clause does not effect an absolute assignment, but only a conditional one – that is, the assignment is conditional on their being debts due from the charterers to the owners and for that reason is not absolute: see *The Halcyon the Great* [1984] 1 Lloyd's Rep. 283, at page 289 and *Guest*, paragraph 2–16. In Lloyd, J.'s judgment in *The Cebu* [1983] 1 Lloyd's Rep. 302, at page 308 rhc, he appears to hold that the assignment is an absolute assignment within Section 136. It is suggested that this is not right.

Owners' lien over freights owed to sub-charterers

30.46 The right of the owners under Line 110 of the New York Produce form to intercept sub-freights may extend to freights owed not to the charterers, but to their sub-charterers. But to allow this to happen, the terms of the sub-charter must include a clause giving the charterers – as disponent owners – a lien over their sub-charterers' freights.

The *Cebu* was time chartered on the New York Produce form to Naviera Tolteca, then sub-time chartered by them to Lamsco and then again was sub-time chartered by Lamsco to Itex. Both the sub-charters were also on the New York Produce form. The owners claimed that there was hire due to them under the head charter. Hire was also owed to Lamsco by Naviera Tolteca and by Itex to Lamsco. The owners sent notices to Itex and later to Lamsco purporting to exercise their lien under Clause 18 of the head charter. It was held by Lloyd, J., that:

(1) "sub-freights" in the context of Clause 18 of the New York Produce form included not only sub-time charter hire but also sub-sub-time charter hire (but see the contrary judgment of Steyn, J., on this point in *The Cebu* (*No. 2*) [1990] 2 Lloyd's Rep. 316 and paragraph 30.30, above); and

(2) the owners' lien, which was in the nature of an equitable assignment, attached not only to hire due to the head charterers, but also to hire due to the sub-time charterers, Lamsco; the head charterers, by virtue of the Clause 18 lien in the sub-time charter, were themselves entitled, as assignees, to intercept the sub-sub-time charter hire due from Itex to Lamsco and they had validly assigned this right to the owners by Clause 18 in the head time charter.

The Cebu [1983] 1 Lloyd's Rep. 302.

30.47 This decision was followed by Christopher Clarke, J., in *The Western Moscow* [2012] 2 Lloyd's Rep. 163, at [57] – [61]. At [61], he said, "by using the expression 'all. . . sub-hire' the draftsman was [providing] that [the lien] was to extend to all sub-hire down the line. If that be the right construction, it is one to which the law can and should give effect. Equity considers as done that which ought to be done. If A ... agrees to assign to B ... a future debt which is to be owed to him by D ... and B agrees that that debt shall be assigned by him to C ... by way of security, then, when the debt arises and the security becomes enforceable, the debt owed by D to A is to be treated

in equity as due to C. The agreement to transfer as between A and B and as between B and C binds the consciences of A and B."

30.48 The position therefore would seem to be this. The owners' lien on sub-freights gives them a floating charge not only over any freights which may be owed to the charterers, but also over any equitable rights which the charterers may have in respect of freights owed to them by their sub-charterers. When ultimately the owners serve notice exercising their lien on the party owing freight at the bottom of the charter chain, all the charges in the chain are crystallised, with the result that the right to receive the freight debt owed at the bottom of the chain is passed by successive assignments up to the owners.

30.49 Lloyd, J., in *The Cebu*, above, indicated that the same result would not have followed had the charters been on the Baltime form, because in that form the lien was limited to all cargoes and sub-freights "belonging to the Time-Charterers".

The exercise of the owners' lien on sub-freights

30.50 The owners exercise their lien by giving notice to the sub-charterers, shippers or other party who owes the freight which they are claiming. In *The Spiros C* [2000] 2 Lloyd's Rep. 319 (C.A.), Rix, L.J., said, at page 323: "The shipowner perfects his right of lien by giving notice to the debtor."

Time of exercise

30.51 As discussed above, the lien can be exercised only while the freight is still owing; once it is paid, the lien is lost. In *The Spiros C*, above, Rix, L.J., said, at [11], "if the shipowner's notice to pay comes too late, and the sub-freight has already been paid, then the lien fails to bite on anything".

30.52 The lien is lost in this way not only if the freight is paid directly to the charterers, but also if it is paid to agents appointed by the charterers to collect it. For this reason, the owners' attempt to lien sub-freights failed in *Samsun Logix* v. *Oceantrade*, below, and in the much older Court of Appeal case of *Tagart*, *Beaton* v. *James Fisher* [1903] 1 K.B. 391 which is summarised at paragraph 30.42, above.

The *Orhan Deval* was chartered to Oceantrade Corporation ('OTC') by a time charter on the New York Produce form governed by English law. OTC became bankrupt. Samsun, a creditor of OTC, obtained freezing orders against OTC, in accordance with which freight due to OTC under a voyage sub-charter of the *Orhan Deval* was paid on 7 September 2005 to English solicitors to hold pending further court order. On 9 September 2005, the owners of the *Orhan Deval* purported to exercise the Clause 18 lien over sub-freights in respect of that freight. In arbitration under the *Orhan Deval* time charter, arbitrators made a final declaratory award that the lien had been validly exercised and that the funds held by the English solicitors were subject to that lien and due to be paid to the owners of the *Orhan Deval*.

Gross, J., accepted Samsun's arguments that: (*a*) Samsun was not bound by the arbitrators' decision; (*b*) on a proper understanding of the freezing orders, the freight payment on 7 September was a payment to OTC's agents and the funds received were OTC's funds, albeit the freezing orders substantially restricted what OTC could do with its funds; (*c*) the purported exercise of the lien on 9 September therefore came too late and did not give the owners of the *Orhan Deval* any priority over Samsun to the funds.

Samsun Logix v. *Oceantrade* [2008] 1 Lloyd's Rep. 450.

Form of notice

30.53 In *The Attika Hope* [1988] 1 Lloyd's Rep. 439, at page 442 lhc, Steyn, J., said that notice "need not be in any particular form and that any kind of notice will suffice, so long as the fact that assignment has taken place is brought to the notice of the debtor".

Right to serve notice conditional on there being "amounts due under this Charter"

30.54 The owners' right to exercise their lien is conditional upon there being an amount due under the charter and unpaid: see *per* Saville, J., in *The Annangel Glory*, above, at pages 48 to 49, "[Counsel for the owners] accepted (in my view correctly) that it was not intended that the owners should be immediately and automatically entitled to receive sub-freights and that on the contrary it was intended the charterers were to be free to deal with them as their own, unless and until amounts were outstanding under the head charter and the owners had given notice. . .".

30.55 If that is right, then it would seem to be the case that, where there is a chain of charters, the owners cannot claim a freight debt at the bottom of the chain unless there is a debt outstanding at every link. That is because the owners' claim against the freight debtor is brought as the assignee of rights belonging to his charterers. An assignee cannot be in a better position than his assignor. Every assignor must therefore be in a position to exercise the lien, in order that the owners, as final assignees, may do so. In order for that to be the case, there must be an outstanding debt owed to each of them.

30.56 As to the question whether the lien can be exercised in respect of a claim for damages, see paragraph 30.4 above.

Effect of notice on freight debtor

30.57 Once the freight debtor has notice of the assignment, he must pay the owners and not the charterers or sub-charterers. "Once notice of an equitable assignment is given to the debtor, he cannot thereafter deal inconsistently with the assigned interest, for instance by making payment to the assignor": *per* Simon Brown, L.J., in *Deposit Protection Board* v. *Barclays* [1994] 2 A.C. 367 (C.A. and H.L.), at page 381. After receiving notice of the lien, the freight debt is not discharged except by payment to the owners.

Effect of a prohibition on assignment of freight

30.58 A term in a contract prohibiting the assignment of rights arising under it is generally treated as effective to prevent an assignment: *Linden Gardens Trust* v. *Lenesta Sludge* [1994] 1 A.C. 85. A provision in a sub-charter prohibiting assignment of the right to receive freight may therefore be effective to prevent the owners from exercising their lien: see *The Western Moscow* [2012] 2 Lloyd's Rep. 163, at [73].

How much of the sub-freight is assigned?

30.59 In principle, there are two possibilities: either the whole freight debt is assigned to the owners (subject to their duty to account for any surplus: see paragraph 30.63 below) or there is an assignment only of a sum sufficient to pay what the owners are owed by the charterers (a form of assignment used, for example, in *Jones* v. *Humphreys* [1902] 1 K.B. 10). Lloyd, J., appears to have assumed the former in *The Cebu* [1983] 2 Lloyd's Rep. 302, at page 308 rhc. However, in that case the question did not need to be decided, since the owners' claim for unpaid hire exceeded the value of the freight debt which they were seeking to lien.

30.60 The practical significance of this question is in the context of a chain of charters, where head owners are seeking to lien a freight debt at the bottom of the chain. On the first hypothesis, the whole freight debt owing at the bottom of the chain is assigned to the owners, subject to the duty to account. On the alternative hypothesis, the value of the claim assigned to the owners can

never be more than the value of the hire owed to them by their charterers. However, the value of the claim actually assigned may be less than that, because: (i) each disponent owner in the chain is only entitled to exercise a lien for the sum he is owed by his charterer; and therefore (ii) the greatest claim that can be passed along the chain of assignments to the head owners is a claim for the value of the smallest sum owed at any link in the chain.

Proceedings against the sub-charterers

30.61 Where they have exercised their lien, the owners are entitled to sue the freight debtor, as an equitable assignee of the debt. However, being equitable assignees only, the owners are normally required to join the creditor to whom that freight debt was originally owed, although this may be dispensed with: see *Guest*, paragraphs 3–16 and 3–17.

30.62 Being assignees of the freight debt, the owners take it subject to equities. The freight debtor may therefore rely on any defences, including any right of set-off, which would have been available to it had the claim been brought by the charterers or sub-charterers. The owners will also be bound by any arbitration or jurisdiction clause in the freight debtor's contract: see *The Jay Bola* [1997] 2 Lloyd's Rep. 279, at page 285 rhc.

Accounting for surplus

30.63 Where, by exercising their lien, the owners recover more than they are owed under the charter, they must account for the surplus. If the freight debt which they have liened belonged to the charterers, they must account to the charterers. If it belonged originally to sub-charterers, it is thought that the owners must account to each of the parties in the chain in proportion to their interests in the remainder (whether that interest is as owner or as chargee).

Priority of claims

30.64 Where the charterers have made another assignment of sub-freights to a third party, there may be an issue as to whom the freight debtor must pay. The issue will be determined by priority of notice in accordance with the rule in *Dearle* v. *Hall* (1828) 3 Russ. 1.

The *Attika Hope* was time chartered on the New York Produce form on 16 November 1983. On 15 December the time charterers entered into a voyage charter. At around the same date the time charterers assigned the voyage charter freight to a third party and notice of that assignment was given to the sub-charterers. On 13 January the owners notified the sub-charterers that they were exercising their lien under Clause 18 of the time charter. The sub-freight was payable on 15 January, being 20 days after release of bills of lading. On 17 January the assignees demanded payment of the freight to them under the assignment. It was held by Steyn, J., that the third-party assignee had priority, the notice of assignment having been given before the owners' notice of 13 January. The sub-charterers, having been persuaded subsequently to pay the sub-freight to the owners, were liable to pay the freight again to the assignees.

The Attika Hope [1988] 1 Lloyd's Rep. 439.

When owners' lien over sub-freights is registrable as a charge

30.65 If the time charterers are a company incorporated in England and Wales or Scotland, the owners' lien on sub-freights, being an equitable assignment by the charterers by way of security, will be void against any liquidator, administrator or creditor of the time charterers unless the particulars of the lien are registered as a charge under Section 860 of the Companies Act 2006 within 21 days of the charge being created: see *The Ugland Trailer* [1985] 2 Lloyd's Rep. 372 and

The Annangel Glory [1988] 1 Lloyd's Rep. 45. It was held in the above cases, which were decided under the equivalent provisions of the 1985 Companies Act, that it was the time charter itself, as the instrument creating the charge, which was registrable under the Act at the time the charter was entered into.

30.66 In *The Ugland Trailer*, above, the impracticability of the registration of time charters was strongly emphasised, but Nourse, J., felt compelled to ignore the commercial considerations having regard to the clear wording of the statute. Saville, J., took the same view in *The Annangel Glory*, above. However as Bowtle has pointed out at [2013] LMCLQ 144, this awkward requirement will be of only limited application, as it does not apply to overseas companies (even where they have a place of business within the UK).

Owners' right to intercept bill of lading freights

30.67 In addition to the owners' lien over sub-freights, the owners have an independent right to intercept the freight payable under an 'owners' bill', in the event that the charterers fail to pay what they owe under the charter.

The nature of the owners' right to intercept freight under an owners' bill

30.68 Bills of lading are either issued on behalf of the owners as carriers or on behalf of the charterers or sub-charterers as carriers. The former is called an 'owners' bill'; the latter, a 'charterers' bill'. Under an owners' bill, the obligation to pay the bill of lading freight is owed to the owners: they are the contracting carriers and, under the terms of the bill of lading, the freight is their reward for carrying the cargo.

30.69 However, it seems that, ordinarily, under the terms of the New York Produce and similar forms of charter, there is an implied obligation on the owners to allow the charterers to collect the freight. That obligation is an implicit corollary of the obligation in Clause 8 to allow the charterers to direct the ship's employment. In *The Bulk Chile* [2013] 2 Lloyd's Rep. 38, Tomlinson, L.J., said, at [28], that it was arguable "that a time charterer who is not in default of his obligation to pay hire, and other amounts, under the head charter could restrain a shipowner from demanding payment of bill of lading freight to be made directly to himself, on the simple ground that until such time as the charterer is in default, the shipowner has, by reason of clause 8 of the NYPE form, or a similar employment clause, agreed to delegate collection of freight to the charterer. . . . Such an attempt by a shipowner to interfere with the charterer's exploitation of the vessel for the purposes of his trade might even be regarded as repudiatory, as was the direction to the master to refuse to sign bills of lading marked freight prepaid in *The Nanfri*, above."

30.70 If the time charterers default, then the implied obligation to allow the charterers to collect the freight no longer applies; the owners are free to claim any freight owed to them.

30.71 In this situation, the owners are not exercising any lien. As Greer, J., said in *Molthes Rederi* v. *Ellerman's Wilson Line* (1926) 26 Ll.L.Rep. 259, at page 262: "It seems a misuse of words to say that a shipowner has a lien on the debt due to him under the contract made with him by a bill of lading. The lien clause in the charter-party is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner. . .." The distinction between, on the one hand, the owners' claim for freight due under the bill and, on the other, their lien over freights owed to the charterers is approved in the judgment of Tomlinson, L.J., in *The Bulk Chile*, above, at [23] – [30], drawing on the judgment of Rix, L.J., in *The Spiros C* [2000] 2 Lloyd's Rep. 319, at [52] – [57].

How the interception is effected

30.72 As long as the bill of lading freight remains unpaid, the owners are entitled to give directions to the shippers or holders of the bill of lading to pay the freight to the owners' account. No special form is required of such directions: it is sufficient that the shippers or bill of lading holders are put on notice that they are required to pay the owners and not the charterers: see *The Bulk Chile* [2013] 2 Lloyd's Rep. 38, at [31].

Where the charterers use a collection agent

30.73 If the bills do not specify that freight is to be paid to the charterers directly, the charterers may collect it by appointing an agent to do so on their behalf. In that situation, the charterers and their agents are entitled to collect the freight only because they have the authority of the owners to do so. Accordingly, the owners can intercept the freight simply by telling the charterers and their agents that they are no longer authorised to collect freight. At that point, the agent will either agree to collect for the owners or another agent will be appointed. As Greer, J., said in *Molthes Rederi* v. *Ellerman's Wilson Line* (1926) 26 Ll.L.Rep. 259, at 261 lhc, "the legal right to the freight is in the owner not the charterer, and the former can intervene at any time before the agent has received the freight and say to him: 'I am no longer content that the charterer should collect the freight. If you collect it all, you must collect it for me.' If the agent then collects the freight, it follows that the shipowner can sue for it as money had and received."

The *Sproit* was time chartered on the Baltime form and sub-chartered for a voyage from Riga to Hull. On one particular consignment, freight was payable on discharge. By that time, a substantial sum in hire was overdue. Agents were appointed at the port of discharge by the time charterers to attend to discharge and collect freight, but before any freight was paid the owners' solicitors contacted the agents and asked them whether they would collect the freight as agents for the owners. The agents agreed to do so, but subsequently refused to hand over the freight collected on the ground that disbursements incurred by them already exceeded the amount in hand.

It was held by Greer, J., that the owners were entitled to ask the agents to collect the freight for the owners' account and that the agents had agreed to do so. It was held further that the agents were not entitled to deduct from the freight the disbursements which they had incurred in their capacity as agents for the time charterers.

Molthes Rederi v. *Ellerman's Wilson Line* (1926) 26 Ll.L.Rep. 259.

30.74 In the same situation – i.e. where the time charterers have appointed an agent to collect freight – the owners may still be able to intercept the freight if they give instructions to the agents to pay the money to their account after the agents have collected the freight but before they have paid it over to the charterers: this was so decided by Channell, J., in *Wehner* v. *Dene* [1905] 2 K.B. 92, apparently on the basis that the agent in such a situation acts jointly for the charterers and owners. However the point was expressly left open in the subsequent case of *Molthes Rederi* v. *Ellerman's Wilson Line* (1926) 26 Ll.L.Rep. 259, above, at pages 261 to 262.

Where the bills specify payment to the charterers directly

30.75 It is common in modern commerce that the bills of lading will expressly stipulate that freight is to be paid to the charterers directly. Very commonly this stipulation takes the form of a term stating that freight is "payable as per charterparty", a term which is discussed below.

30.76 Where the bills stipulate payment to the charterers, the question arises whether the owners can countermand the terms of the bill and direct the shippers or bill of lading holders to pay the owners instead. The answer is that they can. That answer was first given *obiter* by Rix, L.J., in *The Spiros C* [2000] 2 Lloyd's Rep. 319, at [56] – [57]. It was confirmed by the Court of Appeal

in *The Bulk Chile* [2013] 2 Lloyd's Rep. 38, at [24] and [30]. In the latter case, Tomlinson, L.J., said, at [24], ". . . the contract between the shipowner and the shipper is not a contract by which the shipowner contracts to provide a service to the shipper in consideration of the shipper promising to confer a benefit (in the form of payment of freight) on an independent third party, but rather that the nominated recipient is, as between the shipowner and the shipper, to be regarded as the shipowner's agent. If that is the correct analysis, as I think it is, I cannot see why the shipowner's contract with the shipper should be taken to preclude the shipowner from cancelling his nominated agent's authority to act on his behalf in receiving freight, before such payment has been made, and requiring it to be made to himself. . . I see no difficulty in the shipowner countermanding his direction to pay freight to a third party provided of course that he does so before the shipper has made the payment as initially directed."

"Freight payable as per charterparty"

30.77 The effect of the words "freight payable as per charterparty" will depend on their context, but, subject to any provisions to the contrary, (i) they will usually incorporate the freight terms of the sub-charter between the charterers as disponent owners and the shipper and (ii) they will incorporate all the provisions of that charter relating to the payment of freight, and not just the rate of freight.

The time charterers of the *Indian Reliance* under an amended New York Produce form charter, entered into a sub-voyage charter which provided for 95 per cent of the estimated freight to be paid within three days of sailing into a nominated bank account of the time charterers. The bills of lading were marked "freight prepaid" (although the freight had not yet been paid at the time the bills were issued) and they also stipulated "freight payable as per charterparty". The sub-charterers duly paid freight into the nominated bank account of the time charterers, who failed to pay hire and subsequently went into liquidation. The owners then demanded payment of the full freight before delivering the cargo, maintaining that they were not bound by the directions in the sub-charter as to payment of the freight. It was common ground that the bills constituted contracts with the owners and it was held by Rix, J., that: (a) the fact that the bills of lading were marked "freight prepaid" did not in itself preclude the owners from claiming freight from the sub-charterers, if in fact and in law the freight had not been paid at the time of the owners' intervention, but (b) the words "freight payable as per charterparty" not only incorporated the rate of freight into the bills of lading, but also the provisions as to payment of freight, and having paid 95 per cent of the freight into the time charterers' bank account as required by the contract, the sub-charterers could not be required to make a second payment.
The Indian Reliance [1997] 1 Lloyd's Rep. 52.

30.78 In the circumstances described above, provisions in the sub-charter allowing deductions from freight to be made in respect of specified matters such as, for example, commissions or loading port despatch, will bind the owners if they assert their claim for freight. Such contractually authorised deductions are, in effect, an alternative mode of payment of the freight. So also, other arrangements in regard to the manner of payment of the freight agreed between the time charterers and the sub-charterers, even if not expressly provided for in the sub-charter, may be binding on the owners, if the agreement is made before the owners intervene.

The *Spiros C* was time chartered under an amended New York Produce form charter. During the currency of the charter, the time charterers went into liquidation, leaving hire remaining unpaid, having previously sub-chartered the ship for a voyage from Romania to Morocco, on terms that 95 per cent of the freight be paid within three days of signing bills of lading into a nominated bank account of a third party, INC. Owners' bills of lading were issued providing 'freight payable as per charterparty' and incorporating all the terms and conditions of the sub-charter. On 13 March, the owners gave notice to the shippers calling for the payment of the freight to them. However, by that date, deductions from the freight in respect of certain disbursements made by the sub-charterers had been agreed between them and the time charterers and confirmed in writing. By 13 March also, the balance of the freight had been paid on one parcel of cargo into INC's bank account, although the payment was not due until after 13 March.

The owners claimed from the shippers the whole 95 per cent of the freight, contending that neither the deductions agreed with the time charterers nor the advance balance payment constituted due payment of freight. They also claimed from the shippers demurrage at the discharging port. It was held by Colman, J., at first instance, that payment of freight in advance was a valid payment. There was nothing in the sub-charter preventing payment earlier than required.

There was no appeal on this point, but on the remaining points it was held by the Court of Appeal, reversing Colman, J., that: (1) the owners were bound by the agreement regarding deductions from the freight, even though the deductions were not provided for in the sub-charter, since the owners must be regarded as having delegated to the time charterers all matters relating to the collection of freight and the arrangement agreed was to be treated as a legitimate mode of performing the bill of lading freight obligations; and (2) that the owners could not claim discharge port demurrage from the shippers since the sub-charter provisions in that regard placed responsibility for discharge on the charterers or receivers and that left no room for the implication of a term in the bill of lading putting that responsibility upon the shippers. The Court of Appeal further expressed the opinion that the provision in the sub-charter for payment of freight to the third party, INC, did not preclude the owners from claiming payment of the freight to them, provided the claim was made in time. It made no difference whether freight was payable to the time charterers themselves or whether the time charterers stipulated that payment should be made to another.

The Spiros C [1999] 2 Lloyd's Rep. 91; [2000] 2 Lloyd's Rep. 319 (C.A.).

The obligation to account for any surplus

30.79 Where the owners intercept the bill of lading freight, they must account for any surplus after they have deducted the amount due to them under the time charter. Where there is a sub-charter, the very difficult question arises, undecided by the authorities, whether the owners owe that duty to the charterers or to the sub-charterers (in the case of multiple sub-charters, presumably the last in the chain). In *Wehner* v. *Dene*, below, the shipowners accepted that their duty was to the sub-charterers who had made the claim and the (insolvent) charterers appear to have taken no part in the proceedings. The question may matter not only to the sub-charterers but also to the owners. For if the obligation is owed to the sub-charterers, the owners can probably deduct only those sums that were due to them at the time the bill of lading freight was paid and therefore the owners would not be entitled to deduct sums falling due from the charterers after that date (see *Wehner* v. *Dene*, below). Whereas if the obligation to account for any balance is owed to the charterers, the owners may set off against what they owe the charterers sums accruing due from the charterers after the date on which the freight was paid (see paragraph 30.3, above). On the difficult question itself, it is suggested that the better view is that the owners' obligation to account arises from an implied term of the time charter, and is therefore owed only to the charterers.

The *Ferndene* was on time charter and was sub-time chartered for a trip. Bills of lading were issued under the sub-time charter and were signed by the master. The sub-time charterers appointed agents to collect the bill of lading freight. On 15 December these agents received the freight from the consignees. On 16 December the owners gave notice to the agents of their claim for the freight collected. At that time there remained unpaid a part of the semi-monthly hire due under the head time charter on 9 December. On 23 December a further semi-monthly hire payment became due to the owners. The question arose whether it was the sub-time charterers or the owners who were entitled to the bill of lading freight. Channell, J., held:

1. Since the bill of lading contract was with the owners, they were entitled to the bill of lading freight.
2. The agents appointed by the sub-time charterers were to be regarded, in the absence of evidence to the contrary, as agents for the owners as well as for these charterers. The owners were entitled to claim the freight from those agents since they had not yet paid the sub-charterers or given them credit for the freight in any account.
3. The owners' 'lien' did not extend to the hire, which only became due on 23 December.
4. Accordingly, in accounting to the sub-charterers, the owners were entitled to deduct only the amount due under the head charter when the freight was received by the agents. (The owners conceded that any obligation to account was owed to the sub-charterers.)

(Channell, J., also found that if 3. above were wrong, it would only decrease the balance due to the sub-charterers by £35, since the owners withdrew the ship having earned only one day's hire out of the hire payable on 23 December. The sub-charterers abandoned their claim to that extra £35, at the judge's encouragement. 3. above seems right in principle, nonetheless, and was treated as correct by Walton, J., in *Samuel* v. *West Hartlepool* (paragraph 30.3, above).)

Channell, J., said: "Now, although the owner has the right to demand the bill of lading freight from the holder of the bill of lading because the contract is the owner's contract, yet the owner has also, of course, contracted by the charterparty that for the use of his ship he will be satisfied with a different sum, which will also in the great majority of cases be less than the total amount of the bills of lading freights; and, therefore, if the owner were himself to demand and receive the bills of lading freight, as he might do if he chose, he would still have to account to the charterer or the sub-charterer, as the case might be, for the surplus remaining in his hands after deducting the amount due for hire of the ship under the charterparty."

Wehner v. *Dene* [1905] 2 K.B. 92.

Charterers' right to issue "freight pre-paid" bills

30.80 Clause 18 says: "the Owners shall have a lien upon all cargoes, and all sub-freights." Nevertheless the charterers are entitled to issue or present for signing bills of lading which do provide for that right: see for example *The Nanfri* [1978] 2 Lloyd's Rep. 132, at page 149 rhc, *per* Goff, L.J., and also [1978] 1 Lloyd's Rep. 581, at page 591 rhc, *per* Kerr, J. In particular, the master cannot refuse to sign "freight pre-paid" bills if they are required by the charterers: see *The Nanfri* [1979] 1 Lloyd's Rep. 201, particularly Lord Wilberforce's speech at page 206: "This clause, just as much as cl. 9, must be read in the context of the whole contract, and must be related to the commercial situation which exists under time charters. The lien clause must be read as giving the owners a lien upon such freights or sub-freights as, in the event, come to be payable, and which in fact are payable, under any sub-charter or bill of lading, but it cannot be read as interfering with the time charterers' primary right to use the ship and to direct the master as to its use." See also *The Shillito* (1897) 3 Com. Cas. 44.

30.81 If bills of lading are marked "freight prepaid", but freight has not in fact been paid at the time the owners make their claim for freight from the shippers, the owners' rights to intervene or to intercept the freight will not be prejudiced if otherwise they had the right to do so: see *The Nanfri*, above, *per* Lord Russell at page 210 and *The Indian Reliance* [1997] 1 Lloyd's Rep. 52, *per* Rix, J., at page 55 and paragraph 30.77, above.

Charterers' lien on the ship

30.82 By Line 111 of the New York Produce form the charterers are reciprocally given "a lien on the Ship for all monies paid in advance and not earned". Clause 17 of the Baltime form confers an identical right.

30.83 Although the 'lien' given to the charterers cannot be a true possessory lien, for a time charterer unlike a demise charterer does not obtain and so cannot retain possession of the ship, it seems that it confers a similar right, namely to prevent the owners at the end of the charter period from resuming control of the use of the ship for their own purposes. Rigby, L.J., giving the majority judgment of the Court of Appeal in *Tonnelier* v. *Smith* (1897) 2 Com. Cas. 258, said that the provision, "that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid". These remarks were questioned by Lord Sumner in *French Marine* v. *Compagnie Napolitaine* [1921] 2 A.C. 494. He said, at page 516: "The difficulty of reading this lien as meaning that the charterer can refuse redelivery of the ship and yet not be

under a continuing liability for further hire is obvious, and lien on the ship in the strict sense he had none. . . I reserve any opinion as to the meaning and effect of this so-called lien." But, after careful consideration of these comments of Lord Sumner, Robert Goff, J., in *The Lancaster* [1980] 2 Lloyd's Rep. 497 followed and developed the view of Rigby, L.J., by holding that the charterers could at the end of the charter period redeliver the ship, subject to their lien, and then restrain the owners from resuming control over the use of the ship "presumably by injunction". It will be noted that the approach of Robert Goff, J., departs from the words used by Rigby, L.J., ('to postpone [re-] delivery') in order to meet the difficulty pointed out by Lord Sumner that if in order to exercise their lien the charterers did postpone redelivery they would continue to be liable to pay hire.

30.84 But this 'lien' given to the charterers does not give them any further right over the ship or over the insurance monies payable upon her loss. In *The Lancaster*, above, it was argued by the charterers that it was an equitable lien upon the ship, that following the loss of the ship it attached to the hull insurance proceeds, and that it ranked ahead of the rights of certain banks to whom those proceeds had been assigned pursuant to mortgages. Robert Goff, J., rejected each of these three assertions. So far as the first was concerned, he restricted the operation of the lien to that described in the preceding paragraph and, drawing support from the judgment of Roskill, L.J., in *The Panglobal Friendship* [1978] 1 Lloyd's Rep. 368, rejected the suggestion that the lien gave any property interest in the ship.

Any lien or encumbrance

30.85 The effect of Lines 112 and 113 of the New York Produce form is that if the charterers through their fault or that of their agents cause the ship to be arrested in respect of any "lien or encumbrance" which might give to a third party a right having priority over the owners' interest in the ship, the charterers must put up security to obtain her release. Liens which have this effect would include common law maritime liens – such as those attaching to claims for salvage and collision damage – which the claimant may enforce by an admiralty action *in rem*, that is to say against the ship herself, even after a subsequent sale of the ship to an innocent purchaser. It seems that they also include the statutory liens (more properly, the "statutory rights of action *in rem*") which English law gives to claimants for those maritime claims which are listed in the Senior Courts Act 1981, including claims in respect of, for example, loss of life or personal injury, loss of or damage to goods carried, pilotage, general average, and "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship". The statutory liens, unlike maritime liens, are effective only where at the time the action is brought the ship remains in the ownership of the person who is liable for that claim *in personam* (see *The Monica S.* [1967] 2 Lloyd's Rep. 113); but subject to that restriction they do, upon commencement of the action *in rem*, make the claimant a secured creditor, having a charge over the ship which may give him a priority over the owner's "title and interest" in his ship. (For an authoritative survey of the history and effect of maritime and statutory liens, see the speech of Lord Diplock in *The Halcyon Isle* [1980] 2 Lloyd's Rep. 325 (P.C.).)

The *Vestland* was chartered on the Linertime form, which includes a provision (the second sentence of Clause 20) worded exactly as Lines 112 and 113 of the New York Produce form. Cargo claims arose under bills of lading by which the owners were bound, but based on orders of the charterers to discharge cargo at a port other than that named in the bill of lading and on their agents' failure to care for the cargo thereafter. The ship was arrested in Canada in respect of these claims, pursuant to Admiralty procedures similar to those provided for in English law in respect of statutory liens under the Administration of Justice Act 1956 (now the Senior Courts Act 1981). The charterers were unwilling and unable to provide adequate security to release the ship and the owners likewise refused to do so. Eventually, 10 days after the arrest, the charterers said that unless the owners forthwith arranged for the release of the ship the charterers would treat their conduct as a

repudiation of the charter. The owners maintained their refusal and, next day, the charterers entered their own caveat against the release of the ship and claimed damages from the owners. Subsequently the owners alleged that the charterers' failure to provide security and their entry of the caveat was a repudiation by them.

In consequent proceedings in London, arbitrators stated as a question of law for the Commercial Court whether the owners had wrongfully repudiated the charter. Mocatta, J., held that they had not done so. He held that the second sentence of Clause 20 operated: the ship had been "encumbered" by the statutory action *in rem* in Canada, which was a "lien" which could prevail over the owners' interest in the ship and which had been "incurred" by the charterers or their agents. Consequently the owners had been entitled to insist that the necessary security be provided by the charterers.

The Vestland [1980] 2 Lloyd's Rep. 171.

NYPE 93

30.86 It is suggested that arrests of the ship by, or because of fault on the part of, third parties who are, directly or indirectly, sub-contractors of the charterers, for example sub-charterers, shippers or receivers, generally do not fall within Lines 112 to 113 of Clause 18. Such an arrest would be caught, however, if the fault giving rise to it was in the course of carrying out a task that under the time charter the charterers had undertaken to carry out, for example (typically) cargo handling. To that extent, such independent third parties are regarded as charterers' "agents" under the charter (see paragraph 20.14, above). In *The Global Santosh* [2014] 2 Lloyd's Rep. 103, paragraph 25.35 above, the Court of Appeal did not consider it necessary to examine Clause 18 in order to decide that "agents" had a wider meaning when used in the off-hire proviso under consideration in that case: see *per* Gross, L.J., at [37].

30.87 The lien clause, 23, in the 1993 revision of the New York Produce form adds the following provision: "The Charterers undertake that during the period of this Charter Party, they will not procure any supplies or necessaries or service, including any port expenses and bunkers, on the credit of the Owners or in the Owners' time": see Lines 265 to 267.

U.S. Law

The maritime lien

30A.1 The possession of a maritime lien either (*a*) in the case of the owner, on the ship's cargo or freight, or (*b*) in the case of the charterer or cargo owner, on the ship itself, confers a right to proceed *in rem* against the property. It is the very essence of a maritime lien that it confers a right in the property itself, be it the ship, its cargo or its freight. For this reason, maritime liens play an important role in the chartering of ships, as the ownership of a lien provides both the owner and charterer with a form of security by creating rights in the maritime property engaged in the venture.

30A.2 Perhaps the classic description of the maritime lien was stated in *The Young Mechanic*, 30 F. Cas. 873, 876 (No. 18, 180) (C.C.D. Me. 1855), where the court characterized it as fundamentally,

> A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it, by a sale, to the payment of his debt; which so inheres in the thing as to accompany it into whosoever hands it may pass by a sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor. . . or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee or the lien of a bailee for work. . . For it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind; a suit *in rem*, asserting the claim of the libellant to the thing, as against all the world. It is a real action to enforce a real right.

30A.3 Maritime liens may arise by operation of the general maritime law or by contract. The liens expressly provided for in Clause 18 of the New York Produce form are, of course, contractual in nature. In either case, under American law, the lien can be enforced only by an action *in rem* in federal court against the property involved. Under English law the position is significantly different. See paragraphs 30.1 *et seq*.

30A.4 United States courts have generally upheld choice-of-law clauses that designate U.S. law as applying to, inter alia, maritime liens so long as there is some connection between the ship and the United States. In *Liverpool & London S.S. Protection & Indemnity Ass'n* v. *Queen of Leman MV*, 296 F.3d 350, 353–354, 2002 AMC 1521 (5th Cir. 2002), the Court of Appeals for the Fifth Circuit upheld a maritime lien predicated on a protection and indemnity club rule that incorporated English law, but permitted the club "to enforce its right of lien in any jurisdiction in accordance with local law in such jurisdiction." The lien was proper even though it would not exist under English law, and the ship had a sufficient connection to the United States because it had been arrested.

30A.5 In *Trans-Tec Asia* v. *M/V Harmony Container*, 518 F.3d 1120, 2008 U.S. App. LEXIS 5143, *38 (9th Cir. 2008), the Court of Appeals for the Ninth Circuit upheld a maritime lien predicated on a U.S. choice-of-law clause in a bunker contract for bunkers that had been supplied to a foreign-flagged ship in Malaysia. Although the lien would not exist in Malaysia, the ship had traded significantly at U.S. ports.

Executory contracts

30A.6 A maritime lien for breach of charter does not arise if the contract is merely executory. *The Schooner Freeman* v. *Buckingham*, 59 U.S. 182 (1856); *The Saturnus*, 250 F. 407, 408 (2d Cir. 1918), *cert. denied*, 247 U.S. 521 (1918); *The Valmar*, 38 F. Supp. 618, 1941 AMC. 872 (E.D. Pa. 1941); *Bunn* v. *Global Marine Inc*., 428 F.2d 40, 1970 AMC 1539 (5th Cir. 1970); *European-American Banking Corp*. v. *The Rosaria*, 486 F. Supp. 245, 255 (S.D. Miss. 1978). In the case of

time charters, the charter remains executory until the ship is delivered to the charterer. In *Rainbow Line Inc*. v. *The Tequila*, 480 F.2d 1024, 1027 n. 6, 1973 AMC 1431, 1435 n. 6 (2d Cir. 1973), the court stated:

> Delivery of the vessel commences the performance of a time charter and removes it from executory status.

30A.7 So also in *The Oceano*, 148 F. 131, 133 (S.D.N.Y. 1906), the court stated:

> As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom. . .

30A.8 In *E.A.S.T. Inc*. v. *The Alaia*, 673 F. Supp. 796, 1988 AMC 1396 (E.D.La. 1987), *aff'd*, 876 F.2d 1168, 1989 AMC 2024 (5th Cir. 1989), the court followed *The Tequila* in holding that a maritime lien may arise for a breach of a time charter once the ship was placed at the charterer's disposal. See also *Bank One Louisiana N.A*. v. *M/V Mr. Dean*, 293 F.3d 830, 2002 AMC 1617 (5th Cir. 2002). In that case, there was a dispute for priority between a maritime lien arising under the charter in favor of charterer and a bank which had a preferred ship mortgage. The time charter commenced before the ship mortgage was filed. The court ruled that the charter lien attaches once the ship was delivered to the charterer and, at that point, was no longer executory. Because it was prior in time to the ship mortgage, the charter lien had priority. The court's decision provides a thorough analysis of the case law concerning the executory contract doctrine and when a maritime lien attaches. As stated by the court:

> Courts in the nineteenth and early twentieth centuries held that a maritime lien attaches when a charter ceases to be executory and remains inchoate until perfected by the breach of that charter; we see nothing in the ambiguities of recent case law that undermines that authority. This principle can be refined by observing that unlike a contract of affreightment, a time charter ceases to be executory when the owner places the vessel at the charterer's disposal. A maritime lien for breach of a charter thus attaches when the owner places the vessel at the charterer's disposal and remains inchoate until perfected by a breach or discharged by the undisturbed end of the charter. [293 F. 3d at 838.]

30A.9 The same rule was adopted in *Navieros Inter-Americanos S.A*. v. *M/V Vasilia Express*, 1997 AMC 2845, 2856–2857 (1st Cir. 1997).

30A.10 See also *Boston Bermuda Cruising Ltd*. v. *M/V Royal Majesty*, 1998 AMC 1179 (D. Mass. 1997), *aff'd*, 1998 AMC 1184 (1st Cir. 1997), holding that because the ship was never delivered to the charterer, the charter remained executory and no lien could be exercised by the charterer. *The Director*, 26 F. 708, 710 (D. Ore. 1886).

30A.11 The law is well settled with respect to liens relating to cargo. In the case of the owner's lien on cargo owned by the charterer, the owner may not exercise the lien unless the goods are brought on board or otherwise within the ship's control such that there is a union of ship and cargo. At the same time, a lien on the ship for cargo loss or damage will not arise unless there has been a union of ship and cargo: *The Keokuk*, 76 U.S. (9 Wall.) 517, 519 (1870); *Osaka Shosen Kaisha* v. *Pacific Export Lbr. Co*., 260 U.S. 490 (1923); *Krauss Brothers Lumber Co*. v. *Dimon Steamship Corp*., 290 U.S. 117 (1933); *Diana Compania Maritima S.A. of Panama* v. *Subfreights of TheAdmiralty Flyer*, 280 F. Supp. 607, 1968 AMC 2093 (S.D.N.Y 1968); *Antria Shipping Co. Ltd*. v. *Triton Int'l Carriers Ltd*., 1980 AMC 678, 680 (S.D.N.Y. 1976); *Belvedere* v. *Compania Ploman de Vapores S.A*., 189 F.2d 148, 1951 AMC 1217 (5th Cir. 1951) (the decision suggests, however, that it concerns a voyage charter); *Interocean Shipping Co*. v. *The Lygaria*, 1981 AMC 2244 (D. Md. 1981).

Shipowner's lien

30A.12 United States courts recognize the owner's right under the general maritime law to exercise a lien on the charterer's *own* cargo for hire due under the charter, unless there is a contrary

provision in the charter. See *The Bird of Paradise*, 72 U.S. 545 (1867). Thus, even in the absence of Clause 18, the owner would have a lien on the charterer's own cargo for amounts due under the charter. See *Jebsen* v. *A Cargo of Hemp*, 228 F. 143 (D.Mass. 1915). If the cargo is owned by a third party, the owner will not have a lien on the cargo but, under Clause 18 of the charter, will have a lien on sub-freights.

30A.13 The shipowner's lien is said to come into existence upon the execution of the charterparty. The lien remains inchoate, however, and cannot be enforced until the cargo has been loaded. *American Steel Barge Co*. v. *Chesapeake & Ohio Coal Agency Co*., 115 F. 669 (1st Cir. 1902):

> . . . [T]he rights of the owner of the vessel under the clause in question reverted to the date of the execution of the charter, and did not accrue as of the date of the giving of the bill of lading, as now supposed by the owner of the cargo.
> As, therefore, on the broad rules of the admiralty, the owner of the vessel had a lien on this freight, which accrued as of the date of the charter, he stood, in the eyes of the admiralty, which requires no formal assignment, with all the rights of an assignee under a deed of assignment. [115 F. at 673.]

30A.14 See also *Luckenbach Overseas Corp*. v. *Subfreights of the Audrey J. Luckenbach*, 232 F. Supp. 572, 1965 AMC 692 (S.D.N.Y. 1963), where the court stated:

> Under Clause 18 of the charter party, the owner of the vessel was given and had a lien on all freights earned by the vessel. This lien came into existence as an inchoate lien on the date of the charter party. . . . [1965 AMC at 694.]

30A.15 The scope of the shipowner's lien on cargo and sub-freights was explained in *The Freights of The Kate*, 63 F. 707 (S.D.N.Y. 1894), where the court stated:

> The . . . charters gave a lien on "all cargoes and all subfreights for any amount due under this charter." This clause is a common one in time charters. The words "due" and "under this charter," are words limiting the extent of the lien given. They are used in their ordinary commercial sense, and mean sums which are "due" and payable at the time when any freights are due and collectible, and which might be then lawfully collected and applied to the sums then "due" in case of the charterers' default, as distinguished from future or contingent liabilities, not then payable; and also such sums as become due under the provisions of the charter.
>
> This lien, will, therefore, include charter hire up to the time when the vessels were withdrawn from the company's service, and such other amounts also as were then actually "due" to the shipowners from the charterers, for advances made for charterers' account, for coal, provisions, port dues, and any other sums which the provisions of the charter required the company to pay; also any sums then due and payable on account of short delivery or damage to cargo, through the fault of the steamship company, for which the company, by the terms of the charter, was bound to indemnify the ship and owners. [63 F. at 722]

30A.16 As stated above, if the cargo is not owned by the charterer, but is owned by a third party, the owner has no lien on the cargo for hire due under the charter. *Goodpasture Inc*. v. *The Pollux*, 602 F.2d 84, 1979 AMC 2515, *reh. denied* 606 F.2d 321 (5th Cir. 1979), illustrates this principle very clearly. Goodpasture contracted with Empac to sell it a quantity of wheat under terms whereby title to the cargo remained with Goodpasture until payment was made. Empac chartered the ship to carry the wheat. After the cargo was loaded, Empac failed both to pay Goodpasture for the wheat and hire to the owner. The owner then refused to issue freight prepaid bills of lading and later withdrew the ship. Subsequently, the owner filed an *in rem* action against the cargo to recover the unpaid hire. The court held, however, that the arrest failed because the owner did not have a valid lien on the cargo, since title to the cargo never passed to Empac and there was no contract between the owner and Goodpasture. As the court stated:

> Goodpasture had no contract with Negocios, only with Empac: did not care whether the wheat was carried to Colombia, to Timbuktu, or was consumed on board by mice so long as it was paid for; and owed no duties to the ship or Negocios except those exacted of all by the law in general. In particular, whatever rights to payment for use of the Pollux Negocios may have had against Empac, the charterer, did not run against Goodpasture or its wheat.

30A.17 In a further blow to the owner, the court went on to hold that not only was there no basis for the arrest of the cargo, but the arrest constituted an unlawful conversion of the goods for which the owner was liable.

30A.18 Although the owner will not have a lien on cargo owned by a third party, the owner can by contract acquire a right to a lien on sub-freights owing by a third party. Thus, Clause 18 gives the owner a lien on "all cargoes, and all sub-freights" for amounts due under the charter. See *The Kimball*, 70 U.S. 37 (1835); *American Steel Barge Co*. v. *Chesapeake & Ohio Coal Agency Co*., above; *Larsen* v. *150 Bales of Sisal Grass*, 147 F. 783 (S.D. Ala. 1906); *The Freights of The Kate*, above: *N.H. Shipping Corp*. v. *Freights of The Jackie Hause*, 181 F. Supp. 165 (S.D.N.Y. 1960); *The Pandora*, SMA 1466 (Arb. at N.Y. 1980).

30A.19 In *Chembulk Trading LLC* v. *Chemex Ltd*., 393 F.3d 550, 557, 2005 AMC 146 (5th Cir. 2004), the court concluded that a time charter granting the owner a lien on "all cargoes and all freights for any amounts due under this charter" gave the owner a lien on sub-freights owed to the charterer. The court reasoned that construing the term "all freights" to apply to freights, but not sub-freights, would render the provision meaningless.

30A.20 The shipowner's lien on sub-freights is deemed to arise by virtue of the contract, and is not, therefore, a lien "obtained by attachment, judgment, levy, or other legal or equitable process or proceedings" for purposes of the Bankruptcy Act: *Re North Atl. Gulf S.S. Co*., 204 F. Supp. 899, 1963 AMC 871 (S.D.N.Y. 1962), *aff'd*, 320 F.2d 628 (2d Cir. 1963). The owner's maritime lien on sub-freights owed to a bankrupt time charterer is not subject to the filing requirements of Article 9 of the Uniform Commercial Code:. *Re Sterling Navigation Co. Ltd*., 31 B.R. 619, 1983 AMC 2240 (S.D.N.Y. 1983); *Re Pacific Caribbean* (*U.S.A.*) *Inc*., 1985 AMC 2045 (Bankr. N.D. Cal. 1984); *Re Topgallant Lines Inc*., 125 B.R. 682, 1992 AMC 2511, 2514–2517 (Bankr. S.D. Ga. 1992), *modified on other grounds* 154 B.R. 368, 1993 AMC 2775 (S.D. Ga. 1993), *aff'd w/o opin*., 20 F.3d 1175 (11th Cir. 1994).

When the shipowner's lien can be exercised

30A.21 The owner's lien on cargo and sub-freights may be exercised only if the charterer is in default in payment of hire or some other amount due under the charter. See, e.g., *Union Industrielle et Maritime* v. *Nimpex International Inc*., 459 F.2d 926, 1972 AMC 1494 (7th Cir. 1972); *Marine Traders Inc*. v. *Seasons Navigation Corp*., 422 F.2d 804, 1970 AMC 346 (2d Cir. 1970).

30A.22 Furthermore, the lien may be exercised only if the cargo has not been unconditionally released to the consignee. *United States* v. *Freights of the Mt. Shasta*, 274 U.S. 466, 1927 AMC 943 (1927); *Beverly Hills Nat. Bank & Trust Co*. v. *Compania de Navegacion Almirante S.A. Panama* (*The Searaven*), 437 F.2d 301 (9th Cir. 1971), *cert. denied*, 402 U.S. 966 (1971); *N.H. Shipping Corp*. v. *Freights of the Jackie Hause*, above. The owner may discharge the cargo and still maintains his lien thereon, provided he retains control over it. Among the alternatives available to the owner is the method employed in *The Jackie Hause*, above. There, the owner agreed to release the cargo on condition that the sub-freights be substituted for it and deposited in an escrow account.

30A.23 Difficult issues sometimes arise under voyage charters which provide for a lien in favor of owner on cargo, but, at the same time, provide that freight is not earned until the cargo has been discharged. The owner can be caught in a "catch-22" because in order to earn the freight, the cargo must be discharged; in discharging the cargo, however, is the lien lost? The court confronted this issue in *Arochem Corp*. v. *Wilomi Inc*., 962 F.2d 496, 1992 AMC 2342 (5th Cir. 1992). The cargo was crude oil which was discharged from the owner's ship to another lightering ship. The court ruled that the owner had not made an unconditional discharge of the cargo and was entitled to exercise a lien on the cargo aboard the lightering ship for freight and demurrage owed by a voyage

charterer. The court's conclusion that the delivery of the cargo was "conditional" and did not discharge the owner's lien was based on its analysis of the charter. While the charter provided for a lien on the cargo for freight and demurrage, it also provided that payment for some of these costs was not due until after the delivery of the cargo. According to the court:

> No rational person would establish a lien on cargo for certain costs that are due after delivery of the cargo but have delivery of the cargo extinguish the lien. If that were the case, the lien would be a futile mechanism for protection. Consequently, the parties must have intended the lien to survive delivery of the cargo.

30A.24 The lien may be exercised on sub-freights up to the amount thereof, and only if the sub-charterer or shipper has notice of the shipowner's lien and has not yet paid the sub-freights to the charterer. See *American Steel Barge Co*. v. *Chesapeake & Ohio Coal Agency Co*., above; *Akt. Dampsk. Thorbjorn* v. *Harrison & Co*., 260 F. 287 (S.D.N.Y. 1918); *Larsen* v. *150 Bales of Sisal Grass*, 147 F. 783 (S.D. Ala. 1906); *The Solhaug*, 2 F. Supp. 294, 300 (S.D.N.Y. 1931); *Hall Corp*. v. *Cargo Ex Steamer Mont Louis*, 62 F.2d 603, 605 (2d Cir. 1933); *Marine Traders Inc*. v. *Seasons Navigation Corp*., above; *Oceanic Trading Corp*. v. *The Freights of The Diana*, 423 F.2d 1 (2d Cir. 1970).

30A.25 The lien on sub-freights is non-possessory, i.e., it does not depend for its validity upon any right the owner of the lien may have to proceed against the cargo or to take the cargo into possession. Thus, the owner is not required to bring an action against the cargo to enforce its lien on freights; rather, the lien may be asserted on its own directly against the party who owes the sub-freights. See *Tarstar Shipping Co*. v. *Century Shipline Ltd*., 451 F.Supp. 317, 1979 AMC 1011 (S.D.N.Y 1978), *aff'd*, 597 F.2d 837, 1979 AMC 1096 (2d Cir. 1979).

30A.26 The lien on sub-freights may be exercised even if the amount due under the sub-charter or bills of lading is unliquidated or in dispute. See *United States* v. *Freights of the Mt. Shasta*, above.

30A.27 See also *Western Bulk Carriers* (*Australia*) *Pty. Ltd*. v. *P.S. Int'l Inc*., 164 B.R. 616, 1994 AMC 1981 (S.D. Ind. 1994), holding that the owner's lien on sub-freights could be exercised against funds in the sub-charterer's bank account and did not depend on the source of the money in the account but only on whether the debt being satisfied was subject to a lien. The court further held that the owner's maritime lien had priority over a bank's UCC security interest on any funds in the account.

30A.28 Payment of sub-freights without notice of the owner's lien or the charterer's default will effectively discharge the lien. See *American Steel Barge Co*. v. *Chesapeake & Ohio Coal Agency Co*., above, holding that the absence of knowledge of the owner's lien on cargo and sub-freights protected the holder of the bill of lading for amounts paid to the master on account of freight to become due; *Larsen* v. *150 Bales of Sisal Grass*, above, holding that the owner's lien on sub-freights was discharged when the bill of lading freights were paid prior to a default by the charterer without knowledge of the terms of the charter or whether freights due thereunder had been paid; *Akt. Dampsk*. v. *Harrison & Co*. (*The Thorbjorn*), above, holding that a provision in a time charterparty giving a lien for charter hire on all cargoes and sub-freights did not entitle the owner to a lien on cargo owned by a sub-charterer who had paid hire without notice of any claim by the owner. See also *Lykes Lines Ltd*. v. *M/V BBC Sealand*, 398 F.3d 319, 2005 AMC 865 (5th Cir. 2005).

30A.29 In *Union Industrielle et Maritime* v. *Nimpex International Inc*., above, the court held that: "Payment by Nimpex to Midland before the lien arose, extinguished all claims by Union to any freights related to this cargo." See also *MCT Shipping Corp*. v. *Sabet*, 497 F. Supp. 1078 (S.D.N.Y. 1980).

30A.30 There have been cases, however, where the sub-charterer or shipper has been required to pay twice. Thus, where hire is due under the charter, and the sub-charterer makes payment of the

sub-freights to the charterer *with notice* of the shipowner's lien, the owner may still be entitled to exercise his lien on the sub-freights.

30A.31 In *Tarstar Shipping Co*. v. *Century Shipline Ltd*., above, the sub-charterer was required to pay sub-freights twice. The owner had given the sub-charterer oral and written notice of its lien on sub-freights after the charterer defaulted. Prior to receiving the notice of lien, the sub-charterer had paid the sub-freights to a company which acted as its agent in making payment to the charterer. The sub-charterer received the notice of lien, however, *before* its agent actually made payment to the charterer, but failed to make any attempt to determine whether payment had been made or to hold it up. The court held that the sub-charterer was under a duty to make a prompt and good faith effort to ascertain the status of the freights in the hands of its agent. Since the sub-charterer could have stopped payment by its agent to the charterer, it was held liable to the owner for the entire sum due to the owner from the charterer.

30A.32 See also *Antria Shipping Co*. *Ltd*. v. *Triton Int'l Carriers Ltd*., 1980 AMC 681 (E.D. Pa. 1978), *aff'd w/o opin*., 609 F.2d 500 (3d Cir. 1979).

30A.33 In *Jebsen* v. *A Cargo of Hemp*, 228 F. 143, 147–148 (D. Mass. 1915), Ore Company failed to pay hire under its charter with the owner. The ship had been sub-chartered by Ore to Munson Line and Munson had paid Ore freights due under the sub-charter with Ore. The court nonetheless held (*a*) that the owner had a right to cause the judicial seizure of the cargo for freights due from Ore, and (*b*) as an incident to that right, could pursue the freight due from the cargo owner (Peabody) to Munson,

> . . . not because he has a lien upon it, but because it represents the sum to be paid for the use of the ship in the carriage of the cargo, for which he has a lien on the cargo. He is entitled to be compensated, either by payment of the charter money, which represents the use of the ship, or, failing that, by resort to the sum agreed to be paid by the shippers as freight. [228 F. at 149]

30A.34 The court further held that, by virtue of its lien on the cargo, the owner's right to bill of lading freights had priority over Munson's right thereto. The court stated:

> It does not appear, if material, whether these payments [Munson to Ore] were before or after notice was given by the libelant of his intention to enforce his alleged lien; and no question has been raised as to the effect one way or the other of such payments. . . The Munson Line must be deemed to have taken with notice of and subject to the reservation of the lien on the cargo for the charter money due to the Owner, the libelant; and the insolvency of the Ore Company, far from divesting the libelant of the lien and entitling the Munson Line by subrogation or otherwise to the benefit of it, furnishes occasion for the resort by the libelant to the security afforded by the lien which he expressly reserved, and which it is not contended that he has ever done anything to waive.
>
> The fact that the claimant [Munson] has paid the Ore Company what was due from it to that company does not create an equity in its favor. . . The Munson Line was bound, as a matter of prudent business conduct, to examine the charter of the Ore Company, and to govern itself by the provision therein reserving to the Owner a lien on "all cargoes" for the charter money. . . The payment by the Munson Line to the Ore Company must, I think, be deemed to have been made at its risk. [228 F. 145–146, 148]

30A.35 In *Re North Atlantic and Gulf Steamship Co*., 204 F. Supp. 899, 904, 1963 AMC 871, 877 (S.D.N.Y. 1962), *aff'd*, 320 F.2d 628 (2d Cir. 1963), the court stated:

> . . . [T]he shipowner may at any time prior to payment of the subfreights by the shipper, assert his lien by giving notice to the shipper of its existence . . . Such notice of lien bars the shipper from discharging his liability for the subfreights by payment to the charterer.

30A.36 At present, there is a difference of opinion among the circuit courts as to whether or not constructive notice of an owner's lien is sufficient to bind a sub-charterer or shipper. Recent case law holds that in order for owner to have an effective lien on sub-freights the shipper or sub-charterer must have actual notice of the existence of the lien before making payment of the

sub-freights to charterer. *Lykes Lines Ltd*. v. *M/V BBC Sealand*, 398 F.3d 319, 323–324, 2005 AMC 865 (5th Cir. 2005); *Finora Co*. v. *Amitie Shipping Ltd*., 54 F.3d 209 (4th Cir. 1995), *aff'g*, 852 F. Supp. 1298, 1995 AMC 607 (D.S.C. 1994). See also *Berdex Int'l Inc*. v. *The Kapitan Grishin*, 1992 AMC 1559 (N.D. Cal. 1992) (requiring "clear notice" in order to properly perfect the lien). In so holding, the court in *Finora* disagreed with *The Solhaug*, 2 F. Supp. 294 (S.D.N.Y. 1931), in which the court indicated that constructive notice is adequate. In *Seatrade Group N.V*. v. *6,7855.5 Metric Tons of Cement*, 2006 AMC 193, 197 (S.D. Tex. 2005), the court ruled that the owner must have actual notice of the lien (on cargo) before turning over its cargo, but that the cargo owner had indeed received actual notice by means of the sub-charter's provision for a lien on cargo and identification of the owner.

30A.37 In *The Solhaug*, the court held that the effect of the lien clause was to give the owner a valid lien upon all sub-freights for any amounts due under the head charter as and from the time the head charter was entered into. The lien, the court stated, was enforceable against all parties having actual or constructive notice of its terms. The shipper was held to have had at least constructive notice of the head charter and, therefore, of the owner's lien, and in paying sub-freights without making reasonable inquiry, did so at its peril.

30A.38 In *East Asiatic Trading Co*. v. *Navibec Shipping Ltd*., 1979 AMC 1043, 1046 (S.D.N.Y. 1978), the court stated that it is not required that the sub-charter recite or even acknowledge the existence of the shipowner's lien on sub-freights to put the sub-charterer on notice of the lien. The court observed that the mere reference in the sub-charter to the disponent owner's status as a charterer would suffice to give constructive notice of the head charter and its lien clause. See also *Sarma Navigation S.A*. v. *Navibec Shipping Ltd*., 1979 AMC 1050 (S.D.N.Y. 1979). Compare *Saint John Marine Co*. v. *United States*, 1994 AMC 2526, 1994 U.S. Dist. Lexis 8334 (S.D.N.Y. 1994), where the court stated in *dictum* that the extent of notice required to perfect a lien on sub-freights is unsettled.

30A.39 In *Cornish Shipping* v. *Ferromet*, 1955 AMC 235 (S.D.N.Y. 1995), the court held that a lien on sub-freights cannot be exercised against funds belonging to the charterer or its agent, but only against the shipper or other party who has a debt to the charterer. In that case, the shipper paid the sub-freight to the charterer's agent at a time when both parties had been put on notice of the owner's lien. While the shipper remained liable to owner for the sub-freights, the court ruled that the lien could not be exercised against the charterer's own funds since by virtue of the payment, they were no longer sub-freights.

"Freight pre-paid" bills of lading

30A.40 If freight pre-paid bills of lading are issued by the owner or with his authority and are delivered to third parties, the owner may not assert his lien on the sub-freights or the cargo. In *Beverly Hills National Bank & Trust Co*. v. *Compania de Navegacion Almirante S.A. Panama* (*The Searaven*), 437 F.2d 301, 304 (9th Cir. 1971), *cert. denied*, 402 U.S. 996 (1971), where the bills of lading were marked "Freight prepaid as per Charter Party," the court held that the "lien on freights is lost, however, if they are paid without notice of the shipowner's rights."

30A.41 It is worthy of note that because pre-paid bills of lading had been negotiated to purchasers for value before the lien was exercised in *Beverly Hills*, the posting of a bond for payment of freights by the consignee could not have preserved the owner's lien. The lien was discharged when the bills were negotiated to parties without notice of the lien, and could not have been restored by the posting of a bond or other security to substitute for the hire.

30A.42 If the owner exercises its lien on the cargo of a third party, the shipper cannot set off any debts of the charterer to himself. See *American Steel Barge Co*., above.

30A.43 Moreover, since the owner's lien arises when the charter comes into effect, it will give it priority over the charterer's assignee of the sub-freights. See *Luckenbach Overseas Corp*. v. *The Subfreights of the Audrey J. Luckenbach*, 232 F. Supp. 572, 1965 AMC 692 (S.D.N.Y. 1963). In *Schilling* v. *A/S D/S Dannebrog*, 320 F.2d 628, 1964 AMC 678 (2d Cir. 1963), the court held that the owner could assert a lien on sub-freights for the full amount of the installment due, where the time charterer returned the ship prematurely in breach of the charter. The court held that the owner was not obliged to pro-rate the amount of hire due on the period of actual use by the charterer.

30A.44 See generally *Rainbow Line Inc*. v. *The Tequila*, 341 F. Supp. 459, 1972 AMC 1540 (S.D.N.Y. 1972). *aff'd*, 480 F.2d 1024, 1973 AMC 1431 (2d Cir. 1973); *Diana Compania Maritima S.A*. v. *Subfreights of The Admiralty Flyer*, 280 F. Supp. 607, 1968 AMC 2093 (S.D.N.Y. 1968).

30A.45 In *Berdex Int'l Inc*. v. *The Kapitan Grishin*, 1992 AMC 1559 (N.D.Cal. 1992), a time charterer attempted to exercise a maritime lien on cargo for a balance of freight due from the shipper. The charterer had issued bills of lading under which about half of the freight was due and payable by the shipper to the charterer on loading and the balance was due upon arrival at the discharge port. The shipper subsequently sold the cargo to third parties, but on terms which required payment in full to the shipper of the sub-freight. Having received full payment of the sub-freight, the shipper issued freight pre-paid bills of lading to the third parties. The latter set of bills did not contain a lien clause or give the purchasers notice that the charterer had a lien on cargo for sub-freights. Subsequently, the shipper failed to pay the balance of freight due to the charterer when the ship arrived at the discharge port. The charterer then arrested the cargo. According to the court, the issue raised was "should a good-faith cargo purchaser or a time charterer of a ship be forced to bear the loss when a third party with whom both have independently contracted has defaulted on its obligation to the time-charterer?" The court ruled against the charterer. The court dismissed the arrest and held that the charterer had no lien on cargo owned by third parties who had paid sub-freights in good faith without notice of the charterer's lien.

30A.46 In *Baja Ferries USA L.L.C. v. Calder Seacarrier Corp*., 2008 AMC 2558 (S.D.N.Y. 2008), an intermediate charterer attempted to exercise a maritime lien on cargo for a balance of freight due from its sub-charterer. Before it could exercise its lien, the ship's port agent released the prepaid bills of lading. The intermediate charterer filed suit against, inter alia, the broker releasing prepaid bills of lading without its authorization. The court held general maritime law does not afford a disponent owner a lien against either the cargo or sub-freights when the cargo is owned by a third party. Further, even if a provision existed in the bills of lading providing the disponent owner with a security interest, a lien may not be exercised where freight has been pre-paid by the shipper.

30A.47 Problems concerning freight pre-paid bills of lading often arise in liner trades. In *National Shipping Company of Saudi Arabia* v. *Omni Lines Inc*., 106 F.3d 1544 (11th Cir. 1997), for example, the shipper paid freight to a freight forwarder, who failed to pass the funds along to the owner. The court ruled that unless the shipper could prove that the words "freight prepaid" were intended to release it, the shipper remained obligated to cure the forwarder's default and pay owner. The same rule was followed in *Strachan Shipping Co*. v. *Dresser Indus*., *Inc*., 1984 AMC 137, 701 F.2d 483 (5th Cir. 1983). See also, *R.G.N. Capital Corp*. v. *Yamato Transport USA*, *Inc*., 1997 AMC 1185, 1189 (S.D.N.Y. 1997), holding that the carrier was entitled to retain custody of the cargo to exercise its lien until freight which was to have been pre-paid was actually paid.

Self-help

30A.48 A maritime lien on cargo can be perfected by bringing an *in rem* action against the goods. Under U.S. procedure, such an action is known as an "arrest." If the underlying claim is

not otherwise resolved, an arrest will result in a judicial sale of the goods. In some cases, the right to exercise a lien by refusing to deliver the cargo has been recognized. This "self-help" approach may be permitted if the owner has a valid lien on the goods. The holder of the lien has no right to convert the goods to its own use, however, and if owner's retention of the cargo fails to persuade the charterer to meet its obligations, an *in rem* action must be commenced to achieve a judicial sale of the goods.

30A.49 In *The Lenoudis Kiki*, SMA 2323 (Arb. at N.Y. 1986), the panel held that the owner was justified in stopping discharge of the cargo to force the charterer to make a final hire payment. The ship was chartered for a trip to carry a cargo of rice from ports in Texas to Passau. Although charterer paid the initial installment of hire, it was consistently dilatory in making further payments. When the ship arrived at the discharge port, hire remained outstanding. The cargo was carried under a bill of lading which stated that ocean freight would be paid by the U.S. Government. Because of that provision in the bill of lading, the owner was uncertain about its right to exercise a maritime lien on the cargo for the hire due. In order to attempt to force the charterer to make the final hire payment, the owner stopped the discharge with cargo remaining on board. The ship remained at the discharge port until the hire was paid. The panel sanctioned the owner's conduct and rejected the charterer's argument that the refusal to continue discharge constituted a withdrawal of the ship from its service. According to the panel: ". . . as long as the ship remained in port, and was the custodian of the cargo, this action cannot be construed as a withdrawal, but should be considered as a notice of cure. Stopping the discharge was the only defense open to owners."

30A.50 A similar ruling was issued in *The Sally Stove*, SMA 2320 (Arb. at N.Y. 1986). There, the panel held that the owner was justified in suspending the discharge of a cargo of steel pipes because of the charterer's failure to pay overdue hire.

30A.51 In contrast, arbitrators in *The Mistral*, SMA 2724 (Arb. at N.Y. 1990), granted charterer's application in a voyage charter case for an order directing owner and the ship's master to "forthwith discharge and deliver the cargo of steel scrap on board *Mistral* without delay and without assertion of any maritime lien. . .." The arbitrators found that charterer had paid 95 per cent of the freight and that the balance of freight and demurrage was not due until after discharge. In addition, the bills of lading were marked freight pre-paid.

Charterer's liens

30A.52 Under the general maritime law, the charterer has a lien on the ship for breach of the charter by the owner, if the breach occurs after performance has begun. The leading case is *The Oceano*, 148 F. 131, 133 (S.D.N.Y. 1906), where the court stated:

> As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit *in rem* may be maintained for any liability of the master or owner arising therefor. . . Damages sustained by a charterer through breach of a charter contract constitute a lien on the vessel.

30A.53 In *Rainbow Line Inc*. v. *The Tequila*, 480 F.2d 1024 (2d Cir. 1973), the court held that the charterer had a maritime lien on the ship for the owner's breach of charter. The ship was chartered on the New York Produce form for a term of six months with options to renew for two additional periods of six months. The owner prematurely withdrew the ship from the charterer's service, and arbitrators awarded the charterer damages arising from the withdrawal. Subsequently, the charterer commenced an *in rem* action against the ship to recover on the award. The court stated as follows in holding that the charterer had a maritime lien under the General Maritime Law:

The American law is clear that there is a maritime lien for the breach of a charter party, and because the damages sought to be recovered by [charterer] are all of a maritime nature and flow directly from the breach of the charter, it has a maritime lien. [480 F.2d at 1027]

30A.54 See also *The Schooner Freeman* v. *Buckingham*, 59 U.S. 182, 190 (1856), stating that "charterparties, must, in the invariable regular course of. . . business, be made, for the performance of which the law confers a lien on the vessel."

30A.55 In *E.A.S.T. Inc*. v. *The Alaia*, 876 F.2d 1168, 1989 AMC 2024, 2035–2036 (5th Cir. 1989), the court adopted the holding in *Rainbow Lines*, above, that the lien for breach of a time charter ceases to be executory and attaches when the ship is delivered to the charterer.

30A.56 In *Bank One Louisiana N.A*. v. *Mr. Dean MV*, 293 F.3d 830, 2002 AMC 1617 (5th Cir. 2002), the court held that owner's wrongful termination of the time charter created a maritime lien against the ship in favor of the charterer. The decision provides a detailed review of the case law concerning maritime liens, based on which the court notes: "We discover that courts have long understood that maritime liens for charters and shipping contracts attach at the beginning of the contract and remain inchoate until breached." (2002 AMC at 1620)

30A.57 *Schilling* v. *A/S D.S Dannebrog*, above, involved the question of whether a charterer had a maritime lien against the ship for the amount of fuel remaining on board at the time of redelivery. Clause 3 of the charter provided that "the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel at the current prices in the respective ports. . . ." The court clearly indicated that if there were a default by the owner under Clause 3, the charterer would have a valid maritime lien on the ship under Clause 18, which provided in part: "and the charterers to have a lien on the ship for all moneys paid in advance and not earned." On the facts before it, however, the court found that there was no default by the owner under Clause 3. Rather, the court held that by not making payment, the owner had in effect set off the amount due against even larger claims he had against the charterer for unpaid hire arising from the premature redelivery of the ship.

30A.58 In two cases it has been held that the charterer does not have a lien on the ship for prospective lost profits. *European-American Banking Corp*. v. *The Rosaria*, 486 F. Supp. 245 (S.D.Miss. 1978) and *Interocean Shipping Co*. v. *The Lygaria*, 1981 AMC 2244 (D.Md. 1981). In the latter case, the charterer sought to exercise a maritime lien for profits it would have made had the ship been able to perform a sub-charter. The court held that even assuming that the ship's unavailability resulted from the owner's failure to maintain her in a seaworthy condition in breach of its charter obligations, the charterer had no lien for prospective lost profits because none of the cargo that would have been carried was ever loaded.

30A.59 In *Inter-American Shipping Enterprises Ltd*. v. *The T.T. Tula*, 1982 AMC 951 (E.D. Va. 1981), it was held that the charterer did not have a lien on the ship for overpaid charter hire.

Priority of charterer's lien

30A.60 Where the chartered ship is the subject of a foreclosure proceeding, issues can arise relating to the relative priority of a charterer's claim against the ship for breach of charter. As a general rule, maritime liens that arise as a result of the owner's breach of charter will only have the low priority of a contract lien. In *The Bold Venture*, 638 F. Supp. 87, 1987 AMC 182 (W.D. Wash. 1986), the charterer argued that its lien claim was entitled to the status of a tort. The court rejected this contention and held that the breach of charter claims sounded only in contract.

30A.61 The usual rules of priority are modified if preferred maritime lien claims are involved. Maritime liens which arise prior in time to a preferred ship mortgage or which have preferred status because they arise out of a tort such as a collision outrank preferred ship mortgages. Thus,

a maritime lien for breach of a charter entered into before a mortgage is recorded is a "preferred" maritime lien with priority over a subsequent mortgage. *Rainbow Line Inc*. v. *The Tequila*, 480 F.2d 1024, 1025–1026 (2d Cir. 1973). This is so even if the breach does not occur until after the recording of the mortgage. See, e.g., *Bank One Louisiana N.A*. v. *M/V Mr. Dean*, 293 F.3d 830, 2002 AMC 1617 (5th Cir. 2002), holding that the charterer's lien on the ship for damages caused by the owner's wrongful termination had priority over a preferred ship mortgage which was recorded after the charter had begun. This is consistent with the rule that a maritime lien for breach of charter comes into existence when the ship is delivered to the charterer and remains inchoate until there is an actual breach for which the lien can be exercised. See, e.g., *Redwood Empire Production Credit Assoc*. v. *Fishing Vessel Owners Marine Ways Inc*., 530 F. Supp. 75 (W.D. Wash. 1981).

30A.62 If the charter is entered into subsequent to the recording of the mortgage, however, the latter will have priority. See, e.g., *Kopac Int'l Inc*. v. *The Bold Venture*, 638 F. Supp. 87, 89 (W.D. Wash. 1986), and cases discussed therein. These rules were formerly provided for in the Ship Mortgage Act, 46 U.S.C. § 953. The Act was amended on 23 November 1988 by Public Law 100–710. The relevant sections are now codified at 46 U.S.C. §§ 31301(5) and (6) and 31321–31330. The amendment did not enact any substantive changes to the Ship Mortgage Act. See *Maritrend*, *Inc*. v. *Serac & Co*. (*Shipping*) *Ltd*., 348 F.3d 469, 471, 2003 AMC 2743 (5th Cir. 2003).

30A.63 A maritime lien in freights is superior to a perfected non-maritime UCC security interest in the same collateral. *Re Topgallant Lines Inc*., 125 B.R. 682, 1992 AMC 2511, 2514 (Bank. S.D. Ga. 1992), *modified on other grounds* 154 B.R. 368, 1993 AMC 2775 (S.D.Ga. 1993), *aff'd w/o opin*., 20 F.3d 1175 (11th Cir. 1994).

Liens for supplies ordered by charterer

30A.64 Clause 18 was designed to preclude repair yards or suppliers who furnish goods or bunkers to the ship under contracts with the charterer from obtaining a lien on the ship for amounts due, and has been held effective for this purpose.

30A.65 In *Schilling* v. *A/S D/S Dannebrog*, above, the court held that Clause 18 "is sufficient to preclude a lien in a supplier who knows or should know of its existence in the charter." (320 F.2d at 632). In that case, it was claimed that the charterer had a maritime lien for the value of fuel on board when the ship was returned to the owner. The court held that since the supplier did not have a lien on the ship for the fuel, the charterer likewise had no lien, since its claim arose by way of subrogation to the rights of the third-party supplier.

30A.66 See also *Unites States* v. *The Lucie Schulte*, 343 F.2d 897 (2d Cir. 1965), holding that "the prohibition of lien clause in the instant charters was adequate to defeat lien claims of a material man who could have ascertained its existence by reasonable diligence;" *United States* v. *Carver*, 260 U.S. 482 (1923); *Damps. Dannebrog* v. *Signal Oil & Gas Co*., 310 U.S. 268 (1940). See generally *Cardinal Shipping Corp*. v. *The Seisho Maru*, 744 F.2d 461, 1985 AMC 2630 (5th Cir. 1984).

30A.67 In *The Adventure*, SMA 3161 (Arb at N.Y. 1995), the panel found the charterer's general notice of prohibition of liens which it required the master to post on the ship would not have defeated suppliers' liens if in fact it was posted, because it did not contain language to properly put suppliers on notice.

30A.68 The effect of Clause 18 was largely neutralized, however, by amendments to the Federal Maritime Lien Act, 46 U.S.C. §§ 971–975. The Act was adopted in 1910 for the purpose of providing a uniform law regulating suppliers' liens, and superseded the existing general maritime law and state laws to the extent it covers the creation of liens on ships. As amended in 1971, Section 971 provided as follows:

Any person furnishing repairs, supplies, towage, use of dry-dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel.

30A.69 The Federal Maritime Lien Act was amended again on 23 November 1988 by Public Law 100–710. 46 U.S.C. § 971 was amended such that the term "necessaries" is now defined to include "repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. § 31301(4). Although the phrase "or other necessaries" was deleted, the legislative history states that no change in substantive law was intended. See H.R. Rep. No. 100–918, 100th Cong., 2d Sess. 14, 15, 36 (1988).

30A.70 A broad range of types of supplier may obtain a lien for providing necessaries. In general, any items reasonably needed in the ship's business or to keep her out of or remove her from danger will be deemed "necessaries." As used in the Act, the term "necessaries" has been held to include stevedoring services. See, e.g., *Bermuda Express N.V*. v. *The Litsa*, 872 F.2d 554, 563, 1989 AMC 1537, 1549 (3d Cir. 1989), *cert*. *denied*, 493 U.S. 819 (1989); *Universal Shipping Inc*. v. *Panamanian Flag Barge*, 563 F.2d 483, 1978 AMC 1458 (1st Cir. 1976); *TTT Stevedores of Texas Inc*. v. *The Jagat Vijeta*, 696 F.2d 1135, 1138, 1983 AMC 1980, 1982 (5th Cir. 1983).

30A.71 Indeed, it has been held that a stevedore is entitled to assert a maritime lien not only for time worked by the stevedore but also for detention time and "guarantee time," both of which are periods for which stevedores must be paid pursuant to collective bargaining agreements even if no work is actually performed. See *Atlantic & Gulf Stevedores Inc*. v. *The Rosa Roth*, 587 F. Supp. 103, 1985 AMC 718 (S.D.N.Y 1984).

30A.72 "Necessaries" also includes fuel and lubricating oil. *Galehead Inc*. v. *M/V Anglia*, 1999 AMC 2952 (11th Cir. 1999); *Gulf Trading & Transp*. *Co*. v. *The Hoegh Shield*, 658 F.2d 363, 1982 AMC 1138 (5th Cir. 1981); *Exxon Corp*. v. *Central Gulf Lines Inc*., 780 F. Supp. 191, 1992 AMC 1660 (S.D.N.Y. 1991); *Re Queen Ltd*., 361 F. Supp. 1009 (E.D.Pa. 1973). See also *World Fuel Services*, *Inc*. v. *M/V MAGDELENA GREEN*, *et al*, 464 Fed. Appx. 339 (5th Cir. 2012). Other "necessaries" include pilotage, food, repairs, seamen's wages, radar and any other equipment, drydocking and advertising. Even cigarettes have been held to be "necessaries." *Allen* v. *The Contessa*,196 F. Supp. 649, 1961 AMC 2190 (S.D.Tex. 1961).

30A.73 Several courts have held that containers provided to a ship under a lease agreement are necessaries. Compare *Foss Launch & Tug Co*. v. *Char Ching Shipping U.S.A. Ltd*., 808 F.2d 697, 1987 AMC 913 (9th Cir. 1987) *cert*. *denied*, 486 U.S. 828 (1987) and cases cited therein with *Triton Container Int'l*. v. *Itapage*, 774 F. Supp. 1349, 1350–1351, 1991 AMC 2319, 2320–2321 (M.D. Fla. 1990). Containers leased and furnished in bulk to a shipping company and not to individual ships, however, do not give rise to maritime liens. *Itel Containers Int'l Corp*. v. *Atlanttrafik Express Service Ltd*., 982 F.2d 765, 1993 AMC 608 (2d Cir. 1992), *rev'g* 1992 AMC 622 (S.D.N.Y. 1991) and citing as authority *Piedmont & Georges Creek Coal Co*. v. *Seaboard Fisheries Co*., 254 U.S. 1 (1920). See also *Foss Launch & Tug Co*. v. *Char Ching Shipping U.S.A*. *Ltd*., above. In addition, insurance has been held to be a necessary, such that the issuer of a policy has a maritime lien for the payment of premiums. See *Equilease Corp*. v. *The Sampson*, 793 F.2d 598, 1986 AMC 1826 (5th Cir.) (*en banc*), *cert*. *denied*, 479 U.S. 984 (1986); *Flagship Group* v. *Peninsula Cruise*, 771 F. Supp. 756, 1992 AMC 815 (E.D.Va. 1991). But see *Grow* v. *Steel Gas Screw Loraine K*, 310 F.2d 547, 1963 AMC 2044 (6th Cir. 1962), holding otherwise.

30A.74 In giving "necessaries" a broad interpretation, the court held in *Chi Sun Hua Steel Co*. *Ltd*. v. *Crest Tankers Inc*., 708 F. Supp. 18, 1989 AMC 2551 (D.N.H. 1989) that it included a creditor's agreement to release the ship from attachment at a prior port. According to the court, by agreeing to release the ship from attachment the creditor provided a service which was necessary

for her continued operation. See also *Ventura Packers*, *Inc*. v. *F/V Jeanine Kathleen*, 305 F.3d 913 (9th Cir. 2002), holding that a fish processor had a maritime lien because it provided necessaries even though it did so pursuant to a contract which was not maritime in nature.

30A.75 In *Bradford Marine Inc*. v. *M/V Sea Falcon*, 64 F.3d 585 (11th Cir. 1995), however, the court declined to rule that attorneys' fees incurred to assert a maritime lien for repairs were "necessaries" even though the repair contract provided for the recovery of attorneys' fees if suit was necessary to collect payment.

30A.76 The distinction between "general" and "special" agents discussed in prior editions of this book was overruled by the United States Supreme Court in *Exxon Corporation* v. *Central Gulf Lines Inc*., 500 U.S. 603, 1991 AMC 1817 (1991). The court overturned its decision in *Minturn* v. *Maynard*, 17 How. 477 (1855), which had established a *per se* bar of agency contracts from admiralty jurisdiction and replaced it with a more flexible rule which looks to the actual services provided by the agent to determine whether there is a maritime contract. If the services performed under the contract are maritime in nature and involve providing necessaries to the ship, the agent should have a maritime lien.

30A.77 A maritime lien may be assigned or may be acquired by way of subrogation. In *Medina* v. *Marvirazon Compania Naviera S.A*., 709 F.2d 124, 1983 AMC 2113 (1st Cir. 1983), the court held that a person who advanced funds to discharge seamen's wage liens was subrogated to the seamen's rights so long as the party making the advances did not occupy "such a close relationship to the ship and its Owners and exercised sufficient control over the ship that it would be inequitable to grant him a lien." See also *Conti-Lines* v. *The Baroness V*., 1992 AMC 681, 682–684 (M.D. Fla. 1991), holding that a foreign charterer acquired a maritime lien by making advances for repairs to the ship.

30A.78 It appears that the same rule would apply with respect to a party who has made payment on behalf of the ship to a supplier of necessaries. In *Tramp Oil and Marine Ltd*. v. *The Mermaid I*, 630 F. Supp. 630, 1987 AMC 129 (D.P.R. 1986), *aff'd*, 805 F.2d 42, 1987 AMC 866 (1st Cir. 1986), a bunker fuel broker attempted to exercise a maritime lien for fuel supplied to the ship. Broker A had been contacted by Broker B and had arranged for a fuel supplier to make the delivery. The court held that Broker A did not have a lien. Although Broker A had paid the fuel supplier, the charterer had paid Broker B the price of the fuel. Before paying Broker A, however, Broker B went into bankruptcy. The court noted case law in which parties have become subrogated to the rights of a lienor or have taken assignments of such rights but found that these rules did not apply to the case of the plaintiff. According to the court, Broker A could have protected itself by denying Broker B its credit or by requesting that the fuel supplier assign his lien. According to the court, it would not have been equitable to allow Broker A to become automatically subrogated to the lien of the fuel supplier since the charterer, on behalf of the ship, had already paid for the fuel supplied and it was no fault of the charterer that the funds had not reached Broker A.

30A.79 *Galehead*, *Inc*. v. *M/V Anglia*, 1999 AMC 2952 (11th Cir. 1999), also involved lien claims made by a third party supplier. The charterer contacted Polygon to supply fuel to the ship. Polygon, in turn, contacted Asamar, which then engaged and paid Coastal to provide the fuel. The court held that although Asamar had paid for the fuel, it had no maritime lien because it had not done so based on the order of the charterer.

30A.80 *A/S Dan-Bunkering Ltd*. v. *The M/V Zamet*, 945 F. Supp. 1576, 1996 AMC 2417 (S.D. Ga. 1996), presented a situation different than *Tramp Oil*. The fuel supplier contracted directly with the charterer to provide bunkers. The supplier, however, sub-contracted the job to another company which actually provided the bunkers. The court ruled that the fuel supplier had a maritime lien because it had provided bunkers, albeit through an intermediary which it had paid. See also *Ceres Marine* v. *Harmen Oldendorff*, 1995 AMC 2709 (D. Md. 1995).

30A.81 Former Section 972 provided that "the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted" shall be presumed to have authority from the ship owner to procure supplies, etc. Former Section 973 provided that those persons presumed to have authority to bind the ship "shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel." These sections were amended by 46 U.S.C. § 31341 and 31342, but are mentioned here so the reader may better understand older case law.

30A.82 If the supplier has actual notice of Clause 18, or knows facts which should put him on notice that the charterer lacks authority to create liens on the ship, the presumption of authority can be overcome. The burden of proof on the owner, however, may prove to be a heavy one.

30A.83 There are a number of cases in which Section 971 has been interpreted liberally in favor of the supplier and as allowing it to rely upon a presumption that a maritime lien exists. The supplier is under no duty to investigate the terms of the charter or to inquire as to the charterer's authority to bind the ship.

30A.84 The presumption in favor of the supplier may be overcome if the shipowner can show that the supplier had actual knowledge of a "no-lien clause." See *Marine Fuel Supply & Towing Inc*. v. *The Ken Lucky*, 859 F.2d 1405, 1989 AMC 390 (9th Cir. 1988); *Gulf Oil Trading Co*. v. *The Caribe Mar*, 757 F.2d 743, 1985 AMC 2726 (5th Cir. 1985); *Lake Union Drydock Co*. v. *The Polar Viking*, 446 F. Supp. 1286, 1978 AMC 1477 (W.D. Wash. 1978), where the court held that the assertion of a lien will be barred only if the materialman had actual knowledge of the prohibition of lien clause; *Gulf Trading* v. *The Tento*, 1979 AMC 753 (N.D.Cal. 1979); and *Jan C. Uiterwyk Co*. *Inc*. v. *The Mare Arabico*, 459 F. Supp. 1325 (D. Md. 1978).

30A.85 *Ramsay Scarlett & Co*. *Inc*. v. *The Koh Eun*, 462 F.Supp. 277 (E.D.Va. 1978), is representative of the post-1971 cases concerning former Section 971. There, the disponent owner attempted to avoid maritime liens asserted by stevedores on the grounds that since the stevedores knew the ship was operating under a time charter, they should be presumed to have known about the prohibition of lien clause. The court rejected the argument, stating:

> The Court finds the post-1971 law to be as follows: The supplier of necessities to a vessel has no duty or inquiry as to the existence of a charter or a prohibition of lien clause in a known charter. The supplier is entitled to rely upon the statutory presumption of 46 U.S.C. § 971 *et seq*. Any prohibition of lien clause is thus ineffective against such a supplier of necessaries absent actual knowledge of a charter including a prohibition of lien clause. Knowledge of a charter alone does not bar a lien. [462 F. Supp. at 285]

30A.86 It is common for the shipowner to instruct the master or its agents to stamp invoices or order forms from stevedores and other materialmen with a notice that the ship is operating under a charter which contains a prohibition of lien clause. The stamping of invoices in this manner should be sufficient to put the suppliers on notice that the charterer does not have authority to create liens against the ship. It is clear, however, that to be effective, the supplier must have actual notice of the prohibition of lien clause at the time it provides services or supplies to the ship.

30A.87 Thus, the stamping of a delivery receipt with a notice of the prohibition of lien clause *after* bunkers had already been supplied to the ship was held to be ineffective in *Gulf Oil Trading Co*. v. *The Freedom*, 1985 AMC 2738 (D.Or. 1985). On the other hand, an oil company was refused a maritime lien for bunkers supplied to a ship where it had received a letter giving notice of the prohibition of lien clause prior to the delivery of the bunkers. *Gulf Oil Trading Co*. v. *The Caribe Mar*, 757 F.2d 743, 1985 AMC 2726 (5th Cir. 1985).

30A.88 It is possible for the supplier to waive its lien. See 46 U.S.C. § 31305, which replaced Section 974 of the Federal Maritime Lien.

30A.89 A waiver of the lien will be found only where the supplier has clearly manifested its intention to forgo the lien in favor of other security. See *Nacirema Operating Co*. v. *The Al Kulsum*, 407 F. Supp. 1222 (S.D.N.Y. 1975); *Lake Union Drydock Co*. v. *The Polar Viking*, above; *Ramsay Scarlett & Co. Inc*. v. *The Koh Eun*, above. In *Jones Tug & Barge Co*. v. *The Liberty Manufacturer*, 1978 AMC 1183 (C.D. Cal. 1976), the court held that the suppliers had waived their lien on the ship when they agreed to render services in reliance upon the credit of the ship's P. & I. Club.

30A.90 In contrast, in *Gulf Trading & Transp. Co*. v. *The Hoegh Shield*, above, the court ruled that a supplier of bunkers had a maritime lien on the ship even though it admittedly relied on the credit of the time charterer. According to the court, the supplier did not rely *solely* on the charterer's credit and took no action which indicated "the purposeful intention of foregoing its maritime lien in the vessel." (1982 AMC at 1145)

30A.91 It is clear that as between the shipowner and the supplier of goods or services, it is the former who has the affirmative duty of informing the latter of the no-lien clause. However, as between the owner and the charterer, it is the latter who has the duty to give notice of the prohibition of lien clause. Under Clause 18, the charterer undertakes not to allow the creation of liens against the ship, and there can be little doubt that this language would extend to supplier's liens. The charterer's failure to give notice of a prohibition of lien clause would constitute a breach of the charter, entitling the owner to indemnity from the charterer. The charterer's duty to indemnify the owner in this context would include costs incurred in posting a bond to obtain the release of the ship if she is arrested. See, e.g., *The Irene's Grace*, SMA 1213 (Arb. at N.Y. 1978); *The George Vergottis*, SMA 1214 (Arb. at N.Y. 1978); and *The Scotiacliffe Hall*, SMA 1464 (Arb. at N.Y. 1980).

30A.92 *The Pacduke*, SMA 2586 (Arb. at N.Y. 1989), involved a dispute over a special clause drafted by the owner and accepted by the charterer which required the latter to obtain a signed statement from the furnisher of supplies, necessaries or services acknowledging that it was providing the goods or services on charter's credit and would not have a lien on the ship for unpaid bills. The owner sought a declaration that the clause required the charterer to obtain statements signed by the actual supplier, rather than a broker acting on its behalf. The panel found the charter clause at issue to be ambiguous, and ruled against the owner, albeit noting that a more clearly drafted clause could have dealt with the owner's concerns.

30A.93 There are other types of liens the charterer must be wary of in dealing with third parties. For example, what of the situation where the cargo receiver causes the ship to be arrested in exercising a maritime lien for cargo damage for which the charterer is liable? It would seem that if the cargo loss were the direct result of the charterer's acts, it properly could be said that the charterer was in breach of Clause 18 by causing the lien to come into existence. In *The Peerless*, 2 F.2d 395, 1923 AMC 236 (S.D.N.Y. 1923), the court held that the charterer's redelivery of the ship subject to a lien for repairs for which it was responsible was a fundamental breach of the charter.

30A.94 In *The Three Sisters*, SMA 345 (Arb. at N.Y. 1969), the majority of the panel held that the owner was justified in withdrawing the ship from the service of the charterer as the result of the charterer's breach of its promise under Clause 18 not to "suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel." The ship had been arrested by the shippers as the result of the charterer's failure to pay dockage, storage and stevedoring charges.

30A.95 See also *The Wismar*, SMA 1454 (Arb. at N.Y. 1980). There, the charterer sub-chartered the ship on a New York Produce form charter which contained terms identical with those of the head charter. The sub-charterer wrongfully cancelled the sub-charter and caused the ship to be arrested in Canada to obtain security for claims it had against the registered owner. The arbitrators noted that the time chartered owner would have been in breach of Clause 18 and obliged thereunder "to

procure the release of the ship from arrest had the arrest resulted from its own actions or those of its agents." Since the arrest was in fact caused by the sub-charterer with respect to claims against the registered owner, the panel held that it was the registered owner's duty to take steps to release the ship from arrest. The panel observed that, for purposes of Clause 18, a sub-charterer is not deemed to be an agent of the charterer.

Priority of supplier's lien

30A.96 A maritime lien for providing "necessaries" has the status of a maritime contract lien for priority purposes. Thus, ordinarily it ranks behind maritime liens for crew wages, salvors, and torts. If ship mortgages are involved, the supplier's lien will have preferred status only if it came into being before a United States' mortgage was recorded. In the case of foreign ship mortgages, however, United States' suppliers will have priority, even if the necessaries were provided after the mortgage was recorded. See 46 U.S.C. § 31326(b)(2). A supplier's maritime lien outranks state law liens. See, e.g., *Bay State Yacht Sales Inc*. v. *Squantum Engine & Service Co*. *Inc*., 117 B.R. 16, 1991 AMC 94 (Bank. D. Mass. 1990), holding that a maritime lien for supplies outranked the claims of a bona fide purchaser.

Sub-charterer's lien

30A.97 In theory, a sub-charterer is entitled to a maritime lien on the ship for a breach by the disponent owner. If the head time charter contains a prohibition of liens clause, however, this limits the charterer's authority to enter into contracts which may subject the ship to any liens, including liens of a sub-charterer. In *MMI Int'l Inc*. v. *Skyros*, 1991 AMC 1264 (N.D. Cal. 1990), for example, the court held that a prohibition of liens clause in the head charter precluded the sub-charterer from exercising a lien for a breach by the charterer. The court found the sub-charterer had sufficient notice of the prohibition of liens clause because, by the exercise of reasonable diligence, it could have determined the ship was under a charter which had such a clause. See also *Cardinal Shipping Corp*. v. *The Seisho Maru*, 744 F.2d 461, 469, 1985 AMC 2630, 2641 (5th Cir. 1984) and *United States* v. *The Lucie Schulte*, 343 F.2d 897, 1965 AMC 1516 (2d Cir. 1965).

Obligation to free ship from arrest

30A.98 The issues of who as between the owner and charterer must bear the cost of releasing the ship from an arrest and whether either party has any obligation to free the ship must be determined on the facts of each case. In general, it seems correct to say that if the arrest arose from a breach of charter, the party in breach is obligated to bear the cost of securing the release of the ship.

30A.99 Thus, in *The Pandora*, SMA 1466 (Arb. at N.Y. 1980), the charterer failed to pay hire due and owing, and the owner exercised its lien upon the cargo under Clause 18. The arbitrators stated that while Clause 18 is silent as to which party must pay for the costs involved in exercising the lien, since the necessity for such action arose from a failure of performance by the charterer, the charterer was liable for all expenses incurred by the owner in preserving and exercising the lien.

30A.100 The situation presented in *The Wismar*, above, was considerably more complex. There, the ship was arrested in Canada by a sub-charterer for claims of tortious interference in the loading of the cargo which were directed at the owner. The panel noted that under Clause 18, the time charterer "would be obliged to procure the release of the vessel from arrest had the arrest resulted from its own action or those of its agents." But since the arrest was caused by the sub-charterer in

connection with claims against the owner, the owner was held to be under an affirmative duty to release the ship, failing which the ship was off-hire until she was freed.

30A.101 In *The Scotiacliffe Hall*, SMA 1464 (Arb. at N.Y. 1980), the arbitrators held that the charterer was in breach of Clause 18 and, therefore, under a duty to free the ship from an arrest brought by the cargo receivers at the discharge port. The panel noted that the receivers were not agents of the charterer. The ship was arrested, however, in connection with claims against the charterer, and for this reason the detention of the ship was held to be attributable to actions of the charterer.

30A.102 *The Ming Belle*, SMA 2043 (Arb. at N.Y. 1984), involved the grounding of a loaded ship in the Red Sea. A salvage tug was called in to assist refloating the ship and the salvors subsequently filed a claim for salvage security. The owner promptly posted security, but cargo security was not posted until 13 days later. The owner contended that the ship was on-hire during the period the ship was detained due to the unsatisfied salvage lien because the charterer and sub-charterer failed to post cargo's share of the security. The panel majority rejected the owner's contention, finding no charter provision obligating the charterer or sub-charterer to post salvage security on behalf of the cargo owner.

30A.103 One other arbitration award warrants mention. In *The Gabrielle Wesch*, 1981 AMC 1324 (Arb. at N.Y. 1981), the ship was placed under arrest in legal proceedings brought in Guatemala by a third party seeking security for a cargo claim it had against the charterer. The cargo claim concerned an unrelated voyage on a different ship. The owner and the charterer made substantial efforts to attempt to lift the arrest, but both were unsuccessful. At the time the award was issued, the ship had been under arrest for more than a year. The charterer contended that it was not responsible for the arrest under Clause 18 because it was "illegal" in that it was based on a false statement that the ship was owned by the charterer. The panel majority rejected this argument, however, finding that even if the Guatemalan courts were ultimately to conclude that the arrest was improper, that would not make the arrest "illegal" since it was authorized by the Guatemalan court. The majority concluded that the arrest was the charterer's responsibility under Clause 18, because it existed by reason of causes attributable to the charterer and not because of any fault of the owner. The charterer, therefore, was held liable for hire and all expenses resulting from the arrest.

30A.104 *Seguros Banavenez S.A.* v. *The Oliver Drescher*, 761 F.2d 855, 1985 AMC 2168 (2d Cir. 1985), involved, inter alia, the arrest of a ship as security for a cargo claim. At the request of the owner, Drescher, the district court ordered the charterer, Venline, to furnish Drescher with sufficient security so that Drescher, in turn, could post the bond necessary for the release of the ship. The Second Circuit reversed the district court on this issue, reasoning:

> Venline did not ask to be brought into court, and it did not concede liability over to Drescher. Indeed, that issue remains to be decided in arbitration. A shipowner is not compelled to furnish a bond to the person who has arrested his ship. Its *quid pro quo* for voluntarily furnishing security is the release of its ship. Depriving Venline of its property by compelling it to furnish a bond to Drescher without any similar *quid pro quo*, without any valid prior finding as to the parties' respective rights, and without any provision for protection of Venline's interests and expenses, smacks of a violation of due process. [761 F.2d at 863–864, 1985 AMC at 2179–2180]

Charterer's property subject to maritime lien

30A.105 Equipment owned by the charterer and which is placed on board the ship and is "an integral part of the vessel and essential to its navigation and operation" will be subject to maritime liens against the ship. In *The Tropic Breeze*, 456 F.2d 137, 1972 AMC 1622 (1st Cir. 1972), cement equipment owned by the charterer which was essential to the ship's operation as a bulk

cement carrier was held to be subject to a maritime lien. In other cases, refrigeration equipment, diving bells, air pumps, nets, net lifters, oil tanks and fishing gear have all been held to be subject to maritime liens even though owned by the charterer. In order to be subject to attachment, the party against whom attachment is sought must hold title to the attached property. In *Wave Maker Shipping Co*. v. *Hawkspere Shipping Co*., 2003 AMC 209, 210 (4th Cir. 2003), a creditor of the sub-charterer attached bunkers that the sub-charterer had supplied for the ship. The bunkers were purchased under the FUELCON form, which incorporated English law and provided that title would not pass from seller to buyer until the latter had paid the full purchase price. Because the sub-charterer had never paid the supplier, the court found, under the English law applicable to the bunker contract, that title to the bunkers remained with the supplier. The bunkers were not the property of the sub-charterer and were thus not subject to attachment by its creditors.

Filing notices of lien

30A.106 Effective on January 1, 2003 by the Marine Transportation Security Act of 2002, 46 U.S.C. 31343 (2002) was amended to permit the filing of notices of liens against United States documented ships regardless of whether there is a mortgage of record on file.

CHAPTER 31

Salvage; General Average

"114. 19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and
115. Crew's proportion." [The rest of Clause 19, up to and including Line 132, concerns general average: it is set out in the full text of the charter at F1, below.]

Division of net salvage earned

31.1 The words "equal benefit" in Line 114 of the New York Produce form suggest an intention to divide equally what is left of the salvage award after deducting that which the owners and the charterers have each contributed or sacrificed to enable it to be earned.

The *Pocklington* sustained damage while salving the *Dart*. While this damage was being repaired she was off hire. Her owners paid for the repairs and incurred certain other expenses in connection with the salvage operations. The charterers claimed from the owners half of the gross salvage award, relying on a clause reading "All derelicts and salvage shall be for owners' and charterers' equal benefit". Bigham, J., held that all that was to be divided was the net amount after deducting on the one hand the owners' losses and expenses including hire lost during repairs and on the other hand the charterers' loss of time during the salvage itself and the cost of the extra fuel consumed (conceded by the owners as proper deductions). He said: "'Equal benefit' cannot be accorded to shipowner and charterer without taking into account what each has contributed towards securing the benefit. Salvage in this clause does not mean the amount recovered in the suit in the Admiralty Court. It means the net pecuniary result of the salvage operations."
Booker v. *Pocklington Steamship* [1899] 2 Q.B. 690.

31.2 This decision suggests that a broad rather than a narrow interpretation should be given to the word "expenses", so as to allow before division of the net salvage the cost of repairs to the ship caused by the salvage operation, hire during the salvage and any subsequent repairs and also the cost of charterers' bunkers consumed. The corresponding clause in the Baltime form (18) is worded more fully and provides expressly for this result.

General average

31.3 For comments on general average see *Voyage Charters*, paragraphs 20.1 *et seq*. and *Lowndes & Rudolf.*

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CHAPTER 32

Fuel for Owners' Account

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

Fuel costs payable by the owners

32.1 Clause 20 provides that fuel used by the vessel while off hire is to be for the owners' account: see paragraph 25.72, above. The remaining part of Clause 20, and in particular the phrase "Fuel. . . for grates and stoves" was considered by the courts in *The Sounion* [1987] 1 Lloyd's Rep. 230. The Court of Appeal, reversing Gatehouse, J., agreed with the majority view of the arbitrators that the pattern of the New York Produce form was that the cost of fuel for propelling the ship and for cargo work was intended to be for the charterers' account and the cost of fuel used for the crew's domestic purposes for the owners' account. The court held that Clause 20 was intended to extend the owners' liability to all fuel used for the crew's domestic purposes, whether that was for lighting, heating, cooking or other crew facilities such as air conditioning or power for televisions or personal electrical equipment; "grates and stoves" was not to be given a restrictive construction and confined only to heating as the owners had contended.

U.S. Law

32A.1 The rather archaic language of Clause 20 was considered by arbitrators in *The Ming Autumn*, SMA 2189 (Arb. at N.Y. 1986). The charterer argued that all fuel consumed for domestic purposes was for the owner's account and sought to include the modern equivalents of 'grates and stoves' such as electricity and steam, as well as air conditioning and fans in the crew cabins. The panel agreed that the charterer was entitled to a credit for diesel oil used for cooking, which it calculated based on the estimated daily use of the ship's range. In addition, the panel awarded the charterer a credit for fuel used to heat the ship's accommodations. According to the panel, the charterer was not entitled to any other fuel credit. Perhaps the most controversial item concerned air conditioning and it was the view of the arbitrators that this was not covered by Clause 20 as drafted. Based on this ruling, if it is the intent of the parties to allow the charterer a credit for the cost of air conditioning aboard the ship, an express amendment to that effect should be made.

32A.2 In *The Mykali II*, SMA 2240 (Arb. at N.Y. 1986), the charterer claimed a credit for the cost of cooking while the vessel was in port. The panel noted, however, that Clause 20 states "to be agreed to as to quantity." There was no provision in the charter expressing an agreement as to quantity and in the arbitration the parties could not agree. Although the charterer offered a calculation of the ship's daily domestic consumption, the panel found it to be speculative. The panel declined to give any allowance for in port cooking and stated "the proper place for this claim to be quantified is in the fixture negotiations where the quantity should be agreed upon."

CHAPTER 33

Drydocking; Gear; Crew Services

"135. 21. That as the vessel may be from time to time employed in tropical waters during the term of this Charter, Vessel is to be docked at a
136. convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every six months, reckoning from
137. time of last painting, and payment of the hire to be suspended until she is again in proper state for the service.
138. .....
139. .....
140. 22. Owners shall maintain the gear of the ship as fitted, providing gear (for all derricks) capable of handling lifts up to three tons, also
141. providing ropes, falls, slings and blocks. If vessel is fitted with derricks capable of handling heavier lifts, Owners are to provide necessary gear for
142. same, otherwise equipment and gear for heavier lifts shall be for Charterers' account. Owners also to provide on the vessel lanterns and oil for
143. night work, and vessel to give use of electric light when so fitted, but any additional lights over those on board to be at Charterers' expense. The
144. Charterers to have the use of any gear on board the vessel.
145. 23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging;
146. steamer to provide one winchman per hatch to work winches day and night, as required, Charterers agreeing to pay officers, engineers, winchmen,
147. deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles. If the rules of the
148. port, or labor unions, prevent crew from driving winches, shore Winchmen to be paid by Charterers. In the event of a disabled winch or winches, or
149. insufficient power to operate winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned
150. thereby."

Drydocking

33.1 On the subject of bottom fouling generally, see paragraph 11.21, above. A reference to Clause 21 under U.S. law appears at paragraph 3A.65, above.

33.2 For a case in which charterers claimed damages for breach by the owners of an agreement to drydock at a mutually agreed time under an amended Clause 21 of the New York Produce form, see *The Timawra* [1996] 2 Lloyd's Rep. 166 (four-year time charter with sub-let for 24 months; damages awarded to the charterers for cancelled drydocking; whether the owners were entitled to credit for period of next drydocking following cancelled drydocking).

NYPE 93

33.3 The 1993 revision of the New York Produce form removes the obligation to drydock at least every six months that is contained in Lines 135 and 136 of the original form. Instead the parties are given a choice between: (*a*) a clause allowing drydocking "as required by class or

dictated by circumstances" at a time and place to be mutually agreed; and (*b*) a clause forbidding drydocking save 'in case of emergency': see Lines 242 to 248.

Cargo gear, equipment, winches and lighting

33.4 Clauses 22 and 23 contain specific provisions dealing with these matters. General comments on these subjects are at paragraphs 8.62 *et seq*., above.

Crew assistance

33.5 Clause 23 deals principally with crew assistance during loading. General comments on the subject of the services of the crew are at paragraphs 18.13 and 18.14, above.

CHAPTER 34

U.S. Carriage of Goods by Sea Act; Hague Rules

"24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February 1893, and entitled "An Act relating to Navigation of Vessels, etc.," in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses, both of which are to be included in all bills of lading issued hereunder:

U.S.A. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Both-to-Blame Collision Clause

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

Incorporation of Harter Act and United States Carriage of Goods by Sea Act 1936

34.1 In a contract governed by English law the United States Acts will be incorporated as terms of the contract, as far as applicable (see *Adamastos Shipping* v. *Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd's Rep. 73 and paragraph 34.5, below) and will, save in very exceptional cases, be construed in accordance with English law (see *The Stolt Sydness* [1997] 1 Lloyd's Rep. 273, *per* Rix, J., at page 278).

Harter Act

34.2 The Act of 1893 is known as the Harter Act. Both it and the United States Carriage of Goods by Sea Act 1936 (U.S. COGSA) are set out in Appendix A.

34.3 The Harter Act is now mainly superseded by U.S. COGSA. The Harter Act remains effective for any period in which the carrier has charge of the goods prior to loading or after discharge until

delivery. Where, as is sometimes the case, the U.S.A. Clause Paramount is deleted from Clause 24, but the clause is left otherwise unamended, Section 3 of the Harter Act in certain circumstances makes the owners' right to rely upon some of the exceptions in Clause 16 and certain other defences upon which the owners might otherwise be entitled to rely, conditional upon the exercise of due diligence to make the ship seaworthy in all respects. Thus, if the ship is unseaworthy and the exercise of due diligence cannot be established, it is no defence to the owners that the particular unseaworthiness was not the effective cause of the loss or damage suffered.

34.4 By the express words of Lines 151 to 153 of Clause 24, the Harter Act is applicable only in respect of cargo shipped under the charter to or from the U.S.A. The incorporation of U.S. COGSA is not restricted in this way; and on the authority of the decisions in the *Adamastos* case, below, and *The Satya Kailash* [1984] 1 Lloyd's Rep. 588 (C.A.), this Act applies to all trading under the charter without any geographical limitation.

The United States Carriage of Goods by Sea Act (U.S. COGSA)

34.5 It is suggested that the effect of the incorporation of U.S. COGSA by Clause 24 of the New York Produce form is as follows:

(1) the express obligation of seaworthiness at the beginning of the charter period (see paragraphs 3.41 *et seq.*, 7.28 and chapter 8, above) is reduced from an 'absolute' obligation that the ship will be seaworthy to an obligation to exercise due diligence to make the ship seaworthy (but not for the purposes of the cancelling clause; see paragraphs 8.25 and 24.8, above);
(2) before and at the beginning of each voyage under the charter the owners will be obliged to exercise due diligence to make the ship seaworthy, in accordance with Section 3(1) of the Act (see paragraphs 34.13 *et seq*., below); and
(3) all the provisions of the Act are to be given effect so as to regulate the rights and obligations of the owners and the charterers, to the extent that the provisions are capable of that treatment when notionally written out in full in the charter; this is particularly important so far as concerns the excepted perils listed in the Act (see paragraph 34.17, below).

The *Saxon Star* was chartered for as many consecutive voyages as she could tender for within a period of 18 months. Delays occurred on voyages, including the ballast voyage to the first loading port, due to breakdowns of machinery caused by the incompetence of the engine room staff. They were incompetent despite the fact that the owners had exercised due diligence in their selection. Their incompetence made the ship unseaworthy. The charterers claimed that owing to that unseaworthiness the number of voyages completed within the charter period was less than it should have been.

The charter contained an absolute warranty of seaworthiness in these terms: "being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted". It was also provided by a typewritten clause: "It is agreed that the. . . Paramount Clause. . . as attached [is] to be incorporated in this charter-party." The attached Paramount Clause was in the same terms as the U.S.A. Clause Paramount in Clause 24 of the New York Produce form. The owners argued that the absolute warranty of seaworthiness in the charter was reduced to an undertaking to exercise due diligence to make the ship seaworthy by reason of the incorporation into the charter by the Paramount Clause of U.S. COGSA.

It was held by the House of Lords unanimously that:

(1) It was plainly the intention of the parties to incorporate the Hague Rules into the charter and this intention should be given effect to; so the words in the Paramount Clause "This bill of lading" should be read as "This charter-party".
(2) Section 5 of U.S. COGSA, which provides that the Act is not to apply to charterparties, was to be ignored.

And by a majority that:

(3) The charter being of worldwide scope, the limitation in U.S. COGSA to voyages to and from the United States should be disregarded and voyages should be subject to the Act regardless of where they started or finished.
(4) The standards of obligation introduced by U.S. COGSA – the Hague Rules – were applicable to all voyages whether these were in ballast or with cargo.
(5) The immunity given to the owners by Section 4(1) of U.S. COGSA in respect of "loss or damage" extended beyond physical loss or damage to cargo and covered the loss here claimed, namely the loss to the charterers from the reduction in the number of voyages under the charter.

Adamastos Shipping v. *Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd's Rep. 73 (H.L.).

(See also *The Fjord Wind* [1999] 1 Lloyd's Rep. 307 and [2000] 2 Lloyd's Rep. 191 (C.A.), a voyage charter case, on the interaction between an express absolute obligation of seaworthiness at the commencement of the approach voyage and another express term imposing an obligation on the owners to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage".)

34.6 In the New York Produce form it is made clearer than it was in the *Adamastos* case that the U.S.A. Clause Paramount is to apply to the charter itself as well as to bills of lading issued under it: see Lines 153 and 154. The Act is to be incorporated in the manner laid down by Lord Esher, M.R., in *Hamilton* v. *Mackie* (1889) 5 T.L.R. 677, for the incorporation of charter terms in a bill of lading, and approved by the House of Lords in the *Adamastos* case: "the conditions of the charter-party must be read verbatim into the bill of lading as though they were there printed *in extenso*. Then if it was found that any of the conditions of the charter-party on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded." Viscount Simonds adopted this passage in the *Adamastos* case and continued, [1958] 1 Lloyd's Rep. 73, at page 81: "It is obvious that there is much in the Act which in relation to this charter-party is insensible, or, as I would rather say, inapplicable, and must be disregarded." Lord Somervell said, at page 99: "The provisions of the Act are therefore to be incorporated as terms of the contract *as far as applicable*."

34.7 The U.S.A. Clause Paramount in Lines 155 to 159 is the same clause as in the *Adamastos* case. Once the words "bill of lading" are read as "charter" (see *The Aliakmon Progress*, below) the wording of the clause is unambiguous; the provisions of the Act are incorporated and will prevail over conflicting terms elsewhere in the printed form. Whether the provisions of the Act will prevail over terms in typescript is a matter of construction of the contract as a whole: see below under "Other effects of U.S. COGSA", at paragraph 34.17 *et seq*. Not all clauses incorporating the Hague Rules or Hague-Visby Rules legislation make the Rules "paramount" despite their being headed "Clause Paramount": see *Marifortuna Naviera* v. *Government of Ceylon* [1970] 1 Lloyd's Rep. 247. The stronger wording of the *Adamastos* clause was pointed out in that case; see also the comments of Goff, L.J., in *The Agios Lazaros* [1976] 2 Lloyd's Rep. 47, at page 53. Section 5 of U.S. COGSA (from Article V of the Hague Rules) provides that a carrier is "at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities". The U.S.A. Clause Paramount under Clause 24, when read into the charter, provides expressly that nothing in the charter is to be read as a surrender of rights or increase of liability. It is thought, however, that even without such a statement, Section 5 of U.S. COGSA, or Article V of the Hague(-Visby) Rules, generally would not operate to preserve an apparently absolute warranty of seaworthiness under a charter incorporating the Act or the Rules. For, as Viscount Simonds put it in the *Adamastos* case, at page 81, where parties incorporate the Hague Rules into their charter, "They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the Rules subsists between carrier and shipper; in other words they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them."

34.8 The decisions of the House of Lords in the *Adamastos* case are applicable equally to

charters on the New York Produce form. There are of course important differences between time charters and consecutive voyage charters. These differences are considered under "Seaworthiness obligation for each voyage" at paragraphs 34.13 *et seq.*, below. But it is clear from the approach of the House of Lords in the *Adamastos* case that if the contract shows that the parties did intend the Hague Rules to apply to their charter, the courts will strive to give effect to that intention as far as this can sensibly be done.

34.9 In cases relating to time charters for a trip, the courts have shown no hesitation in acknowledging that Clause 24 incorporates U.S. COGSA (and so the Hague Rules) into the charter. In *The Aliakmon Progress* [1978] 2 Lloyd's Rep. 499, under a trip charter on the New York Produce form, the Court of Appeal upheld the owners' defence of error in navigation (Section 4(2)(a) of U.S. COGSA) against a claim for damages following damage to the ship in a collision with a quay caused by a navigational error on board. Lord Denning, M.R., said: "It is plain on the decision of the House of Lords in the *Adamastos* case. . . that, although there is a clause saying 'This bill of lading shall have effect' &c. nevertheless it really meant, 'This charterparty shall have effect', &c. So the provisions of the Hague Rules apply to this time charter." The Court of Appeal gave effect in the owners' favour to the same defence under a trip charter in *The Aquacharm* [1982] 1 Lloyd's Rep. 7; see further below, at paragraph 34.20.

34.10 The decision of the House of Lords in the *Adamastos* case was again considered by the Court of Appeal in *The Satya Kailash*, below, where the court held that Clause 24 of the New York Produce form had the effect of incorporating U.S. COGSA into a short-term time charter for lightening purposes and that the provisions of the Act in the context of the charter were not confined to voyages to or from the United States.

The *Oceanic Amity* was time chartered on the New York Produce form for a period of 20 to 40 days for the purpose of lightening the charterers' ship *Satya Kailash* off Tuticorin. *The Satya Kailash* suffered ranging damage due to the negligent navigation of the *Oceanic Amity*. The question arose whether the owners of *The Oceanic Amity* were exempted from liability for this damage either by Clause 24 of the charter or by the exceptions in Clause 16. It was held by the Court of Appeal (Robert Goff and Oliver, L.JJ.) that:

(1) Clause 24 effectively incorporated the U.S. COGSA into the charter and that its effect was not confined to voyages to or from United States ports.
(2) The damage suffered by *The Satya Kailash* was "loss or damage" arising from neglect in navigation within the meaning of Section 4(2)(a) of U.S. COGSA, so that the owners of *The Oceanic Amity* were protected by that exception.
(3) The owners were not, however, protected by the exception 'errors of navigation' in Clause 16 of the charter because those words were not wide enough to embrace negligent errors (see paragraph 27.26, above).

The Satya Kailash [1982] 2 Lloyd's Rep. 465 and [1984] 1 Lloyd's Rep. 588 (C.A.).

Incorporation of other Hague Rules legislation

34.11 In *The Marinor* [1996] 1 Lloyd's Rep. 301, below, the time charter incorporated a paramount clause which made the charter subject to the Canadian Carriage of Goods by Water Act 1936 "as amended". At the time the charter was entered into, the 1936 Act was still in force, but by the time the voyages took place which were the subject of the dispute, the 1936 Act had been repealed and replaced by the Carriage of Goods by Water Act 1993, which enacted the Hague-Visby Rules. It was held that the words "as amended" were intended to provide for any legislative changes which might subsequently be made, whether strictly by amendment or by repealing of the original Act and replacement by another Act containing amended provisions in respect of the same subject matter. Hence it was the 1993 Act which was to be regarded as incorporated at the relevant time.

U.S. COGSA applicable to all voyages under the New York Produce form

34.12 Following the *Adamastos* decision, the Act will apply to ballast as well as laden voyages and whether or not voyages begin or end in the United States. In the words of Viscount Simonds at [1958] 1 Lloyd's Rep. 73, at page 82: "The contractual subject-matter was the whole period during which the vessel was under charter, and it is, in my opinion, to this whole period that the parties agreed that the statutory standard of obligation and immunity should relate." The incorporating words in the New York Produce form charter are in the same wide terms. See also *The Satya Kailash* [1982] 2 Lloyd's Rep. 465 and [1984] 1 Lloyd's Rep. 588 (C.A.) and paragraph 34.10, above.

Seaworthiness obligation for each voyage

34.13 Without the incorporation of U.S. COGSA there is under the New York Produce form no express or implied obligation of seaworthiness at the beginning of each of the voyages under the charter. There are only the obligations of seaworthiness at the beginning of the charter and the maintenance obligation in Lines 37 and 38: see paragraphs 3.41 *et seq.*, 7.28 (read with chapter 8) and 11.5 *et seq.*

34.14 But it is suggested that the incorporation of U.S. COGSA creates an obligation before and at the beginning of each voyage to exercise due diligence to make the ship seaworthy. This is a step beyond the decision in the *Adamastos* case. There the charter was for consecutive voyages and thus there was already a seaworthiness obligation in respect of each voyage, although one that was held to be modified by the incorporation of the Act.

34.15 In *The Aquacharm* [1982] 1 Lloyd's Rep. 7 it was accepted by Lord Denning, M.R., and Griffiths, L.J., *obiter*, that Clause 24 of the New York Produce form had the effect of incorporating into a time charter for a trip with a single cargo the Hague Rules obligation of due diligence to make the ship seaworthy at the beginning of the voyage. This again was little more than a modification of the existing obligation of seaworthiness at the time of delivery. In the case of a period time charter, the Act, if it has the effect suggested, is *creating* an obligation rather than modifying an existing one. But when the Act is notionally written out in full in the charter there seems no good reason to disregard as "insensible" or "inapplicable" the relevant provision, Section 3(1), nor to give "voyage" anything other than its ordinary meaning, and the language of Robert Goff, L.J., in *The Satya Kailash*, above, suggests that he would have accepted that the voyage by voyage obligations of seaworthiness of the Act are applicable to a period charter on the New York Produce form. Moreover, Section 3 of the Harter Act, which requires the exercise of due diligence to make the ship seaworthy, is expressly incorporated by Lines 151 to 153 in respect of all cargo-carrying voyages to and from the United States.

34.16 This view of the impact of the *Adamastos* decision upon the New York Produce form of time charter should, however, be treated with some caution pending its full acceptance by the courts. In *The Hermosa* [1980] 1 Lloyd's Rep. 638, at page 647, Mustill, J., made the following, *obiter*, comments: 'the difficulties created by the inclusion of the Hague Rules into a time charter have not yet been worked out by the courts. The analogy with a consecutive voyage charter is not exact. For example, the charterer pays directly for the whole of the time while the ship is on hire, including ballast voyages; and there are in most time charters express terms as regards initial seaworthiness and subsequent maintenance which are not easily reconciled with the scheme of the Hague Rules, which create an obligation as to due diligence attaching voyage by voyage. It cannot be taken for granted that the interpretation adopted in [the *Adamastos* case] in relation to voyage charters applies in all respects to time charters incorporating the Hague Rules. It is, however, unnecessary to

tackle this problem in the present case, for on the findings which I have made, there was a breach of the initial warranty of seaworthiness or (if that warranty is to be regarded as qualified by the Hague Rules) of the obligation to exercise due diligence to make the ship seaworthy.'

Other effects of U.S. COGSA

General

34.17 The provisions of the Act are notionally written out in the charter and only those which are in that context "insensible" or "inapplicable" or "inconsistent with the purpose of the charterparty" are disregarded. Lord Reid said in the *Adamastos* case, [1958] 1 Lloyd's Rep. 73, at page 91: "That leaves to be incorporated those parts of the Act which enact the rights and liabilities of carrier and shipper and which are capable of being applied to a charter-party if one reads owner and charterer for carrier and shipper." (Lord Reid was in the minority in the House of Lords as to the results which followed from this incorporation.) As to the relationship between Sections 3(1) and 3(2) of the Act and the charterers' responsibility for cargo operations under a time charter, for example, under Clause 8 of the New York Produce form, see paragraphs 20.8 to 20.18, above.

Conflict with other clauses

34.18 Where there is a conflict between the provisions of the Act which are incorporated by Clause 24 of the New York Produce form and the other printed terms of the contract, the U.S.A. Clause Paramount under Clause 24 provides that the provisions of the Act will override. Where there is no conflict, the provisions of the Act will supplement those other terms. Shaw, L.J., in *The Agios Lazaros* [1976] 2 Lloyd's Rep. 47, said, at page 59: ". . . the terms of the specific contract and the Hague Rules are fused together. The combined terms interact between themselves. There is no line of demarcation or difference in quality or effect save that if the incorporated clause is also a paramount one the Hague Rules will not merely supplement the specific contract but will operate also to modify any incompatible clauses in it."

34.19 *The Agios Lazaros* was a case where the paramount clause was incorporated by an additional clause in typescript. The position may be different if there is a conflict between the provisions of the Act as incorporated by the printed Clause 24 and typescript additional clauses. This was the case in *The Satya Kailash* [1984] 1 Lloyd's Rep. 588, above, where there were typed additional clauses imposing certain absolute warranties of seaworthiness. Robert Goff, L.J., in giving the judgment of the Court of Appeal, said: "in our judgment, these clauses cannot affect the construction to be placed on cl. 24 as such. The most that could be said of these clauses is that, as typed clauses, they might be given precedence over the printed clause paramount in cl. 24 so as to override *pro tanto* the provisions of s.4(1) of the United States Act as incorporated into the charter. We cannot see that the fact that the parties have thought fit to provide for an absolute warranty of seaworthiness in these clauses can otherwise affect the incorporation of the United States Act into the charter by cl. 24. If anything, their presence pre-supposes that the qualified seaworthiness obligations under ss.3(1) and 4(1) of the United States Act would otherwise be applicable."

Exceptions in Section 4(2) of U.S. COGSA

34.20 Subject to this the owners and, where appropriate, the charterers will be entitled, in addition to the exceptions set out in Lines 103 and 104, to the protection given by the exceptions in Section 4(2) of U.S. COGSA, set out in full at paragraph 27.29, above. However, the seaworthiness

obligation under Section 3(1) must be kept in mind because, if it is not fulfilled and the non-fulfilment causes damage, the immunities under Section 4(2) cannot be relied on: see *Maxine Footwear* v. *Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105.

The owners of the *Aliakmon Progress* sued for hire due under a trip charter on the New York Produce form. This action was brought against a firm which had guaranteed the obligations of the charterers. These guarantors sought to set off a claim for damages arising out of an incident at an Icelandic port. While berthing, the master had given an astern order too late, rammed the quay and damaged the ship. Temporary repairs were done and a cargo loaded for Antwerp. After discharge permanent repairs were done in Antwerp, which caused the ship to lose her previous cargo arrangements and to have to wait 39 days for a replacement cargo. The Court of Appeal held that because the owners were entitled to rely on Section 4(2)(a) of the United States Act ("Act, neglect, or default of the master. . . in the navigation. . .of the ship") this cross-claim of the guarantors was not sustainable.

The Aliakmon Progress [1978] 2 Lloyd's Rep. 499 (C.A.).

The *Aquacharm* was time chartered for a trip on the New York Produce form to carry a cargo of coal from Baltimore to Japan. Having been ordered to load to maximum draught for a passage through the Panama Canal, the master negligently failed to take into account that in passing through a fresh water lake which forms part of the Canal, the ship's forward draught would increase. The ship was consequently refused entry to the Canal; after considerable delay part of the cargo had to be discharged, carried through the Canal on another ship and then reloaded.

The Court of Appeal held that the ship remained on hire (see paragraph 25.12, above) and that the alternative claim by charterers to recover as damages the hire they had to pay was defeated because that loss arose from neglect of the master in the management of the ship which was excepted under Section 4(2)(a) of U.S. COGSSA.

The Aquacharm [1980] 2 Lloyd's Rep. 237 and [1982] 1 Lloyd's Rep. 7 (C.A.).

34.21 Conversely, the exceptions set out in Lines 103 and 104 of the charter will be rendered ineffective by Section 3(8) to the extent that they give wider protection than the Act.

34.22 The extent to which the application of U.S. COGSA (including Section 3(8), above) is restricted by the fact that Section 2 relates only to "the loading, handling, stowage, carriage, custody, care and discharge" of cargo has been a matter of debate. In the *Adamastos* case, Devlin, J., took the view that the words "loss or damage" in Section 4(1) and (2) of the Act, while not restricted to physical loss of or damage to the goods, were restricted to loss or damage "in relation to" or "in connection with" the operations listed in Section 2 as set out above. In the House of Lords, the majority agreed with Devlin, J., that "loss or damage" was not restricted to physical loss or damage and so could embrace the claim in that case, namely one for the loss of voyages under a consecutive voyage charter (whether or not, as Lord Somervell considered, that claim did arise in relation to the loading and carriage of goods). However, the Court of Appeal in *The Satya Kailash* [1984] 1 Lloyd's Rep. 588, at page 595, said that what had been decided by the House of Lords on this point in *Adamastos* was no more than that "where the subject matter of the contract is not merely the carriage of goods by sea but is voyages, the immunities in s.4 are, despite the express words of s.2, to be read as relating to the contractual voyages".

34.23 The Court of Appeal in *The Satya Kailash* went on to lay down the wider principle that, where the Hague Rules are incorporated, they give the owners protection not only against loss or damage in relation to the matters referred to in Section 2, but also in relation to other contractual activities performed by the owners under the charter. Robert Goff, L.J., said, at page 596: "Section 2 of the United States Act specifies the activities in relation to which the carrier, under any contract of carriage of goods by sea, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in the Act. This range of activities is very comprehensive, and comprehends the full range of activities under the ordinary bill of lading contract to which the Act applies; so that, under any such contract, the carrier will be able, in respect of any such activities, to invoke the immunities in s.4. However, under a charter-party (whether a time or a voyage

charter-party) the owner is required to perform a wider range of activities than those specified in s.2; for example, under a time charter there will be ballast voyages to be performed, and under a voyage charter the vessel will be required to proceed to a loading port as specified in the charter-party or as ordered by the charterers. The question arises: if the United States Act is incorporated into a charter-party, is the owner entitled to invoke the immunities in s.4 in respect of this wider range of activities? The answer given to that question by the majority of their Lordships in the *Adamastos* case is, in our judgment, in the affirmative. . . ."

34.24 Consequently, it was held in *The Satya Kailash* that, as the loading of grain from a mother ship was a contractual activity to be performed under the charter, the owners of the lightening ship were entitled to the immunities in Section 4 of the Act in respect of damage caused by the lightening ship to the mother ship (which was owned by the charterers), even though that damage did not fall within any of the range of activities specified in Section 2 of the Act: see paragraph 34.10, above. See also *The Aliakmon Progress*, above, *Australian Oil Refining* v. *Miller* [1968] 1 Lloyd's Rep. 448, and the comments upon the latter case in *The Satya Kailash*. For comments on the effects of Section 4(2)(a) on the obligation to prosecute voyages with the utmost despatch, see paragraphs 18.7 and 18.10, above, dealing with *The Hill Harmony* [2001] 1 Lloyd's Rep. 147 (H.L.).

34.25 The immunities given by Section 3 of the Harter Act are not expressed as being subject to the same restriction as that imposed by Section 2 of U.S.COGSA, described in the previous paragraphs. This may be thought to give Clause 24 of the New York Produce form a wider application than would be the case if reference were made only to the 1936 Act. But this must be doubtful in view of the fact that the words in Lines 151 to 153 which incorporate the Harter Act expressly do so "in respect of all cargo" shipped to or from United States ports, which may suggest a similar restriction.

Section 3(6) of U.S. COGSA

34.26 The incorporation of U.S. COGSA will give the owners the benefit of the one-year time limit provision in Section 3(6) in respect of claims in relation to goods loaded or to be loaded under the charter: see *The Agios Lazaros* [1976] 2 Lloyd's Rep. 47. The result is that "the carrier and the ship" will be "discharged from all liability in respect of loss or damage" unless "suit is brought" within one year after delivery of the goods or the date when the goods should have been delivered. This clearly covers proceedings by the charterers against the owners. It does not, however, cover proceedings by the owners against the charterers; this is so even where the charterers are the carrier under the relevant bill(s) of lading, because although Section 1(a) of U.S. COGSA defines "carrier" as including "the charterer who enters into a contract of carriage with a shipper", in the context of a time charter the word "carrier" must refer to the owners and not to the charterers: see *The Khian Zephyr* [1982] 1 Lloyd's Rep. 73.

34.27 The words "loss or damage" in Section 3(6) are not restricted to physical loss of or damage to goods, but extend to loss or damage related to goods: see *The Ot Sonja* [1993] 2 Lloyd's Rep. 435 (C.A.). In *The Ot Sonja* claims for financial loss due to delay in loading the cargo and expenses for extra tank cleaning and pumping of the cargo incurred by the voyage charterers as a result of breaches of charter by the owners were held to be loss or damage related to goods and therefore time barred under an Asbantakvoy charter which incorporated Section 3(6) of U.S. COGSA. (See also *The Stolt Sydness* [1997] 1 Lloyd's Rep. 273 – where a claim for financial loss arising from the necessity to buy in substitute cargo due to delays in delivery of the cargo was held to be related to goods.) But in *The Standard Ardour* [1988] 2 Lloyd's Rep. 159, Saville, J., held that a claim by time charterers arising out of delay in the issue of bills of lading was not a claim

which related to goods loaded or to be loaded, and was therefore not caught by the one-year time limit provision of Section 3(6).

34.28 The question whether there is a sufficiently close relationship between loss or damage claimed and the goods in question to enable the owners to invoke the time limit, is one of fact in each case: see *Linea Naviera Paramaconi* v. *Abnormal Load (The Sophie J.)* [2001] 1 Lloyd's Rep. 763. In that case two specialised cranes were shipped on the owners' barge under a contract of affreightment. Prior to shipment, loading was delayed by the necessity to carry out repairs to the barge and this was attributed to a breach of the owners' obligations under the Hague Rules, to which the contract of affreightment was subject. The party claiming incurred expense in keeping on standby lifting equipment and personnel who were specifically required for the loading of the specialised cranes on board the barge. It was held that there was a sufficiently close relationship between this expense and the goods in question to enable the owners to rely upon the Hague Rules time bar. For the time bar to apply, the claim must relate to goods either shipped pursuant to the charter or intended to be so shipped; and in the case of goods intended to be shipped, it is necessary for a particular voyage or voyages to have been in the contemplation of both parties at the time when the breach that prevented the shipment on that voyage occurred. Otherwise, there would be no certainty about the commencement of the one-year period: see *The Marinor*, below.

A time charter of the *Marinor* was entered into for a period of 10 years. In the course of the charter the ship carried a series of sulphuric acid cargoes to United States East Coast ports, which out-turned contaminated, for reasons which were not fully ascertained. The charterers shipped their next sulphuric acid cargo to Savannah on another ship. They also arranged as a test that a further acid cargo should be carried by the *Marinor* to Tampa where the acid could be used in the fertiliser industry, even if it was contaminated, which in the event it was. Subsequent sulphuric acid cargoes were shipped on substitute tonnage. The question arose whether the charterers' claims were time barred under the Hague-Visby Rules, to which the charter was subject by virtue of a Canadian Clause Paramount that was expressed "to form part of this Charter Party".

It was held by Colman, J., that claims for financial losses in respect of the Tampa cargo, comprising loss on sale at less than market value and extra voyage and discharging expenses, were time barred since they were sufficiently related to cargo carried on a particular voyage to constitute a liability "in respect of the goods" within the meaning of Article III, rule 6, whereas claims for the cost of the subsequent substitute tonnage were not sufficiently related to goods carried or intended to be carried by the *Marinor*: they were in effect claims for loss of use of the ship.

The Marinor [1996] 1 Lloyd's Rep. 301.

34.29 In the course of his judgment in the above case, Colman, J., drew a distinction between clauses in a time charter which incorporate the Hague or Hague-Visby Rules into the charter by general words and those which give the Rules, and in particular Article III, rule 6, a more restricted application. In the case of *The Marinor*, in which the Hague-Visby Rules were incorporated by general words, the breaches on which the charterers relied in support of their claims were not breaches of Hague Rules obligations, but breaches of other specific terms of the charter. It was held nevertheless that the one-year time limit applied to the Tampa voyage claims. Colman, J., said at pages 310 and 311 of the report that: ". . . where there is incorporation by general words into a time charter of legislation enacting the Hague Rules or Hague-Visby Rules, the shipowners will be entitled to rely on the protection of the time bar against claims for breach of any of the terms of the charter, even if not co-extensive with obligations under the rules, provided that (i) those claims assert (*a*) a liability involving physical loss of or damage to goods or (*b*) a liability for financial loss sustained in relation to goods and (ii) the goods in question were either shipped or were intended to be shipped pursuant to the charter. In order to operate the time bar provision in the case of goods intended to be shipped it is clearly necessary for a particular voyage or voyages to have been in the contemplation of both parties at the time when the breach preventing shipment

on that voyage occurred. In the absence of such a qualification there would be great uncertainty in the commencement of the one year time period."

34.30 Colman, J., referred, at page 308 of his judgment, to *The Stena Pacifica* [1990] 2 Lloyd's Rep. 234 and concluded that: "This decision expressly contemplates that where the rules are incorporated into a time charter the time bar will apply only where. . . the claim is based on a factual foundation which involves non-compliance with the owners' obligations under the rules albeit the claim was expressly founded on breach of the charter terms. . . ." He therefore appeared to treat *The Stena Pacifica* as a case in which the Hague-Visby Rules were incorporated by general words. On this basis it would be a decision which ran counter to his own view of the effect of such incorporation, although he did not in terms disagree with it.

The *Stena Pacifica* was chartered on the Shelltime 4 form. Discharge of a cargo in Nigeria was considerably delayed and the time charterers alleged that this was due to defective pumps. Voyage sub-charterers claimed damages against the time charterers for the loss in market value of the cargo caused by the delay. Over a year after completion of discharge, the time charterers commenced arbitration against the owners, claiming damages in respect of the delayed discharge from the owners in the same amount as was claimed against them by the sub-charterers. The owners contended that the claim was time-barred by virtue of Clause 27(c)(ii) of Shelltime 4, which applied the Hague-Visby Rules to any claim 'arising out of any loss of or damage to or in connection with cargo'.

Evans, J., had no doubt, following *Goulandris* v. *Goldman* [1957] 2 Lloyd's Rep. 207, at page 222 *per* Pearson, J., and *Renton* v. *Palmyra* [1956] 2 Lloyd's Rep. 379, that even though there was no physical loss or damage to cargo, a claim for financial loss in relation to cargo came within the definition of "loss of or damage to or in connection with cargo". But that in itself was not sufficient to make the claim "subject to" the Rules under Clause 27(c)(ii). It had to be shown further that the alleged breach on which the claim was based arose under or was co-extensive with the owners' obligations under the Rules. So under Clause 27(c)(ii), Article III, rule 6 of the Hague Rules does not apply to a claim based upon an alleged breach of a term of the charter which is independent of the Rules.

The Stena Pacifica [1990] 2 Lloyd's Rep. 234.

34.31 It is submitted, however, that the Hague-Visby Rules were not incorporated by general words in *The Stena Pacifica* but in the specific terms set out in Clause 27(c)(ii) of the Shelltime 4 form. Contrary to the above-quoted passage from Colman, J.'s judgment in *The Marinor*, it does not appear that Evans, J., in *The Stena Pacifica* sought to lay down any general principle, but construed Clause 27(c)(ii) in the context of Clause 27 and the charter as a whole. He said, at page 237 of the report: "The apparent intention is that the shipowner's liability for what I will call generally 'cargo claims' shall be governed by the rules. They are to be 'subject to' the rules. This means, in my judgment, claims which the goods' owner may bring under the rules and which are of the kind referred to in 27(c)(ii). So, in so far as the owner is alleged to have been in breach of his obligations under the rules, in my judgment the charterer's claim is made subject to the rules. But the position is different where the charterer alleges not a breach of the rules, but of some other term of the charter-party itself." Cresswell, J., quoted and approved the first two sentences of this paragraph in *The Casco* [2005] 1 Lloyd's Rep. 565, at page 571, adding "I do not consider that Mr Justice Colman in *The Marinor* intended to cast doubt on the construction of cl.27(c)(ii) in *The Stena Pacifica*." Since, therefore, Clause 27(c)(ii) was "concerned with what would be regarded in the marine market as 'cargo claims'", it did not apply Article III, rule 6 to a claim by the charterers for damages for loss of use of a ship due to the unsatisfactory state of her cargo tanks.

34.32 Accordingly, it seems that if the Hague or Hague-Visby Rules are not incorporated by general words, the scope to be given to the Article III, rule 6, time bar will depend upon the construction of the particular incorporating clause.

34.33 Claims in respect of property belonging to the charterers, which is on board the ship during the currency of the charter and is lost or damaged as a result of the owners' breach of

charter, may be caught by the one-year time limit provision if it can properly be regarded as "goods" to be "delivered" by, or at the latest by, a specific date.

The *Seki Rolette* was chartered on an amended New York Produce form charter. Clause 24 was replaced by an additional clause which provided: "The following Paramount Clause to apply and to be inserted in all Bills of Lading issued under the charter party. . .". Various property of the charterers consisting of bunkers, trucks, lashing equipment and a car deck were lost in a collision. Mance, J., expressed the view that the Paramount Clause meant that the Hague Rules were "to apply" to the charterparty as well as to be inserted in bills of lading and that all the claims were subject to the time limit in Article III, rule 6, except the claim for loss of bunkers. The trucks, lashings and decking were to be delivered up at latest on the termination of the time charter, but the bunkers were never to be delivered up; they were to be consumed.

The Seki Rolette [1998] 2 Lloyd's Rep. 638.

34.34 Under English law, Article III, rule 6 of the Hague or Hague-Visby Rules applies to arbitration proceedings as well as to court proceedings: see *The Merak* [1964] 2 Lloyd's Rep. 527. In *The Stolt Sydness* [1997] 1 Lloyd's Rep. 273, where U.S. COGSA was incorporated into a voyage charter which expressly provided for London arbitration and English law, it was held that Section 3(6) of the Act was also to be construed as applying to arbitration proceedings, even though under U.S. law the reference to bringing "suit" was not apt to refer to arbitration (although as to that see paragraph 34A.15, below). The same reasoning would, it is suggested, apply in the case of an unamended New York Produce form charter and *a fortiori* in the case of an NYPE 1993 charter. In an arbitration case, "suit is brought" within Section 3(6) when arbitration proceedings are commenced. Under English law, unless there is provision in the contract to the contrary, that occurs when one party serves an appropriate notice in writing satisfying Section 14 of the Arbitration Act 1996.

34.35 Where the charter applies the Hague-Visby Rules or legislation giving effect to them, rather than the Hague Rules or legislation giving effect to them, to claims brought under the charter, as can occur, for example, under Clause 27(c)(ii) of the Shelltime 4 form, and the claim is by the charterers for indemnity in respect of a cargo liability incurred by them, the time limit for the claim, it is suggested, will be that provided for by Article III, rule 6 *bis* of the Hague-Visby Rules. Rule 6 *bis* states: "An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

34.36 This rule was considered by the Privy Council in *The Xingcheng* [1987] 2 Lloyd's Rep. 210, a case in which a first carrier under a through bill of lading, which was not subject to the Hague-Visby Rules, incurred a liability to cargo for damage which was caused while the cargo was in the care of the on-carrier. The first carrier sued the on-carrier under the on-carriage bill of lading, which was subject to the Hague-Visby Rules, for an indemnity. The on-carrier relied on the one-year time limit in Article III, rule 6 of the Hague-Visby Rules. The first carrier relied on Article III, rule 6 *bis*. In upholding the application of the latter rule, Lord Brandon said, at page 213, that Article III, rule 6 *bis*: ". . . creates a special exception to the generality of r. 6. Rule 6 *bis* must, therefore, in a case to which it applies, have a separate effect of its own independently of r. 6. The case to which r. 6 *bis* applies is a case where shipowner A, being under actual or potential liability to cargo-owner B, claims an indemnity by way of damages against ship or shipowner C. If that claim by shipowner A against ship or shipowner C is made under a contract of carriage to which the Hague-Visby Rules apply, then the time allowed for bringing it is that prescribed by r. 6 *bis* and not that prescribed by r. 6. There is no express requirement in r. 6 *bis* that the liability to cargo-owner B in respect of which shipowner A claims an indemnity against ship or shipowner C must also arise under a contract of carriage to which the Hague-Visby Rules apply."

34.37 Under English law the applicable time limit under rule 6 *bis*, in such a case, would be six years by virtue of the Limitation Act 1980.

34.38 For the effect on the time limit of the incorporation of the Inter-Club Agreement into a New York Produce form charter, see paragraph 20.50, above.

Sections 4(4) and 4(6) of U.S. COGSA

34.39 The owners will also obtain the benefit of the limited right to deviate under Section 4(4) and of the rights in respect of dangerous goods given by Section 4(6): see paragraphs 28.2 and 9.17 *et seq.*, above.

Section 4(3) of U.S. COGSA

34.40 The wording of this section appears at paragraph 9.25, above. It was held by Mustill, J., in *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277 (see paragraph 19.30, above), that charterers could not use this provision as a defence to a claim by owners for an indemnity against the consequences of complying with the charterers' orders (on which, generally, see paragraphs 19.15 *et seq.*, above). Indeed, the judge doubted whether it had any meaning at all in a time charter. He said, at page 296: "This is not the place for a full discussion of the difficult problems raised by the incorporation of the Hague Rules into the inapposite context of a time charter. I will merely say that whatever result the parties may have intended to achieve when including the rules, and even if 'shipper' can be read as meaning 'charterer', they would need to use much clearer language than this to introduce the idea of fault into the shipowner's implied indemnity, where it has never been before. It may be that art. IV, r. 3 [the equivalent provision in the Hague Rules to Section 4(3) of the Act] means nothing at all in the context of a time charter." In any event, Section 4(3) does not reduce the shipper's obligation in relation to dangerous goods under the second part of Section 4(6) (see paragraph 9.18, above) from an 'absolute' obligation to one of due diligence; see *The Giannis NK* [1998] 1 Lloyd's Rep. 337 (H.L.) and paragraph 9.25, above.

Section 4(5) of U.S. COGSA

34.41 The owners will obtain the benefit of this limitation of their liability in respect of loss of or damage to goods carried under the charter, or in connection with the carriage of goods under the charter. The limitation of liability applies "in any event", meaning simply in every case, whatever the gravity or nature of the breach of obligation by the owners. So, for example, it applies even where the breach is of the owners' obligations as to the seaworthiness of the ship (*The Happy Ranger* [2002] 2 Lloyd's Rep 357 (C.A.)) or if the owners are in breach in carrying cargo on deck (*The Kapitan Petko Voivoda* [2003] 2 Lloyd's Rep 1 (C.A.)).

Deck cargo

34.42 The Hague Rules do not apply to cargo that "by the contract of carriage is stated as being carried on deck and is so carried": see Article 1(c) of the Rules. Even where the Rules have been incorporated into a time charter, the relevant "contract of carriage", for the purposes of Article 1(c), is not the charter, but the bill of lading. Consequently the Rules do not govern the carriage of deck cargo, as between the parties to the time charter, so long as a bill of lading is issued in respect of the cargo stating that it is carried on deck: see *The Socol 3* [2010] 2 Lloyd's Rep. 221.

Division of operations between owners and charterers

34.43 The incorporation of U.S. COGSA does not transfer from the charterers to the owners the responsibility for those operations which have been allocated to the charterers by the express provisions of the charter. For example, the charterers remain responsible for loading and stowing the cargo, as agreed in Line 78. What the Act does is to establish the standard to be applied to those operations which remain with the owners in accordance with the allocation in the charter. Devlin, J., said of the Hague Rules, albeit in a different context, in *Pyrene* v. *Scindia* [1954] 1 Lloyd's Rep. 321, at pages 328 and 329: "Their object. . . is to define not the scope of the contract service but the terms on which that service is to be performed. . . I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play." Devlin, J.'s analysis was approved by the House of Lords in *Renton* v. *Palmyra* [1956] 2 Lloyd's Rep. 379, which the House of Lords declined to reverse in *The Jordan II* [2005] 1 Lloyd's Rep. 57. As to whether that analysis applies equally in relation to the owners' seaworthiness obligations, see paragraph 20.10, above.

Both-to-blame collision clause

34.44 This clause has been inserted into bills of lading to deal with a particular situation under U.S. law whereby the carrier, although protected by the Hague Rules against direct suit by cargo on the carrying ship, may become liable to that cargo indirectly. This arises from U.S. law allowing cargo lost or damaged in collision to recover in full from the non-carrying ship and for that ship to recover an indemnity from the carrying ship in accordance with its proportion of blame for the collision. Where both ships are to blame the carrier ends up with an indirect liability to his own cargo. The both-to-blame collision clause gives the carrier a contractual right to recover over against cargo and thus effectively restores the Hague Rules position. This is explained more fully in the U.S. law section at paragraphs 34A.22 *et seq*., below, where the validity of the clause is also considered.

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34.45 Clause 31 of the 1993 revision of the New York Produce form incorporates into the charter and requires to be included in all bills of lading or waybills issued thereunder (*a*) a clause paramount, (*b*) the both-to-blame collision clause, (*c*) the New Jason clause, (*d*) a U.S. trade-drug clause and (*e*) war clauses; Clause 32 is a special war cancellation clause, applicable to the charter alone: see Lines 318 to 402. There is no reference to the Harter Act and the clause paramount reads as follows:

> This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation as may mandatorily apply by virtue of origin or destination of the bills of lading, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said applicable Act. If any term of this bill of lading be repugnant to said applicable Act to any extent, such term shall be void to that extent, but no further.

U.S. Law

Harter Act and the United States Carriage of Goods by Sea Act

34A.1 Although the Harter Act and the Carriage of Goods by Sea Act (COGSA) do not by their own terms apply to charters, they may effectively be incorporated in whole or in part in the charter. See, e.g., *United States* v. *The Marilena P*, 433 F.2d 164, 1969 AMC 1155 (4th Cir. 1969); *The Marine Sulphur Queen*, 460 F.2d 89, 1972 AMC 1122 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972). If the charterparty does not incorporate COGSA, then COGSA will not apply, even between sub-charterers and owners who are not party to the same charters. See *Great Am. Ins. Co.* v. *M/V Handy Laker*, 2003 AMC 116, 137–138 (S.D.N.Y. 2002) (voyage sub-charter precluded application of COGSA to sub-charterer's claim against owner).

34A.2 Clause 24 of the New York Produce form expressly incorporates the Harter Act, at least for cargo shipped under the charter to and from the United States. It is not yet settled whether the mere reference to "U.S.A. Clause Paramount," without more, effectively incorporates COGSA into the charter. The issue was raised but not decided in *Nissho-Iwai Co. Ltd.* v. *The Stolt Lion*, 617 F.2d 907, 913, 1980 AMC 867, 875 (2d Cir. 1980). COGSA can be incorporated by reference in the charter, however, either expressly or by a Clause Paramount which explicitly provides for incorporation or which otherwise indicates the intent of the parties that COGSA is to govern. Compare *Shell Oil Co.* v. *The Gilda*, 790 F.2d 1209 (5th Cir. 1986) (clause paramount incorporated COGSA in its entirety) with *Associated Metals & Minerals Corp.* v. *The Jasmine*, 983 F.2d 410, 1993 AMC 957 (2d Cir. 1993) (language of charterparty held insufficient to expressly incorporate COGSA into charter). The statement in Clause 24 of the New York Produce form that the charter "is subject to the following clauses. . . " and the reference to the U.S.A. Clause Paramount does effectively incorporate COGSA. *Hartford Fire Insurance Co.* v. *Calmar S.S. Corp.*, 404 F. Supp. 442, 1976 AMC 2636 (W.D. Wash. 1975), *aff'd*, 554 F.2d 1068 (9th Cir. 1977). Other cases holding that COGSA was incorporated by reference in the charter include *Sun Company Inc. and Sun Oil Trading Co.* v. *S.S. Overseas Arctic*, 27 F.3d 1104, 1995 AMC 57 (5th Cir. 1994); *Eurosteel Corp.* v. *M/V Apollogracht*, 2002 U.S. Dist. LEXIS 18345 (S.D.N.Y. 2002); and *Narcissus Sh. Corp.* v. *Armada Reefers, Ltd.*, 950 F. Supp. 1129, 1997 AMC 2499 (M.D. Fl. 1997). COGSA was held not to be effectively incorporated in the charter in *Francexpa Miltrade International, S.A.* v. *M/V Kielgracht*, 1997 AMC 2773, 2782 (S.D. Tx. 1996). The most important effect of the incorporation of the Harter Act and COGSA in a charter is that the absolute warranty of seaworthiness is reduced to a duty to use due diligence to make the ship seaworthy. See discussion at paragraphs 11A.1 to 11A.6.

34A.3 There are some significant differences between the Harter Act and COGSA. The most important one is that whereas both Acts apply to the time when the cargo is loaded on board the ship until it is discharged, the Harter Act also applies to damage occurring between the time the cargo is discharged until proper delivery is made. *Caterpillar Overseas S.A.* v. *The Expeditor*, 318 F.2d 720, 1963 AMC 1662 (2d Cir.), *cert. denied*, 375 U.S. 942 (1963); *Procter and Gamble Ltd.* v. *The Stolt Llandaff*, 1981 AMC 1880, 1885 (E.D.La. 1981), *aff'd*, 664 F.2d 1285, 1982 AMC 2517 (5th Cir. 1982).

Hague-Visby Rules

34A.4 Charterparties may incorporate by reference the Hague-Visby Rules. See, e.g., *Mobil Shipping and Transportation Co.* v. *Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 1999 AMC 2705, 2712 (2d Cir. 1999). The "clause paramount" in the charter provided that it was subject to COGSA,

unless the bill of lading for the cargo was issued in a country that recognized the Hague-Visby Rules, in which case those rules would trump COGSA. Because the bill of lading was issued in England, a country that has adopted the Hague-Visby Rules, those rules applied.

34A.5 See also *Itel Container Corp.* v. *M/V Titan Scan*, 139 F.3d 1450, 1998 AMC 1965 (11th Cir. 1998) (upholding application of Hague-Visby Rules).

Owner and charterer as carrier

34A.6 Under COGSA, it frequently happens that both the owner and the charterer will be a carrier in so far as cargo is concerned. This will occur, for example, where a bill of lading is issued by the charterer on its own form and signed by the master. See generally *Mente & Co*. v. *Isthmian S.S. Co. (The Quarrington Court)*, 36 F. Supp. 278, 1940 AMC 1546 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266, 1941 AMC 1234 (2d Cir. 1941), *Trade Arbed Inc*. v. *The Ellispontos*, 482 F. Supp. 991, 994 (S.D. Tex. 1980), *Granite State Ins. Co.* v. *The Caraibe*, 825 F. Supp. 1113, 1994 AMC 680 (D.P.R. 1993); *Hyundai Corp. U.S.A.* v. *Hull Ins. Proceeds of The Vulca*, 800 F. Supp. 124, 1993 AMC 434 (D.N.J. 1992), *aff'd*, 54 F.3d 768, 1995 U.S. App. LEXIS 11714 (3d Cir., 11 April 1995).

34A.7 There is a split of authority on whether actual privity of contract is required in order to deem a party a "carrier" under COGSA. The court held in *Hyundai Corp. U.S.A.* v. *Hull Ins. Proceeds of the Vulca*, above, that it is not necessary that the charterer or owner actually issue the bill of lading to be deemed a "carrier" under COGSA. See also *Duferco Steel Inc.* v. *M/V Festivity*, 1999 AMC 1186, 1187 (S.D.N.Y. 1998) and *Pacific Employers Insurance Co.* v. *M/T Iver Champion*, 1996 AMC 2535, 2554 (E.D.La. 1996). In the Fifth Circuit, however, privity of contract is required in order to be deemed a COGSA carrier. *Thyssen Steel Co.* v. *M/V Kavo Yerakas*, 1995 AMC 2317, 2321, 50 F.3d 1349, 1353 (5th Cir. 1995), *reh'g denied* 1995 U.S. App. LEXIS 13563 (5th Cir. 1995); and *Francexpa Miltrade International, S.A.* v. *M/V Kielgracht*, 1997 AMC 2773, 2783 (S.D.Tx 1996). *See also QT Trading, L.P.* v. *SAGA MORUS, et al*., 641 F. 3d 105 (5th Cir. 2011) (in order to establish a direct claim against defendants, cargo owner would have to establish privity of contract, something it does not attempt and cannot establish).

34A.8 We have discussed above the question of the rights and liabilities as between the owner and charterer where both are held liable for cargo damage. Even though the owner and charterer both may be carriers, it does not automatically follow from this that their rights and duties with respect to the cargo owner will be the same.

34A.9 In *Hasbro Industries Inc.* v. *The St. Constantine*, 1980 AMC 1425 (D.Haw. 1980), there was major cargo damage when a fire broke out in the ship's engine room. Bills of lading had been issued by a sub-charterer and the cargo owner brought an action against both the owner and the sub-charterer. After a trial, the court found that the fire was caused by an unseaworthy condition of the ship which was within the owner's actual privity and knowledge and for which the owner was held liable to cargo under Section 4(2)(b) of COGSA. The charterer and sub-charterer, however, were exonerated from liability even though their duties to cargo were also governed by COGSA. The court noted that the charterer had no direct control over the operation or maintenance of the ship or the training of the crew. Thus, the charterer did not have "actual privity and knowledge" of the causes of the fire as required to establish the carrier's liability under Section 4(2)(b) of COGSA.

34A.10 According to the court, the charterer's obligation was to ensure that the owner carried out his duty to keep the ship "in a thoroughly efficient state and classified in the highest class Norwegian Veritas." This obligation the charterer fulfilled by "requiring that the ship be maintained to the classification standards and by monitoring the ship's inspection to insure that the standards were being maintained."

34A.11 *The St. Constantine* involved a claim under the fire exception of COGSA which, as the discussion above indicates, imposes a burden on the cargo owner to prove that the cause of the fire was within the *actual* privity and knowledge of the carrier. The burden of proof under other sections of COGSA is not so great, however, and in the usual case where the owner is held liable because of cargo damage or loss caused by the failure to exercise due diligence to correct an unseaworthy condition, the charterer's direct liability to cargo is likely to be co-extensive with that of the owner.

Time to commence proceedings

34A.12 In *Son Shipping Co*. v. *DeFosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952), the court held that the incorporation of COGSA in the charter did not also result in the application of COGSA's one-year time for suit provision to the commencement of arbitration proceedings. There, the charterer demanded arbitration in connection with a claim for loss of cargo after the one-year limitation period had run. The shipowner contended that the demand for arbitration was untimely, but the court rejected the defense, saying:

> Nor does the reservation to the carrier in the charter party of all rights it would have under [COGSA] make the demand for arbitration untimely. It is true that the demand was not made within the one year limitation upon suits, contained in § 1303(6) of the above Act, but there is, nevertheless, no time bar because arbitration is not within the term "suit" as used in that statute. Instead, it is the performance of a contract providing for the resolution of controversy without suit. . . We are aware that the time within which arbitration may be demanded may be of great importance to the parties who have by contract agreed to have their differences so determined, especially to a shipowner. But unless they see fit to condition their agreement by an express time limitation, a demand within a reasonable time, as here, is not barred. [199 F.2d at 689.]

34A.13 Where the charter contains an arbitration clause the question of whether a claim is time barred is one for decision by the arbitrators. *Conticommodity Services Inc.* v. *Philipp & Lion*, 613 F.2d 1222 (2d Cir. 1980); *Office of Supply*, *Government of the Republic of Korea* v. *N.Y. Navigation Co. Inc.*, 469 F.2d 377, 1973 AMC 1238 (2d Cir. 1972).

34A.14 In *National Iranian Oil Co.* v. *Mapco International Inc.*, 983 F.2d 485, 491 (3d Cir. 1992), the court held that the district court determines the timeliness of the petition to compel arbitration, while the arbitrator determines the timeliness of the demand for arbitration and of the underlying claims. In very limited situations, however, the court will determine whether a demand for arbitration should be denied on grounds of laches. In *Conticommodity Services Inc.*, above, the court interpreted its previous ruling in *Reconstruction Finance Corp.* v. *Harrisons & Crosfield*, 204 F.2d 366 (2d Cir.), *cert. denied*, 346 U.S. 854 (1953), very narrowly, and held that the "court could determine only those questions of delay that relate to the two issues it is required to decide under Section 4 of the [Arbitration] Act—the making of an arbitration agreement and the failure, refusal, or neglect to arbitrate." (613 F.2d at 1226.) For example, if a party shows that its ability to present proof in relation to the demand for arbitration has been prejudiced by the delay of the other in making the demand, it would be within the court's power to determine whether the dilatory party should be permitted to use the Arbitration Act to compel an arbitration.

34A.15 Despite the language of *Son Shipping* to the effect that an "arbitration" is not a "suit" as that word is used in COGSA, New York arbitration panels have generally followed the English rule and required strict adherence to the COGSA one-year statute of limitations with respect to the commencement of arbitration proceedings on claims for cargo damage arising under charters incorporating that Act. See *The Osrok*, SMA 654 (Arb. at N.Y. 1971), which was affirmed at 469 F.2d 377 (2d Cir. 1972). In *The Uranus*, 1977 AMC 586, 590–591 (Arb. at N.Y. 1977), the panel concluded that by including the "General Clause Paramount," the parties intended that the one-year

time bar be a part of the charter, at least as to cargo claims. A similar result was reached in *The Silverhawk*, SMA 1041 (Arb. at N.Y. 1976) and *The Prairie Grove*, 1976 AMC 2589 (Arb. at N.Y. 1976). In the latter case, the panel's strict application of the one-year time bar was approved by the district court, which stated:

> The parties by contract agreed that the liability of the carrier and the ship for loss or damage should be discharged unless suit were brought within one year after delivery of the goods. No suit was so brought nor was a demand for arbitration made within one year. Arbitrators have ruled that the claim is time-barred and they could have (indeed should) rationally so decide. [1976 AMC at 2594.]

34A.16 The incorporation of COGSA in the charter may also result in the application of the one-year time bar to cargo damage actions against stevedores. *United States* v. *The South Star*, 210 F.2d 44 (2d Cir. 1954), was a suit by the Government against the shipowner for cargo damage. The charter incorporated the COGSA one-year limitation provision as to suits for the loss of or damage to cargo. The suit was filed more than one year after the cargo was delivered, and as to the shipowner, the suit was dismissed. The shipowner had impleaded the ship's agent and stevedores, however, and the Government contended the one-year limitation period did not apply to them. The court rejected this view, stating:

> As the vessel and the owner were under the duty of stowage in a proper manner, Judge Leibell held that the limitation provisions of the charter enured also to the benefit of the ship's agent and the stevedore, to whom the performance of such duty had been delegated. We agree with this view. . . . [210 F.2d at 45]

34A.17 In cases where the owner or charterer is sued by a third party cargo owner for the loss of or damage to cargo, it will often in turn seek indemnity from the other for amounts he may have to pay the cargo owner. In this situation, the owner's or charterer's claim for indemnity is not governed by the one-year limitation provision contained in COGSA, even if the underlying cargo claim is governed by COGSA. *Lyons-Magnus Inc.* v. *American Hawaiian S.S. Co.*, 41 F. Supp. 575, 1941 AMC 1550 (S.D.N.Y. 1941); *Spanish Amer. Skin Co.* v. *Buanno Transp. Co.*, 1975 AMC 910 (N.Y.Civ. 1975); and *Francosteel Corp.* v. *The Tien Cheung*, 375 F. Supp. 794, 1973 AMC 2370 (S.D.N.Y. 1973). Instead, it is governed by the doctrine of laches, and the court or the arbitrators should look to the analogous state law governing indemnity claims to determine whether the action is timely. In New York, the analogous statute of limitations allows indemnity claims to be commenced within six years after payment has been made on the underlying cargo claim. See C.P.L.R. § 213; *St. Paul Fire and Marine Ins. Co.* v. *United States Lines*, 258 F.2d 374, 1958 AMC 2385 (2d Cir. 1958), *cert. denied*, 359 U.S. 910 (1959).

34A.18 This rule should apply even if the charter incorporates COGSA. As the court stated in *Francosteel Corp*., above:

> In any event, the court finds the COGSA period of limitations inapplicable to suits for indemnity. The application of this statute to an indemnification claim would thwart the purpose of Rule 14 of the Federal Rules of Civil Procedure as well as the modern trend of authority. Any other conclusion would sanction a plaintiff to selectively sue an isolated defendant, and, by skillful manipulation of the limitations period, allow him to deny that defendant any claim for indemnity against a third-party defendant who may be subject to liability over. (For example, plaintiff brings suit one day before it is time-barred.) [1973 AMC at 2372.]

34A.19 Similarly, in *Marubeni-Iida (A) Inc.* v. *Toko Kaiun Kabushiki Kaisha*, 327 F.Supp. 519 (S.D.Tex. 1971), the cargo owner brought an action against the charterer and shipowner for cargo damage. The charterer then commenced an action for indemnity against the stevedore. The stevedore contended that the indemnity action was time barred under the one-year time for suit provision of COGSA, on the theory that it was a third party beneficiary of the bill of lading. The court noted that a stevedore could possibly be considered a third party beneficiary of a bill of lading

if the intent was expressly recited in the bill. The court held, however, that such a provision would only protect the stevedore in an action brought directly against it by the cargo owner, and not in an indemnity action by the charterer.

34A.20 In earlier editions of this book, we made reference to an anomalous decision of the Fifth Circuit which held that the right of indemnity was governed by COGSA's one-year limitation period. *Grace Lines Inc.* v. *Central Gulf S.S. Corp.*, 416 F.2d 977 (5th Cir. 1969), *cert. denied*, 398 U.S. 939 (1970). That decision was consigned "to the briney deep" by the Fifth Circuit in *Hercules Inc.* v. *Stevens Shipping Co. Inc.*, 698 F.2d 726, 755, 1983 AMC 1786 (5th Cir. 1983) (*en banc*), wherein the court adopted the majority rule that a cause of action for indemnity "arises separately from and after liability has been established" (698 F.2d at 735) and is governed by the doctrine of laches.

34A.21 The difficulties which nonetheless may arise with respect to indemnity claims are illustrated by the decision of the arbitrators in *The Ruth*, SMA 2426 (Arb. at N.Y. 1987). In that case, an intermediate charterer was held liable in a London arbitration for a cargo contamination claim. The cargo claim was governed by COGSA and although it was, in fact, put into arbitration in London more than one year after delivery, the English High Court of Justice found that the claim was not time-barred and permitted it to proceed. Having been held liable in the London arbitration for the cargo contamination claim, the intermediate charterer sought indemnity from the owner in New York arbitration under the head charter. However, the New York panel ruled against the intermediate charterer. According to the panel, by agreeing to New York arbitration with owner and London arbitration with the sub-charterer, the intermediate charterer took the risk of a conflict of law between England and the United States. The New York panel was of the view that, had the contamination claim been asserted in New York, it would have been rejected because it was time-barred. The panel found that, notwithstanding the decision of the English court, had the claim been brought in New York, it would have been held time-barred. According to the panel, the risk of this conflict was to be borne by the intermediate charterer rather than owner.

Both-to-blame collision clause

34A.22 The "both-to-blame" clause becomes operable in the context of claims for cargo damage resulting from a mutual fault collision. If the collision is the result of negligent navigation, the cargo interests usually will be unable to obtain any recovery from the carrying ship because of the errors in navigation exception from liability contained in COGSA. The cargo interests, however, can obtain a full recovery from the non-carrying ship. *The Atlas*, 93 U.S. 302, 315 (1876). The non-carrying ship, in turn, will seek indemnity from the carrying ship for its proportional share of the liability to cargo. See *The Chattahoochee*, 173 U.S. 540 (1898). Under the both-to-blame clause, the carrying ship is entitled to reimbursement from cargo for any amount it is required to pay the non-carrying ship by way of indemnity for the cargo claim.

34A.23 Thus, in a collision between ship A and ship B in which both ships are at fault, cargo on A may recover its entire loss from B. Cargo's recovery against B becomes an element of B's damages, part of which is then recoverable from A in proportion to A's fault. The net result is that A will be indirectly liable for part of the cargo loss on A, even though A has no direct liability for this loss. It is the avoidance of this indirect liability which the both-to-blame clause is designed to achieve.

34A.24 The both-to-blame clause has long been held invalid when used by common carriers in contracts of affreightment governed by the Harter Act or COGSA. *United States* v. *Atlantic Mut. Ins. Co.*, 343 U.S. 236, 1952 AMC 659 (1952). In that case, the Supreme Court held that a shipowner engaged in the common carriage of goods may not, under the above Acts, exempt himself from liability for negligence for which he is responsible.

34A.25 The clause has been held valid, however, when used in a private contract of charter. *American Union Transport Inc.* v. *United States*, 1976 AMC 1480 (N.D. Cal. 1976). In that case, the court stated:

> . . . the parties to a private carriage contract enjoy freedom to adjust the risk of loss or damage in any way they choose and may avoid liability for any cause, including liability for negligence.
>
> We also have in mind that the both-to-blame clause, as here used in a private carriage contract, does not really "exculpate" the carrying ship from a cargo claim of navigational negligence since it is the policy of the admiralty law. . . to exempt the carrying ship from such a claim by cargo in any event; nor does the clause operate to exempt the other non-carrying ship from paying the penalty for its negligence. The carrying ship merely seeks in a private carriage contract to make its statutory exemption from navigational negligence to cargo meaningful by requiring cargo to indemnify it for that part of cargo damage by which it has been indirectly burdened—notwithstanding its exemption.
>
> Whatever may be the public policy consideration of a both-to-blame clause in bills of lading arising out of common carriage, such considerations are not sufficiently applicable in contracts of private carriage to justify the overturning of a long-established maritime rule recognizing the legality of such arrangements in private carriage contracts. [1976 AMC at 1483–1485]

34A.26 See also *Alamo Chemical Transportation Co.* v. *The Overseas Valdes*, 1979 AMC 2033, 469 F.Supp. 203 (E.D.La. 1979), holding that a both-to-blame clause is valid in a private contract.

34A.27 The question remains whether the both-to-blame clause would be valid even in a charter if it is used in conjunction with a Clause Paramount. (The charter in *American Union Transport Inc.* apparently did not incorporate COGSA by any reference.) Since the Clause Paramount by its own terms purports to render invalid any clause inconsistent with COGSA, which would include the both-to-blame clause, it is arguable that the Clause Paramount nullifies that clause. As the cases discussed above indicate, however, there are persuasive reasons for concluding that the both-to-blame clause is valid in a private contract, even if COGSA is incorporated therein.

34A.28 In the case of *Allseas Maritime* v. *The Mimosa*, 574 F. Supp. 844 (S.D.Tex. 1983), the court held that the both-to-blame clause in a private contract of affreightment which specifically incorporated COGSA was valid and effective.

Forum selection clauses

34A.29 Bills of lading often contain forum selection clauses. Exclusive forum selection clauses are considered to be presumptively valid by United States courts. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). In *Vimar Seguros y Reaseguros S.A.* v. *The Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995), the United States Supreme Court upheld a foreign arbitration clause in a bill of lading. A main argument raised in *The Sky Reefer* was that the Japanese arbitration clause at issue was in violation of Section 3(8) of COGSA because the Japanese version of the Hague Rules reduced the carrier's obligations to cargo below COGSA's requirements. The court rejected this argument as premature. In so doing, however, the court indicated that, if it were shown that enforcement of a forum selection or choice of law clause had the effect of reducing a carrier's obligations under COGSA, the clause would be invalid as against United States' public policy.

34A.30 *The Sky Reefer* has been followed in a large number of subsequent cases. The ruling has been held to apply not only to foreign arbitration clauses, but also to forum selection clauses referring to foreign courts. See e.g., *Mitsui & Co. (U.S.A.) Inc.* v. *M/V Mira*, 111 F.3d 33, 1997 AMC 2126 (5th Cir. 1997) (High Court of Justice in London, England).

34A.31 A sampling of court decisions applying *The Sky Reefer* includes *Far Eastern Antique Arts* v. *Cho Yang Success*, 2002 U.S. Dist. LEXIS 10698 (S.D.N.Y. 2002) (enforcing Korean and German forum selection clauses); *Thyssen, Inc.* v. *M/V Alpha Jupiter*, 1997 U.S. Dist. LEXIS 23803 (S.D.N.Y. 1997) (enforcing Chinese forum selection clause); *Jockey Int'l Inc.* v. *M/V Leverkusen*

Express, 217 F.Supp. 2d 447 (S.D.N.Y. 2002) (enforcing Hamburg, Germany, forum selection clause); *Abrar Surgery (Pvt) Ltd.* v. *The Jolly Oro*, 2000 AMC 109 (S.D.N.Y 1999) (enforcing Croatian forum selection clause); *Chiyoda Fire & Marine Inc. Co. of America* v. *The Hyundai Freedom*, 1999 AMC 1603 (S.D.N.Y. 1999) (enforcing Japanese forum selection clause); *Ferraro Foods, Inc.* v. *The Izzet Incekara*, 2001 AMC 2940 (S.D.N.Y. 2001) (enforcing Turkish forum selection clause); *Street Sound Around Electronics Inc.* v. *The Royal Container*, 30 F.Supp.2d 661, 1999 AMC 1805 (S.D.N.Y. 1999) (enforcing German choice of law and forum selection clause); *Lucky Metals Corp.* v. *M/V Ave*, 1996 AMC 265 (S.D.N.Y 1995) (enforcing London arbitration clause); *Int'l Marine Underwriters Cir.* v. *M/V Kasif Kalkavan*, 989 F.Supp. 498, 1998 AMC 765 (S.D.N.Y. 1998) (enforcing Korean forum selection clause); *TMC Co. Ltd.* v. *M/V Mosel Bridge*, 2002 U.S. Dist. LEXIS 12316 (S.D.N.Y. 2002) (enforcing Japanese forum selection clause); *Tradearbed, Inc.* v. *M/V Agia Sophia*, 1997 AMC 2838 (D.N.J. 1997) (enforcing Korean jurisdiction clause); *Gibbs Int'l Inc.* v. *Federal Ins. Co.*, 1997 AMC 2954 (D.S.C. 1997) (enforcing Korean forum clause); *Bunker Holdings, Ltd., et al v. GREEN PACIFIC A/S, et al*, 346 Fed. Appx. 969, 2009 AMC 2394 (4th Cir. 2009)(enforcing Greek forum selection clause for contractual and non-contractual claims).

34A.32 In *New Moon Shipping Co.* v. *Man B & W Diesel A.G.*, 121 F.3d 24, 29 (2d Cir. 1997), it was held that the burden is on a plaintiff who brings suit in a forum other than the one designated by a forum selection clause to make a "strong showing" to avoid enforcement of the clause. See also *Glyphics Media* v. *Conti Singapore*, 2003 U.S. Dist. LEXIS 4387 (S.D.N.Y. 2003) (enforcing an Indian jurisdiction clause). Although forum selection clauses are presumptively valid, there are circumstances where they will not be enforced. See, e.g., *New Moon Shipping Co. Ltd.* v. *Man B&W Diesel A.G.*, 121 F.3d 24, 29 (2d Cir. 1997). These include a showing that either: (*a*) inclusion of the forum selection clause was the result of fraud or overreaching; (*b*) the party opposing the clause "will be effectively deprived of a 'day in court' due to the grave inconvenience or unfairness of the selected forum;" (*c*) fundamental unfairness of the chosen law may deprive the party of a remedy; or (*d*) the clause contravenes a strong public policy of the United States. See *Roby* v. *Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993). As stated above, it remains the rule under *The Sky Reefer* that a forum selection clause which has the effect of reducing a carrier's obligations below COGSA's requirements would not be enforceable. For an instance in which the court refused to enforce a forum selection clause for this reason, see *Central National-Gottesman, Inc.* v. *M.V. Gertrude Oldendorff*, 204 F. Supp. 2d 675, 681, 2002 AMC 1477 (S.D.N.Y. 2002), where the court found that enforcement of the London forum clause could lessen the time charterer's COGSA obligations as a "carrier" because the English court might enforce a clause that exonerated the time charterer and provided that only the owner was liable. In *Heli-Lift Ltd.* v. *M/V OOCL Faith*, 2003 AMC 30, 40 (C.D. Cal. 2001), the court concluded that the German forum clause would not be enforced as a lessening of liability on the facts and circumstances of that case. The helicopter carried as cargo had been stowed on deck in contravention of the bill of lading, a deviation under U.S. law: see *id.* at 38. The court refused to enforce the clause because it concluded that a German court would enforce an on-deck stowage clause that would relieve the carrier of liability. In *Ferrostaal* v. *M/V Tupungato*, 2004 AMC 2498, 2500–2501 (S.D.N.Y. 2004), *aff'd*, 2007 AMC 1213 (2d Cir. 2007), the court rejected the argument that the narrower English view of who was a "carrier" would impermissibly lessen liabilities under COGSA, noting that the indemnity claims at issue were not subject to COGSA in the first place.

34A.33 In *Uniwire Trading LLC* v. *M/V WLADYSLAW ORKAN, et al*, 622 F. Supp. 2d 15, 2008 AMC 2152 (S.D.N.Y. 2008), a cargo owner claimed its steel pipes were damaged during transit aboard the *M/V WLADYSLAW ORKAN*. The cargo owner notified the shipowner of its intent to arrest the ship in New York. To avoid the arrest, the ship's P&I Club posted a Letter of Undertaking

which provided for claims to be filed in the Southern District of New York. When the cargo owner sued the owner and charterer to recover damages, it claimed the Southern District of New York did not have jurisdiction to hear the action because the bills of lading that governed the shipment designated courts in Poland as the exclusive forum for the action. The court found the forum selection clause in the bills of lading was valid and enforceable in so far as any *in personam* action against the owner or charterer was concerned; however, the LOU gave the Southern District of New York jurisdiction to hear plaintiff's *in rem* action against the ship.

34A.34 In prior editions of this book, we referred to *Indussa Corp.* v. *The Ranborg*, 377 F.2d 200, 1967 AMC 589 (2d Cir. 1987), which held that foreign forum selection clauses in bills of lading were not enforceable because they contravened Section 3(8) of COGSA. The court's reasoning in *The Sky Reefer* flatly rejected *Indussa* and the rule stated in *Indussa* is no longer viable.

34A.35 The fourth edition of *Voyage Charters* contains an in-depth analysis of COGSA.

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CHAPTER 35

Ice; Navigation; Tugs; Pilot; Insurance

"167. 25. The vessel shall not be required to enter any ice-bound port, or any port where lights or light-
168. ships have been or are about to be with-
169. drawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not
170. be able on account of ice to safely enter the
171. port or to get out after having completed loading or discharging.
26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the
navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account."

Ice clause

35.1 The wording of Clause 25 is nearly identical to the wording of the first part of Clause 14(B) of the Baltime form. The second part of Clause 14(B) adds (a) that the ship shall not be obliged to force ice and (b) that if the master fears that his ship may be frozen in or damaged by ice at a loading or discharging place he may "sail to a convenient open place" and await fresh instructions.

35.2 Scrutton, L.J., in *Limerick* v. *Stott*, below, said that the Baltime clause "enables the captain to refuse to go to an ice-bound port, and to refuse to force ice which he meets on his voyage, without being guilty of any breach of charter, and without prejudicing his owners' right to hire while he is waiting for proper orders, or for a sea free of ice. He is also allowed, but is not obliged, to leave a port which is likely to become ice-bound; that is. . . it cannot be said that the owner loses his right to hire, because the captain elects to stay when he might have escaped".

Ice-bound

35.3 A port which is kept open by icebreakers is not regarded as "ice-bound" under such clauses.

The *Inishboffin* was chartered on an earlier version of the Baltime form for "one Baltic round" voyage. The ship was ordered to Abo which was kept open the whole winter by icebreakers. There was evidence that ships regularly ran six voyages a week between Abo and Stockholm. It was held by the Court of Appeal affirming Bailhache, J., that Abo was not an ice-bound port.

Limerick v. *Stott* (1920) 5 Ll.L.Rep. 190 (Bailhache, J.), (1921) 7 Ll.L.Rep. 5, 69 (C.A.).

Forcing ice

35.4 Lines 199 and 200 of the Baltime form, part of Clause 14(B), provide that the ship shall not be obliged to force ice. So the master may refuse to do so. If he unreasonably elects to force ice in order to reach a port to which he has properly been ordered, the charterers will not be responsible for damage sustained by the ship. In *Limerick* v. *Stott*, above, the ship encountered thick ice on the usual route to Abo, when she was some 200 miles from the port. The master, instead of waiting for icebreaker assistance, decided to try to force the ice. He failed and the ship became fast. An

icebreaker was then called and for the rest of the voyage the ship had icebreaker assistance. It was held by the Court of Appeal that the charterers were not liable for the damage caused to the ship in trying to force the ice.

Damage from ice en route

35.5 In *Limerick* v. *Stott*, above, the ship could have reached her port of destination in safety, had the master waited and called for icebreaker assistance straight away instead of attempting to force the ice. But if, because of ice en route, the port of destination cannot be reached in safety and the master has to force the ice, the charterers may be liable for the damage to the ship on the ground that the port is unsafe.

The *Sussex Oak* was chartered under the Baltime form and was ordered to proceed to Hamburg in January 1947. On her passage up the Elbe ice was encountered but the pilots considered it safe to proceed. However, when the ship was nearing the approaches to Hamburg she was stopped by a large ice floe. The ship was then in a part of the river in which she could neither turn, go astern nor anchor in safety. On the advice of the pilots she forced her way through the ice, suffering damage in consequence. It was found as a fact that the master acted properly in proceeding without icebreaker assistance.

It was held by Devlin, J., that the charterers were liable for the damage to the ship on the ground that Hamburg was then an unsafe port and the charterers were not entitled to order the ship to go there. Devlin J., said: "It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety. In the present case, the only route to Hamburg was by the Elbe, and the arbitrator has found that this approach was unsafe by reason of ice."

The Sussex Oak (1950) 83 Ll.L.Rep. 297.

35.6 It was argued by the charterers in the above case that the owners could not rely on the safe port obligation under Baltime Clause 2 because the ice clause gave an exclusive remedy for ice dangers. Devlin, J., dismissed this argument, but Lord Roskill in *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307, at page 321, expressly left open the question whether Devlin, J., was correct on this point.

Not a demise of the ship

35.7 Clause 26 of the New York Produce form emphasises what is anyway clear from the rest of the charter, namely that this is a time and not a 'demise' charter. The nature of a time charter is discussed in the Introduction, at paragraphs I.4 *et seq*.

Navigation, pilots and tugs

35.8 The dividing line between "navigation", which is the owners' responsibility, and "employment", which is the charterers', was analysed by the House of Lords in *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, see paragraphs 19.24 *et seq*., above. Although the owners are responsible for navigation, they are not usually liable for errors of navigation: see paragraphs 27.26 and 27.27, above.

35.9 Even though the charterers "provide and pay for" pilotage under Clause 2, the pilot does not become the servant of the charterers so as to cause them to be vicariously liable for the pilot's negligence (see *Fraser* v. *Bee* (1900) 17 T.L.R. 101) and it is thought that the owners are responsible for the risks of using pilots: see the general comments at paragraphs 12.17 *et seq*., above. Likewise,

it is thought that the owners are responsible for the risks of using tugs, even though they too may be provided or paid for by the charterers: see paragraphs 12.19 and 12.25, above.

NYPE 93

35.10 Line 282 of the 1993 revision of the New York Produce form adds to those things for which the owners are to "remain responsible" under Clause 26 of the 1946 version, "acts of pilots and tug boats".

Extent of insurance cover

35.11 Clause 26 of the New York Produce form puts upon the owners the responsibility for insuring the ship "same as when trading for their own account". Clause 1 requires them to pay for the insurance of the ship. These provisions require the owners to meet the cost of insuring against war risks, as well as against hull and machinery risks, within the trading limits laid down in the charter: see the judgment of Donaldson, J., in *World Magnate Shipping* v. *Rederi A/B Soya* [1975] 2 Lloyd's Rep. 498.

35.12 The way in which such insurance is effected, including the precise risks insured against and the value for which the ship is insured, are matters for the discretion of the owners; but that discretion is to be exercised according to the standards of a prudent owner: see *The Athos*, [1981] 2 Lloyd's Rep. 74, below at paragraph 35.19.

35.13 It does not follow from the words "same as when trading for their own account" that the owners are obliged to maintain, during the charter, insurance cover identical to that which they had been trading under prior to the beginning of the charter period: see the judgment of Robert Goff, J., in *The Antaios* [1981] 2 Lloyd's Rep. 284, and paragraph 35.19, below.

Baltime form

35.14 Clause 3 of the Baltime form requires the owners "to provide and pay. . . for insurance of the Vessel". More specific provisions are made so far as concerns war risks insurance in Clause 20(D), on which see paragraphs 5.33 *et seq*., above.

Effect of insurance provisions on owners' claims against charterers for damage to the ship

35.15 A provision that the owners are to pay for the insurance of their ship does not usually imply that they may not claim against the charterers for damage to the ship caused by the charterers or their servants: see *Aira Force* v. *Christie* (1892) 9 T.L.R. 104 (C.A.).

35.16 Moreover, an agreement that the charterers may order the ship outside the charter trading limits in exchange for paying any extra premium required by the ship's underwriters does not relieve the charterers of their obligation as to the safety of the ports outside those limits to which they order the ship.

The New York Produce form charter for *The Helen Miller* contained an additional clause defining the trading limits as being "between safe ports within Institute Warranty Limits including St. Lawrence up to and including Montreal, but excluding Cuba . . . Guinea, and all unsafe ports, but Charterers have the liberty of breaking limits, they paying extra insurance, if any, . . .". The charterers ordered the ship to ports outside the Institute Warranty Limits and she suffered ice damage on voyages to these ports, which were found to have been unsafe at the relevant time.

Mustill, J., held that the charterers were liable for this damage. The owners had given general consent to

trading outside the Limits but this did not detract from the charterers' duty to select ports which were safe, and this was not affected by the charterers' payment of extra insurance premium: "by paying the premium the charterer does obtain a benefit – the benefit of being able to send the ship on a voyage which the owner would not otherwise allow her to perform. But this is not at all the same as saying that the charterer thereby obtains the right to send her on such a voyage risk-free."

The Helen Miller [1980] 2 Lloyd's Rep. 95.

35.17 By contrast, in *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307, at page 321, the House of Lords held that the then war clause in the Baltime charter, which gave the owners the right to insure against certain war risks and charge the premium to the charterers, operated as a complete code and prevented the owners claiming under other provisions of the charter in respect of those described risks: see the summary of this case in paragraph 10.50, above. But that is not thought to be the effect of the current Baltime Clause 20(D); see paragraph 5.34, above. Nor is there, absent the unusual presence of the sort of 'complete code' found in the charter in *The Evia* (*No.2*), above, any general principle preventing the owners from recovering damages for breach of the charterers' safe port obligation merely because the charterers have paid for hull insurance on the ship, even where the policies are to be in the joint names of the owners and the charterers; see *The Ocean Victory* [2014] 1 Lloyd's Rep. 59, in which Teare, J., said at [193], "The mere fact that the charterer pays for the hull insurances is not enough to exempt him from liability for breach of his obligations under the charterparty. There has to be an intention to create an exhaustive code which determines the parties' rights and liabilities by reference to a claim on the insurance policy." See further the judgment of Bingham, J., in *The Concordia Fjord* [1984] 1 Lloyd's Rep. 385, at pages 387 and 388, and paragraph 10.83, above.

Provisions for reimbursement of premiums by charterers

35.18 It is often provided in time charters, either by printed provisions such as Clause 20(D) of the Baltime form or by special additional clauses, that certain insurances are to be placed by the owners but paid for ultimately in whole or in part by the charterers. For extra insurance for breaking Institute Warranty Limits, see *The Helen Miller*, above, and for a series of disputes concerning insurance against war risks see paragraph 5.35 *et seq*., above.

Discounts from premiums

35.19 The charterers are only obliged under such clauses to reimburse the owners for what the owners actually had to pay to their underwriters. Thus, the charterers are entitled to credit for any discounts against the gross premium which the underwriters allow to the owners: see *The Athos* [1981] 2 Lloyd's Rep. 74, below, where Neill, J., said at page 87: "I am satisfied that *prima facie* a duty to reimburse imposes an obligation to repay that which the other party has expended and that therefore the paying party is entitled to the benefits of any discounts which the payee has received."

Premiums for war risks insurance

35.20 In a series of cases following the outbreak of hostilities between Iraq and Iran, the charterers challenged the demands of the owners for reimbursement of premiums for war risks insurance. They are considered and summarised at paragraph 5.35 *et seq*., above.

U.S. Law

Ice clause

35A.1 Under the ice clause, the master may not be compelled to enter an icebound port or a port where, because of ice conditions, the ship may be unable to safely enter or depart after having completed loading or discharging. *The Dirphys*, SMA 283 (Arb. at N.Y.). It is incumbent on the master, however, to protest the port as inaccessible or potentially so. The master's failure to protest may result in a waiver of the owner's rights under the ice clause. *The Dirphys*, above; *The Leprechaun Spirit*, SMA 1056 (Arb. at N.Y. 1976).

35A.2 In a number of cases, it has been held that ice conditions may render a port or berth unsafe, such that the safe port/safe berth warranty discussed at paragraph 10A.1 et seq. applies. This would seem to be correct, since the ice clause does not modify the safe port/safe berth warranty. Indeed, the ice clause would appear to both reinforce and broaden the warranty by expressly stating the master's right to refuse to enter a port which may be dangerous because of ice conditions, or which the master reasonably may fear will become dangerous because of ice. It is certain that the mere expectation of ice conditions will not make a port unsafe. Under the ice clause, however, the master may still be entitled to refuse to go there if he has a realistic fear that the ship may become trapped or exposed to danger because of ice. See *The Leprechaun Spirit*, above.

35A.3 In *The Ming Summer*, SMA 2490 (Arb. at N.Y. 1988), the panel held that damages sustained by the ship as a result of stranding in ice were caused by the negligence of the pilot and the master. The owner's claim for the cost of repairs was denied, and charterer was awarded off-hire for the repair period.

Time charterer's interest in the ship

35A.4 A time charter is simply a contract for the use of the ship for any given period of time, and gives the time charterer no property interest in the ship. *Robins Dry Dock & Repair Co*. v. *Flint*, 275 U.S. 303 (1927); *The Bay Master*, 1969 AMC 359 (E.D.N.Y 1969); *Mondella* v. *The Elie V*, 223 F. Supp. 390 (S.D.N.Y. 1963); and *Federal Commerce & Navigation Co*. v. *The Marathonian*, 392 F. Supp. 908 (S.D.N.Y. 1975), *aff'd percuriam*, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

35A.5 In *Robins*, the ship was damaged while in drydock as the result of negligence of the yard's employees. The charterer attempted to recover damages from the dry dockyard for loss of the use of the ship while she was repaired. The court held that the charterer had no property interest in the ship, and could not recover for losses sustained as a result of a third party's negligent interference with the performance of the contract between the charterer and the ship's owner.

35A.6 This rule was challenged in *The Marathonian*, above, where the charterer sought to recover from the offending ship for loss of use while the ship was repaired following a collision. On the authority of *Robins*, the claim was denied. See also *Rederi A/B Soya* v. *Evergreen Marine*, 1972 AMC 1555 (E.D.Va. 1971). In *Norwegian Bulk Transport A/S* v. *International Marine Terminals Partnership*, 2006, U.S. Dist. LEXIS 62098, *9–12 (E.D. La. Aug. 31, 2006), *aff'd*, 520 F.2d 409, 2008 U.S. App. LEXIS 5256, 2008 AMC 975, (5th Cir. 2008), the court applied *Robins Dry Dock* to preclude the time charterer's claim for extra hire it incurred while the defendant terminal repaired damage that it had caused to the chartered ship.

35A.7 An exception to *Robins* was made in *Venore Transportation Co*. v. *The Struma*, 583 F.2d 708, 1978 AMC 2146 (4th Cir. 1978). There, the court held that *Robins* was inapplicable because of the nature of the charter arrangements. The *Oswego Liberty* was time chartered for a period of

13 and a half years. During the course of the charter, she was in collision with the *Struma* and was laid up for repairs for over one year. Under the terms of the charter, the charterer was required to pay hire while the ship was undergoing repairs. The charterer brought an action against the *Struma* to recover the hire paid to the owner while she underwent repairs.

35A.8 The court found that because there was no suspension of the charterer's obligation to pay hire while the ship was being repaired, the charterer had standing to bring the claim. While recognizing that, in the technical sense, the charterer has no possessory interest in the ship, the court held that "its interest in the ship is sufficient to give it standing to claim damages, measured by charter hire paid when the owner has no claim for loss of use because its receipts of charter hire have been interrupted." (1978 AMC at 2150.)

35A.9 See also *Standard Navigazione S.p.A*. v. *The K.Z. Michalos*, 1981 AMC 748 (S.D. Tex. 1981), holding that a time charterer who was contractually obligated to pay hire while the ship was undergoing repairs following a collision was subrogated to the rights of the owner to the extent of the hire paid, and could bring an action against the owner of the other ship.

35A.10 In *G&G Steel, Inc*. v. *Sea Wolf Marine Transporation*, *LLC*, 380 Fed. Appx. 103, 2010 AMC 2403 (2nd Cir. 2010), the court held that although the charterer was required to (1) pay deductibles, (2) maintain the ship in a good and seaworthy condition during the term of the charter, fair wear and tear excepted, (3) bear any costs incurred by the owner in restoring the ship to such condition, and (4) cover any expenses incident to its particular use of the ship, those standard charter obligations were insufficient to demonstrate the requisite proprietary interest in the ship under the *Robins Dry Dock* rule. The court also rejected charterer's contention that, even if it lacked a proprietary interest in the ship, dismissal of its claims was improper because the charter shifted the risk of loss from the shipowner to charterer. Because the case involves an allision, not a collision, the court found no basis for recognizing a loss-shifting exception to the *Robins Dry Dock* rule.

35A.11 The effect of *Robins* can be extremely significant in a variety of contexts. In *Riffe Petroleum Co*. v. *Cibro Sales Corp*., 601 F.2d 1385, 1979 AMC 1611 (10th Cir. 1979), for example, the time charterer was a debtor in a Chapter XI proceeding in bankruptcy. The bankruptcy court had issued a general stay order which prohibited the commencing of any actions against the debtor. After the issuance of the stay order, a bunker supplier commenced an *in rem* action against the ship to enforce a maritime lien for the furnishing of necessaries and fuel oil. The time charterer then sought to hold the bunkers supplier in contempt of the stay order by reason of its action against the ship. The court held that the *in rem* action did not violate the bankruptcy order because it was not directed against any property of the debtor. As the court noted, "under a time charter, the shipowner agrees to carry goods in a ship in which the charterer has no property interest." (1979 AMC at 1615.)

35A.12 In *Porina* v. *Marward Shipping Co. Ltd*., 521 F.3d 122 (2d Cir. 2008), the court held that a shipowner was not subject to personal jurisdiction in United States courts based on calls made by the ship at the time charterers' direction. It was alleged that the owner of a Cypriot flagship collided with a fishing ship in international waters near Sweden. The fishing ship sank and the entire crew was killed. Suit was brought here on the numerous death claims and for loss of the ship based on the fact that the ship had called at U.S. ports on multiple occasions, both before and after the alleged collision. The court ruled, however, that all of the U.S. port calls were made under orders from the charterer of the ship and the shipowner did not purposefully avail itself of the benefits of doing business in the U.S.

"The owners to remain responsible . . . "

35A.13 It is a basic feature of time charter that it is the responsibility of the owner to man and maintain the ship. While the charterer undertakes responsibility for certain charges arising out of

the employment of the ship, such as bunkers, a time charter is in no sense a demise of the ship. Although the charterer has the right to employ the ship as it wishes, within limits set by the charter, the responsibility for navigation, maintaining insurance, providing a crew, and all such other matters remains with the owner. See generally *Bergan* v. *Int'l Freighting Corp*., 254 F.2d 231, 1958 AMC 1303 (2d Cir. 1958); *Riffe Petroleum Co*. v. *Cibro Sales Corp*., 601 F.2d 1385, 1979 AMC 1611 (10th Cir. 1979).

35A.14 In *H. Schuldt* v. *Standard Fruit & Steamship Co*., 1979 AMC 2470, 2477 (S.D.N.Y. 1978), the ship grounded while docking at Pier 42 of the East River, New York, as the result of negligence on the part of the docking pilot. The owner contended that since the charterer was obliged to pay for pilotage, it thereby assumed responsibility for any negligent acts of the pilot. The court disagreed, and held that under the demise clause, the owner remained responsible for the negligence of the docking pilot.

35A.15 The charterer's interest in the ship is such that, in the absence of any active negligence of its own, it is not liable to crew members for unseaworthiness or operating negligence. See *Morewitz* v. *Imbros Shipping Co. Ltd*., 1979 AMC 1622 (E.D. Va. 1978); see also *Weeks Marine, Inc*. v. *Hanjin Shipping*, 2005 AMC 1917 (D.N.J. 2005) (claim by the owner of barge damaged by negligent navigation of ship). Thus, a time charterer ordinarily would not incur liability for any personal injuries suffered by crew members. Nonetheless, if the charterer performs any functions which put it in a position of owing a duty of care to crew members, it will be liable for losses resulting from its acts. *Mondella* v. *The Elie V*, 223 F. Supp. 390, 393, 1965 AMC 2672, 2676 (S.D.N.Y. 1963); see also *Hodnett* v. *United States*, 2003 AMC 2337, 2339–2341 (E.D.Va. 2003).

Insurance

35A.16 The owners' responsibility under this section to insure the ship, "same as when trading for their own account," reinforces the language of Clause 1 under which it is obliged to pay for insurance for the ship. These clauses would seem to impose a duty on the owner to carry insurance on the ship that a reasonably prudent owner would be expected to have for trading within the charter limits, and should include P. & I. hull and machinery, and war risk insurance.

35A.17 Although the charterer has no ownership interest in the ship, it may, by contract, assume liability to indemnify the owner for insurance costs. This assumption of responsibility for insurance costs occurs most frequently when the owner is faced with additional costs because of the trade in which the charterer uses the ship. Thus, in *Seas Shipping Co. Inc*. v. *United States*, 1951 AMC 503 (S.D.N.Y. 1951), the charterer agreed to reimburse the owner for the extra cost of marine insurance occasioned by the ship's trading beyond the full limits of "American Institute trade warranties." (The owner's claim for additional premiums was denied, however, because the court found that the ship did not go beyond the allowed trading limits.) See also *The Stuyvesant*, SMA 1722 (Arb. at N.Y. 1982).

35A.18 In *The Panagos D. Pateras*, SMA 1566 (Arb. at N.Y. 1981), the charter contained a typewritten clause which provided:

> Any extra war risk insurance and/or officially imposed crew bonus to be for Charterers' account, including any additional war risk premiums for Suez Canal transit if any.

The owner had the ship covered for war risks with the Hellenic Mutual War Risks Association (Bermuda) Limited. The Association's cover was divided into four parts, including (A) hull and machinery, disbursements, etc., (B) detention and diversion expenses, (C) protection and indemnity and (D) sue and labor. Under the rules of the Association, all of these items formed part of the standard cover. The charterer admitted liability for all extra premiums related to a passage

through the Suez Canal, except those for item (B), which, it argued, were for the owner's account under Clause 1 of the New York Produce form. According to the charterer, the item (B) cover was in reality "blocking and trapping" insurance which, under standard war risk cover, is offered only as a separate form of coverage.

35A.19 The arbitrator rejected this argument, and held that the owner was entitled to reimbursement for the item (B) cover. As he stated:

> Even if I were to find that the item of Blockage and Trapping is a separate item under the standard War Risks policy, I could not see any reason to make Owners change their basic coverage. The choice of where or which medium to use to obtain normal War Risks coverage lies solely with Owners. If by the selection of any specific Association or Underwriter, certain additional coverages are made available over and above those considered as "standard" in an open market policy, but always within the described rules of coverage, the Charterers must accept the means determined by Owners to be in their best interests. It would be impractical for every underwriter or association all to have exactly similar terms, and even more so for a shipowner to have to change its chosen means of cover to suit the requests of every individual charterer, unless specifically contracted for under the Charter Party.

35A.20 See also *The Olympic Armour*, SMA 1840 (Arb. at N.Y. 1983), holding that the charterer was obligated to indemnify the owner for added premiums incurred in respect of the Hellenic War Risks Club's Part 2(B) cover for "detention and diversion expenses;" *The Capetan Costis I*, SMA 1622 (Arb. at N.Y. 1981), holding that the owner was entitled to reimbursement for extra premiums for a passage through the Suez Canal.

35A.21 In *The Crane Nest*, 1939 AMC 1186 (Arb. at N.Y. 1939), a time chartered owner was held liable for extra insurance costs under a sub-charter. The charterer admitted responsibility for extra insurance premiums, but contended that the sum charged was excessive. The arbitrator held that the sub-charterer had made a good faith effort to procure the lowest rate to be had, and that the charterer was liable.

CHAPTER 36

Commissions

"172. 27. A commission of 2½ per cent is payable by the Vessel and Owners to
173. .....
174. on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.
175. 28. An address commission of 2½ per cent payable to ..... on the hire earned and paid under this Charter.
By cable authority from"

36.1 Clauses 27 and 28 of the New York Produce form deal with commissions. By Clause 27, the owners undertake to pay commission to the broker – or brokers – named in Line 173, calculated as a percentage of the hire earned and paid under the charter. Usually, but not always, the named broker is the owners' broker. The wording of Clause 28 is elliptical. Its effect, however, is thought to be twofold: first, the charterers are given the right to make a deduction from hire of the specified percentage; and second, the charterers undertake to pay the value of the deduction to the person – or persons – named in Line 175. Usually this will be the charterers' broker.

Baltime form

36.2 Under Clause 24 of the Baltime form, the position of the brokers is better than it is under the New York Produce form in three ways:

(1) there is a minimum commission payable, enough to cover expenses plus a reasonable fee for work done;
(2) there is express provision entitling them to compensation if the full hire is not paid because of a breach of charter by either of the parties to it. The right is against the party in breach;
(3) they are entitled to compensation of up to one year's commission if the parties agree to cancel the charter.

For a case in which the owners were held liable to the brokers under (2) above, where the owners had broken their obligation to deliver the ship by a stated date with the result that the charter had been cancelled, see *The Helvetia-S* [1960] 1 Lloyd's Rep. 540.

Broker's right to payment of commission

36.3 Prior to the coming into force of the Contracts (Rights of Third Parties) Act 1999 (the '1999 Act'), the broker named in Clause 27 of the New York Produce form could not claim commission from the owners by relying simply on the promise contained in that clause. The owners' contractual promise to pay commission to the broker could be enforced only by the charterers. They were entitled to enforce that promise because the law regarded them as trustees for the broker of the owners' promise to pay commission: see *Les Affréteurs Réunis* v. *Walford* [1919] A.C. 801 (H.L.).

If, however, the charterers refused to sue the owners on the broker's behalf, the broker could enforce his claim for commission by an action against both the owners and the charterers: see *The Panaghia P* [1983] 2 Lloyd's Rep. 653. See also *Atlas Shipping* v. *Suisse Atlantique* [1995] 2 Lloyd's Rep. 188 on a question of jurisdiction over such a claim.

36.4 The 1999 Act introduced a simpler regime. Subject to certain qualifications, Section 1 of the Act enables a person to sue on a contract to which he is not a party, if a term of the contract purports to confer a benefit on him. One important qualification is that a third party cannot enforce a contract where, on a proper construction of that contract, it appears that the parties did not intend that he should be able to enforce it. The Act, therefore, gives a broker claiming commission under the New York Produce form, and under most usual forms of dry cargo time charter, the right to enforce his claim directly against the owners: see generally *Nisshin* v. *Cleaves* [2004] 1 Lloyd's Rep. 38. See also for a general review of the effect of the 1999 Act, *Chitty*, paragraphs 18–088 *et seq*.

36.5 It must be borne in mind, however, that Section 3 of the Act will allow the owners to raise by way of defence or set-off any matter that "arises from or in connection with the contract and is relevant to the term, and. . . would have been available to [the owners] by way of defence or set-off if the proceedings had been brought by" the charterers.

Broker's right and obligation to arbitrate a claim for commission

36.6 Section 8 of the 1999 Act provides that where a third party has a right to enforce a term of a contract by operation of Section 1 of the Act, and where the contract contains an arbitration agreement, the third party is obliged to bring his claim in arbitration. The effect of Section 8 is that the third party is treated as if he were a party to the relevant arbitration agreement. In *Nisshin* v. *Cleaves* [2004] 1 Lloyd's Rep. 38, Colman, J., held that Section 8 permitted and required a broker to arbitrate his claim for commission under the charterparty arbitration clause, even though the terms of the arbitration clause referred only to disputes between "the parties to the charter" or between the "owners" and the "charterers". The rationale for this is that the broker is, in effect, the statutory assignee of the charterers' right to require payment by the owners. For an analysis of this judgment, and the issues underlying it, see Parker at [2004] LMCLQ 445.

Cancellation or variation of the charter under the 1999 Act

36.7 Section 2 of the 1999 Act provides that, in certain circumstances, where a third party has a right under Section 1 of the Act to enforce a term of a contract, the parties to that contract cannot, by agreement, rescind it or vary it in such a way as to extinguish or alter the third party's entitlement, without first obtaining the third party's consent. The relevant circumstances are, as applied to the case of a broker: (*a*) where the broker has communicated his assent to the term to the owners; (*b*) where the owners are aware that the broker has relied on the term; or (*c*) where the owners can reasonably be expected to have foreseen that the broker would rely on the term and the broker has in fact relied on it. In any ordinary chartering transaction, it is likely that all or at least some of these circumstances will exist.

36.8 Clearly, this provision prohibits a variation of the charter designed to prevent the broker from earning commission on an ongoing charter. However, it is less clear whether it affects the parties' right to agree to the early termination of the charter for other reasons. It is thought that Section 2 does not prohibit such an agreement. An agreement to cancel the charter for that reason, or otherwise redeliver before time, does not extinguish or alter the broker's right to commission on hire earned and paid. It merely has the practical effect that no further hire is in fact earned or

paid and hence no right to commission arises. (The question whether an agreement to terminate the charter early may be prohibited by an implied agreement with the broker is discussed immediately below.) On similar logic, or by extension, it is not thought that Section 2 of the 1999 Act prevents the owners and the charterers from varying a charter so as to amend its duration or rate of hire.

An implied obligation on the owners not to prevent the broker earning commission?

36.9 It is clear from the express terms of Clauses 27 and 28 of the New York Produce form that commission is payable only on hire which is both earned and paid under the charter or under any continuation or extension of it. If hire is not paid for the full period of the charter, whether, for example, because of off-hire or because of early termination, the broker does not earn his commission.

36.10 In such circumstances, the question may arise whether any term is to be implied into the agreement between owners and their broker, to the effect that the owners will do nothing to deprive the broker of the commission which he would otherwise earn. The answer is not entirely clear. The House of Lords decided in *French* v. *Leeston Shipping* (1922) 10 Ll.L.Rep. 448 that no undertaking is to be implied that the owners will not agree to terminate the charter.

The *Clematis* was chartered for 18 months, the brokers being entitled to 2 per cent commission from the owners on hire paid and earned. After four months the ship was sold to the charterers and the charter was cancelled by mutual agreement. The brokers sought commission for the remaining 14 months.

The House of Lords held that the brokers were not entitled to it. They could succeed only if there were to be implied into the contract a stipulation that the owners would not in any circumstances terminate the charter by agreement, and there was no necessity for any such implication. Lord Buckmaster said: "The contract works perfectly well without any such words being implied, and, if it were intended on the part of the shipbroker to provide for the cessation of the commission which he earned owing to the avoidance of the charterparty, he ought to have arranged for that in express terms between himself and the shipowner."

French v. *Leeston Shipping* (1921) 8 Ll.L.Rep 110 (C.A.), (1922) 10 Ll.L.Rep. 448 (H.L.).

36.11 In reaching their decision, the House of Lords approved an earlier decision of the Court of Appeal in *White* v. *Turnbull, Martin* (1898) 3 Com. Cas. 183, in which the charterers, in the course of a 12-month time charter, cancelled the charter, alleging unfitness of the ship for her employment. Litigation between the owners and charterers was settled on terms that the charter should be terminated and the charterers reimbursed for advance hire overpaid. Commission was payable under the charter "on all hire earned" and the brokers claimed commission on hire for the balance of the 12 months of the charter. It was held that on the express wording of the charter, commission was payable only on the hire actually paid, that there was no 'wilful act' on the part of the owners which put an end to the charter and that there was no business necessity to imply a term that the charter would not be ended prematurely by agreement.

36.12 In *French* v. *Leeston Shipping*, above, Lord Dunedin expressed the view that the position might be different if the premature termination of the charter were brought about "simply and solely to avoid payment of the commission". That observation, coupled with a similar observation of Lord Buckmaster and the approval of the decision of the Court of Appeal in *White* v. *Turnbull*, *Martin*, would strongly suggest that, in the case of the normal commission arrangements under a time charter, something more is required than a premature termination of the charter as a result of a breach of charter by the owners before brokers could claim damages for loss of commission.

36.13 However, in a number of cases relating to contracts for the sale of ships negotiated by brokers, the courts have held that a term should be implied to protect the broker. Where the broker has negotiated a sale on behalf of his principal as seller, a term is implied into the contract between broker and principal that the principal will not deprive the broker of his commission by

breaking the sale contract: see *Alpha Trading* v. *Dunnshaw-Patten* [1981] 1 Lloyd's Rep. 122 (C.A.) and *Moundreas* v. *Navimpex* [1985] 2 Lloyd's Rep. 515. See also *The Manifest Lipkowy* [1989] 2 Lloyd's Rep. 138 (C.A.), where the Court of Appeal rejected the contention that the sellers owed the buyers' broker an implied duty not to break the sale contract. In these cases, *French* v. *Leeston Shipping* was distinguished on two grounds. First, it was said that in *French* v. *Leeston* the termination of the contract between principal and third party was by agreement (rather than for breach); second, it was said that that case stood as authority for the proposition that a term will not be implied requiring a person to carry on a particular business in order to preserve his agent's right to commission.

36.14 It is perhaps doubtful whether the first of these is an adequate basis for distinguishing *French* v. *Leeston*. While that case did not itself involve a breach of the charter contract by the owners, the case of *White* v. *Turnbull*, *Martin*, above, seemingly did, in the sense that the settlement under which the charter was terminated prematurely would hardly have been agreed by the owners had the charterers not had strong grounds for contending that the owners were in breach of their obligations as to the fitness of the ship for the employment.

36.15 As was emphasised by May, L.J., in *The Manifest Lipkowy*, the implication of a term is ultimately a question of the construction of the particular contract. It is submitted that cases in which commission is payable under a time charter "on hire earned and paid" should be distinguished from cases in which commission is payable on the conclusion of a sale – whether on the grounds mentioned above or otherwise. It is accordingly suggested that the owners should not be liable to their broker for terminating the charter, whether by agreement or for breach, unless they have done so for the purpose of avoiding paying commission.

Address commission

36.16 An agreement that there will be an "address commission" gives the charterers the right to make a deduction of that amount from hire. In *Fyffes* v. *Templeman* [2000] 2 Lloyd's Rep. 643, at page 657, Toulson, J., said: "There is certainly nothing unusual about a shipowner and ship charterer agreeing that the charterer should receive what is misleadingly termed 'address commission', but is in reality a discount or rebate on the hire". Although the address commission is payable only on hire "earned" as well as paid, it is thought that the charterers are entitled to deduct address commission from hire paid in advance.

36.17 Clause 28 envisages that "address commission" will be payable to a named third party. Where a recipient has been agreed, it is implicit that he is to be paid by the charterers. In many cases, however, there is no agreement that the address commission will be paid to any particular third party. Where that is the case, the agreement for an "address commission" is in practice simply a rebate from hire.

U.S. Law

Commissions

36A.1 The services performed by a broker in arranging a charter are not considered maritime for jurisdictional purposes. Consequently, claims by brokers for commissions ordinarily are not maritime or admiralty causes and do not give rise to a maritime lien in favor of the broker. See *The Thames*, 10 F. 848 (S.D.N.Y. 1881); *Taylor* v. *Weir*, 110 F. 1005 (D.Or. 1901); *Andrews & Co*. v. *United States*, 124 F. Supp. 362, 1954 AMC 2221 (Ct.Cl. 1954), *aff'd* 292 F.2d 280 (Ct.Cl. 1954); *Marchessini & Co*. (*New York*) v. *Pacific Marine Co*., 227 F. Supp. 17, 1964 AMC 1538 (S.D.N.Y. 1964); *European-American Banking Corp*. v. *The Rosaria*, 486 F. Supp. 245, 255 (S.D. Miss. 1978); and *Boyd*, *Weir & Sewell Inc*. v. *Fritzen-Halcyon Lijn Inc*., 1989 AMC 1159 (S.D.N.Y. 1989).

36A.2 Equally, a claim for a broker's commission will not support a maritime attachment under Rule B. *Harvey Mullion & Co. Ltd*. v. *Caverton Marine Ltd*., 2008 A.M.C. 2361 (S.D.N.Y. 2008) (citing *Shipping Financial Services Corp*. v. *Drakos*, 1998 A.M.C. 1578, 1585 (1998), which held that a ship brokerage contract was not sufficiently maritime in nature under *Exxon Corp*. v. *Central Gulf Lines*, *Inc*., 500 U.S. 603 (1991)).

36A.3 But see *Naess Shipping Agencies Inc*. v. *SSI Navigation Inc*., 1985 AMC 346 (N.D.Cal. 1984), where the court held that there was admiralty jurisdiction of a broker's claim for commissions. In that case, the broker had arranged contracts for the construction and subsequent charter of four container vessels. The court found that since the broker's duties were to extend throughout the period of performance of the construction contracts and charters, and because the broker was to be paid commissions over the 14-year life of the contracts, there was admiralty jurisdiction. The court distinguished other decisions holding that there is no admiralty jurisdiction over a broker's claim for commissions on the basis that, in the present case, it could not be said that the contracts were preliminary to a maritime contract; rather, because the broker's duties were to extend throughout the life of the contracts, the brokerage contract itself was deemed to be maritime in nature.

36A.4 Since the broker is not a party to the charter, it cannot claim a right of action under it to recover commissions. *Congress Coal and Transp. Co. Inc*. v. *International S.S. Co*., 1925 AMC 701 (Penn. 1925). Moreover, a charterer's attempt to enforce the broker's rights in an action under the charter has been rejected. In two cases, arbitrators held that they lacked jurisdiction to award broker's fees since the claim did not constitute a dispute between the parties to the charter. *The Caribbean Trader*, SMA 41 (Arb. at N.Y. 1964) and *Jugotanker-Turisthotel* v. *Mt. Ve Balik Kurumu*, SMA 1133 (Arb. at N.Y. 1977).

36A.5 The broker's entitlement to commissions is entirely dependent upon the language of the contract authorizing the commissions. Unless the charter provides otherwise, the broker may recover commissions only to the extent that hire is actually paid under the charter. *Lougheed & Co. Ltd*. v. *Suzuki*, 216 App. Div. 487, 215 N.Y.S. 505, *aff'd* 243 N.Y. 648, 152 N.E. 642 (1926); *Caldwell Co*. v. *Connecticut Mills*, 225 App. Div. 270, 273, 232 N.Y.S. 625, *aff'd* 251 N.Y. 565, 168 N.E. 429 (1929); *Tankers Int'l Navigation Corp*. v. *National Shipping & Trading Corp*., 499 N.Y.S. 2d 697, 1987 AMC 478 (A.D. 1 Dept. 1986).

36A.6 In *Lougheed*, above, the charter provided that a commission was due "on the monthly payment of hire." The charterer paid no hire because of the owner's failure to make a timely delivery of the vessel. The court dismissed the broker's claim for commissions and stated that the brokerage clause "indicated a clear intention to pay commissions only on the monthly payment of hire when received." (216 App. Div. at 492.) According to the court, "commissions were payable to [the broker] only as and when monthly hire for the steamship was received. . . ." (*Id*. at 493)

36A.7 In *Tankers Int'l*, above, the broker claimed commissions on funds paid by the charterer to the owner to settle the latter's claim for unpaid hire. While the court stated that a factual question was raised as to whether the obligation to pay commissions survived the charterer's default, the court observed that as a matter of law, the payment of settlement funds was not the equivalent of the payment of hire as earned under the charter. According to the court:

> Even had the shipowners recovered the full amount of hire sought by their claims, it is well settled that a broker is not entitled to recover commissions merely because his principal has secured a benefit equivalent to what he would have received had the contract been performed. [499 N.Y.S. 2d at 701]

36A.8 In *Rountree Co*. v. *Dampskibs Aktieselskabet Oy II* (*The Hinnoy*), 1934 AMC 26 (City Ct. N.Y. 1933), a broker's claim for commissions based on the earnings under a substitute charter entered into by the charterer in mitigation of damages under a charter which the broker had arranged and which the charterer had cancelled was denied.

36A.9 Where a charterparty contains a provision that commissions are payable upon its execution, a broker is entitled to receive such commissions even if no hire is earned. See *Vellore S.S. Co*. *Ltd*. v. *Steengrafe*, 229 F. 394 (2d Cir. 1915).

CHAPTER 37

Shelltime

37.1 This chapter is intended mainly as a guide to cases decided by the English courts on this form and on other tanker time charter forms. Tanker charter cases have therefore been covered in detail even where they have already been dealt with in the earlier chapters of the book. The chapter takes the Shelltime 4 form as its framework. The Shelltime 4 form was issued in December 1984. It was revised in December 2003 so as to reside on BIMCO's on-line document service "*idea*", which hosts a variety of non-BIMCO documents as well as BIMCO's own published forms. Shelltime 4 (2003 revision) thus now resides on "*idea*" as "the first 'living' time charterparty" (*per* Grant Hunter, Head of Documentary Department, BIMCO, writing in *Legal Issues Relating to Time Charterparties*, Informa (2008), paragraph 1.39). This apparently allows Shell to update the form from time to time. Any such updating may result in a new "version number" for the document, "depending on its significance". It is not difficult to envisage how this could result in problems, and no doubt broking practice must take careful account of the possibility for error or confusion, although we understand that in fact Shell has not updated the form since April 2006. For complete clarity here, this chapter takes as its text Shelltime 4 (2003 revision, version 1.1 Apr 06), as published on "*idea*" on 1 April 2014, and that is the version reproduced at F4 in the Forms section at the end of this book.

"SHELLTIME 4"

Issued December 1984 amended December 2003, Version 1.1 Apr 06

IT IS THIS DAY AGREED between 1
of (hereinafter referred to as "Owners"), being owners of the 2
good motor/steam vessel called 3
(hereinafter referred to as "the vessel") described as per Clause 1 hereof and 4
of (hereinafter referred to as "Charterers"): 5

37.2 Questions arising in connection with the formation of the contract and with the parties to the contract are dealt with earlier in this book in chapters 1 and 2, respectively.

37.3 Clause 1 – Description and Condition of Vessel; Safety Management

1. At the date of delivery of the vessel under this charter and throughout the charter period: 6
   (a) she shall be classed by a Classification Society which is a member of the International Association of Classification Societies; 7 8
   (b) she shall be in every way fit to carry crude petroleum and/or its products; 9
   (c) she shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator, radar, computers and computer systems) in a good and efficient state; 10 11 12
   (d) her tanks, valves and pipelines shall be oil-tight; 13
   (e) she shall be in every way fitted for burning, in accordance with the grades specified in Clause 29 hereof: 14 15

(i) at sea, fuel oil for main propulsion and fuel oil/marine diesel oil* for auxiliaries;
(ii) in port, fuel oil/marine diesel oil* for auxiliaries;

(f) she shall comply with the regulations in force so as to enable her to pass through the Suez and Panama Canals by day and night without delay;

(g) she shall have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay;

(h) she shall comply with the description in the OCIMF Harmonised Vessel Particulars Questionnaire appended here to as Appendix A, provided however that if there is any conflict between the provisions of this questionnaire and any other provision, including this Clause 1, of this charter such other provisions shall govern;

(i) her ownership structure, flag, registry, classification society and management company shall not be changed;

(j) Owners will operate:
(i) a safety management system, certified to comply with the International Safety Management Code ("ISM Code") for the Safe Operation of Ships and for Pollution Prevention;
(ii) a documented safe working procedures system (including procedures for the identification and mitigation of risks);
(iii) a documented environmental management system;
(iv) documented accident/incident reporting system compliant with flag state requirements;

(k) Owners shall submit to Charterers a monthly written report detailing all accidents/incidents and environmental reporting requirements, in accordance with the "Shell Safety and Environmental Monthly Reporting Template" appended hereto as Appendix B;

(l) Owners shall maintain Health Safety Environmental ("HSE") records sufficient to demonstrate compliance with the requirements of their HSE system and of this charter. Charterers reserve the right to confirm compliance with HSE requirements by audit of Owners.

(m) Owners will arrange at their expense for a SIRE inspection to be carried out at intervals of six months plus or minus thirty days.

Obligations upon delivery

37.4 Clauses 1(a) to (g) of Shelltime 4, to the extent that they contain undertakings as to the state and condition of the ship at the time of delivery, and Clause 1(h), to the extent it requires that the ship shall comply with the details set out in the attached Vessel Questionnaire, all form part of the description of the ship. Also forming part of the description are the name of the ship (or in the case of a newbuilding, the yard and yard number: see *The Diana Prosperity* [1976] 2 Lloyd's Rep. 621) to be inserted in Line 3, as well as the stipulations as to personnel contained in Clause 2(a). If a ship is misdescribed and the misdescription is discovered by the charterers before or upon delivery, the question whether delivery may be refused or whether the charterers must accept delivery and claim damages depends in part on which element of the description is inaccurate and in part on the seriousness of the misdescription. This question is dealt with at paragraphs 3.21 to 3.25, 7.47 *et seq.* and 8.43 *et seq.*, above.

37.5 The stipulations in Clause 1 (and Clause 2(a)), to the extent they contain undertakings applicable at the date of delivery, impose absolute obligations (see paragraph G.1, below), so that it is irrelevant to any question of compliance or breach whether due diligence was exercised or not: see *The Fina Samco* [1994] 1 Lloyd's Rep. 153, *per* Colman, J., at page 158, the facts of which are set out under Clause 3 below, and *The Trade Nomad* [1998] 1 Lloyd's Rep. 57, [1999] 1 Lloyd's Rep. 723 (C.A.); and see generally on description of the ship chapter 3, above. But in regard to claims arising out of "any loss of or damage to or in connection with cargo", if they are subject to the Hague or Hague-Visby Rules pursuant to Clause 27(c)(ii), the effect of Article IV, rule 1 of the Rules will be to reduce the obligation of seaworthiness from an absolute obligation to an obligation to exercise due diligence to make the ship seaworthy. If, under Clause 27(c)(ii), such claims are

subject to the Hamburg Rules, then the owners will not be liable if they show, under Article 5(1) that they, their servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences. (Clause 27 is quoted at paragraph 37.136, below, and Clause 27(c)(ii) is discussed in paragraphs 37.142 and 37.143.)

37.6 The general requirement in Clause 1(c) that the ship shall be "tight, staunch, strong. . . and in every way fit for the service. . ." constitutes an express undertaking of seaworthiness. This has been so held in the case of the New York Produce charter in which the wording is almost identical save that the word "fitted" is used instead of "fit", a distinction which is not thought to be material. In *The Derby* [1984] 1 Lloyd's Rep. 635, at page 641, Hobhouse, J., whose decision was upheld by the Court of Appeal at [1985] 2 Lloyd's Rep. 325, in considering the words "tight, staunch, strong and in every way fitted for the service" in Line 22 of the New York Produce form, said: "When one is concerned, as here, with a charter-party which is going to run for a considerable period of time and gives to the charterer very wide options as to the orders he may give to the owners, questions arise as to the extent to which the owners are required, at the time of delivery, to anticipate and provide in advance for every contingency. . . With regard to 'fitness for the service', as used in the NYPE form, the fitness must be fairly generally construed as otherwise one may be laying the owners open to having to fulfil conflicting and inconsistent obligations depending on which contingency is taken into account. So, while I do not accept owners' argument that to be unfit the vessel must be foredoomed to being unable properly to carry out the charter-party obligations. . . I do not accept either charterers' argument that any subsequent delay or any necessity to make some alteration to the vessel or its equipment, etc., automatically shows an initial lack of fitness."

37.7 Such considerations will be most relevant to matters not specifically dealt with in Clause 1 of the Shelltime 4 and, by contrast, less relevant in general to those matters which are specifically dealt with as, for example, under Clause 1(d), (e) and (h). But in the case of a wide-ranging undertaking, such as that in Clause 1(g), that at the date of delivery the ship "shall have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay", questions may well arise as to the extent to which the owners are required to anticipate every contingency. For authorities on fitness and on documents required to be on board to comply with this obligation, see paragraphs 8.48 *et seq.*, above. In *The Elli and The Frixos* [2008] 2 Lloyd's Rep. 119 (C.A.), Clause 1(g) of the original Shelltime 4 form was held to be a continuing promise, applicable throughout the charter, although Clause 1 was then introduced only by the words "At the date of delivery under this charter" (contrast paragraphs 37.11 *et seq*., below). That reading of Clause 1(g) seems, with respect, doubtful. It is thought the better reading was that 'required from time to time' in Clause 1(g) described the character of the documents promised by Clause 1(g), rather than the time at which they were promised.

37.8 Questions of fitness are *prima facie* questions of fact. A deficiency in equipment which has no effect on the safety of the ship, her efficient operation, or the security or integrity of her cargo, and is of no real commercial significance, may not make the ship unfit for the service even though, by reason of the deficiency, the equipment in question does not comply with the requirements of the charter.

The *Arianna* was time chartered for a period of 10 years on the Essotime form for worldwide trading. The charter provided by Clause 3: ". . . hire to commence when written notice from the Master has been given to the Charterer . . . that the Vessel is at its disposal . . . the Vessel being then ready with holds and cargo tanks, pipes and pumps clear and clean to Charterer's Inspector's satisfaction and in every way fitted for the service and the carriage of [general products], and being on delivery tight, staunch and strong and with pipe lines, pumps and heater coils in good working condition, so far as the same can be attained by the exercise of due diligence. . ." . The charter further provided by an additional Clause 69: "Owner to at all times maintain tank cleaning system in good order such that 6 machines can run simultaneously, at seawater temperature of 180´F at 170 PSI pressure."

When the ship was tendered for delivery, the charterers declined to accept her on the ground that her tank-cleaning system did not comply with the requirements of the charter. Arbitrators found that while the vessel's six tank-cleaning machines could run simultaneously at the temperature and pressure required by Clause 69, that clause, properly construed, required that the six machines should be capable of running simultaneously while the ship was in port and was at the same time heating cargo destined for other ports and this the ship could not achieve. The arbitrators found further that the pattern of trading under the charter might have been such that this situation would never have arisen and, even if it did, the ship could always run four cleaning machines simultaneously; the only consequence of the deficiency would have been some minor delay. The arbitrators held that, despite the breach of Clause 69, the ship was nevertheless 'in every way fitted for the service' and the charterers' refusal to take delivery was unjustified.

On appeal, it was argued on behalf of the charterers that in the light of the deficiency in the tank-cleaning system, the ship could not as a matter of law be "fitted for the service". In rejecting this submission Webster, J., held that the question of fitness was primarily one of fact. Whether the ship was fit or not depended upon the significance of the defect and it was implicit in the arbitrators' award that they regarded the deficiency in this case as of no real significance in a commercial sense.

The Arianna [1987] 2 Lloyd's Rep. 376.

37.9 It should be noted however that the form of charter in *The Arianna* differed considerably from the Shelltime 4 and in particular contained no equivalent to the express requirement of Clause 1(h) that at the date of delivery under the charter the ship is to comply with a detailed description. *The Arianna* case is also considered under Clause 5, below, in connection with the cancelling provision.

37.10 For cases on provisions in tanker time charters for substitution of the ship, see *Société Anonyme Maritime et Commerciale* v. *Anglo-Iranian Oil* [1953] 2 Lloyd's Rep. 446 and [1954] 1 Lloyd's Rep. 1 (C.A.), *Niarchos* v. *Shell Tankers* [1961] 2 Lloyd's Rep. 496 and paragraphs 3.4 *et seq.*, above.

"and throughout the charter period"

37.11 These words appear in Line 6, introducing Clause 1, and also in Line 45, introducing Clause 2(a). They were not in the original Shelltime 4. The question arises whether they render Clauses 1(a) to 1(h) not only absolute undertakings applicable at the date of delivery, but also absolute, continuing undertakings that the ship will always possess all of those attributes in full, no matter what happens during the charter. It is thought that cannot be the correct reading. It would involve the owners in an extravagant promise and is contradicted by Clause 3(a), by which the owners undertake only an obligation to exercise due diligence to maintain or restore the ship (see paragraphs 37.23 *et seq.*, below).

37.12 The better reading of Line 6, it is suggested, is that "throughout the charter period" applies only to Clause 1, items (i) to (m), which were added to the standard form at the same time, and each of which is by nature a promise by the owners as to how the ship will be operated during the charter rather than a promise that a particular state of affairs will exist at the moment of delivery (on which, in respect of Clause 1(g), see paragraph 37.7, above). Reading "At the date of delivery" in Line 6 with Clause 1(a) to (h) and "throughout the charter period" with Clause 1(i) to (m) recognises and gives effect to that clear difference in the nature of those sets of items. Thus, the sense of Line 6, it is thought, is "At the date of delivery of the vessel under this charter and, *in the case of (i) to (m) below*, throughout the charter period". It may seem remarkable that Clause 1 (and, by parity of reasoning, Clause 2(a)) should mix together provisions referable to the owners' obligations on delivery and provisions as to what will be required during the charter period. However, that is something Shelltime 4 has always done. Clause 2 has always contained delivery obligations (Clause 2(a)) and ongoing obligations (Clause 2(b)) and Clause 3 has always mixed together matters of ongoing maintenance and repair (Clauses 3(a) and 3(c)) and a provision concerned only

with breach of the owners' delivery obligations (Clause 3(b)), all under the marginal title (in the circumstances a misleading one), "Duty to Maintain".

37.13 The undertakings in Clauses 1(i) to (m) which, thus, apply "throughout the charter period", require the owners to follow certain specific management and reporting systems and do not require particular elaboration. However, it should be noted that they will not apply directly so as to determine the owners' liability arising out of any loss of or damage to or in connection with cargo. Any such claim, brought by the charterers or by any other person, will be subject to the Hague, Hague-Visby or Hamburg Rules pursuant to Clause 27(c)(ii). That said, if the owners have failed to comply with Clauses 1(i) to (m), that may have an impact on whether they can establish a defence to such a claim under the applicable Rules.

Oil major approvals

37.14 At Clause 43 (see paragraph 37.192, below) Shelltime 4 contains, as did the charter in *The Seaflower (No. 2)* below, an express right in the charterers to terminate the charter if the ship becomes unacceptable to "any Oil Major". The identity of these dominant oil companies is discussed at paragraph 37.194.

37.15 Additional clauses describing the ship as having certain oil major approvals at the date of the charter may be construed as conditions entitling the charterers to treat the contract as discharged if the ship does not have the stated approvals at that time. Oil major approvals, like class, are matters of status rather than seaworthiness: see *The Seaflower (No. 2)* and *The Rowan*, below (in which Longmore, L.J., suggested at [16] in the Court of Appeal report that this aspect of the description of the ship at the outset will 'normally' be a condition). It has become common to incorporate clauses drawing on provisions of the SIRE tanker vetting system established by the Oil Companies International Maritime Forum (OCIMF); see, for example, *The Savina Caylyn* [2011] 1 Lloyd's Rep. 550, in which express provision was made as to the circumstances in which difficulties with vetting approvals were to entitle the charterers to terminate the charter (in that case, three consecutive oil major vetting failures). It should also be noted that oil majors have not for some years now issued (as such) standing approvals of vetted ships and references to oil major approvals may need to be construed accordingly as connoting 'SIRE inspected/vetted and not disapproved' (see *The Rowan* [2011] 2 Lloyd's Rep. 331 and [2012] 1 Lloyd's Rep. 564 (C.A.)).

37.16 A clause by which the owners undertake to obtain a particular oil major approval within a certain time may also be construed as a condition, if the necessary implication from the contract as a whole is that it was the parties' intention to give the charterers a right to cancel if the approval was not obtained within the period.

The *Seaflower* was chartered on the Shelltime form for a period of 11 to 12 months. An additional "Majors Approval Clause" stated that the ship had Mobil, Conoco, BP and Shell approvals, and went on:

". . . Owners guarantee to obtain within 60 (sixty) days Exxon approval in addition to present approvals. On delivery date hire rate will be discounted USD250 (two hundred and fifty) for each approval missing, ie Mobil, Conoco, BP, Shell, Exxon.

If for any reason during the time-charter period, Owners would loose [sic] even one of such acceptances they must advise Charterers at once and they must reinstate the same within 30 (thirty) days from such occurrence failing which Charterers will be at liberty to cancel charterparty or to maintain same at reduced rate as stipulated above."

The owners failed to obtain the Exxon approval within 60 days and the charterers cancelled. The owners contended that a right of cancellation arose only if the owners lost an approval during the period of the time charter and failed to reinstate it within 30 days.

It was held by the Court of Appeal, reversing Aikens, J., that the obligation to obtain the Exxon approval within 60 days was a condition, breach of which entitled the charterers to treat the contract as at an end. If that provision was not so classified, it lost nearly all its effect and gave rise to uncertainty; there was no commercial

or other reason for treating a failure to obtain the Exxon approval differently from a failure to renew the other approvals and the word 'guarantee' emphasised the importance attached to the term, even though on its own the word would have been insufficient to support a conclusion that the term was a condition of the contract.

The Seaflower (No. 2) [2001] 1 Lloyd's Rep. 341 (C.A.).

(See also the report at [2000] 2 Lloyd's Rep. 37 on the charterers' alternative claim on the footing that the above term was not a condition but an intermediate term only.)

37.17 Clause 2 – Shipboard Personnel and their Duties

2. (a) At the date of delivery of the vessel under this charter and throughout the charter period:
   (i) she shall have a full and efficient complement of master, officers and crew for a vessel of her tonnage, who shall in any event be not less than the number required by the laws of the flag state and who shall be trained to operate the vessel and her equipment competently and safely;
   (ii) all shipboard personnel shall hold valid certificates of competence in accordance with the requirements of the law of the flag state;
   (iii) all shipboard personnel shall be trained in accordance with the relevant provisions of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1995 or any additions, modifications or subsequent versions thereof;
   (iv) there shall be on board sufficient personnel with a good working knowledge of the English language to enable cargo operations at loading and discharging places to be carried out efficiently and safely and to enable communications between the vessel and those loading the vessel or accepting discharge there from to be carried out quickly and efficiently;
   (v) the terms of employment of the vessel's staff and crew will always remain acceptable to The International Transport Worker's Federation and the vessel will at all times carry a Blue Card;
   (vi) the nationality of the vessel's officers given in the OCIMF Vessel Particulars Questionnaire referred to in Clause 1(h) will not change without Charterers' prior agreement;
   (b) Owners guarantee that throughout the charter service the master shall with the vessel's officers and crew, unless otherwise ordered by Charterers;
   (i) prosecute all voyages with the utmost despatch;
   (ii) render all customary assistance; and
   (iii) load and discharge cargo as rapidly as possible when required by Charterers or their agents to do so, by night or by day, but always in accordance with the laws of the place of loading or discharging (as the case may be) and in each case in accordance with any applicable laws of the flag state.

Obligations upon delivery

37.18 The detailed requirements in Clause 2(a)(i) to (iv) as to the adequacy, competence and efficiency of the crew at the date of delivery, which are also part of the description of the ship, are again absolute in nature: see under Clause 1, above. Clause 2(a)(i) is equivalent to the undertaking of seaworthiness at the time of delivery that is implied at common law, insofar as it relates to the ship's crew: see paragraph 8.56, above.

"and throughout the charter period"

37.19 As in Line 6 introducing Clause 1, see paragraphs 37.11 *et seq.*, above, it is thought these words in Line 45 do not convert the requirements of Clause 2(a)(i) to (iv) into continuing, absolute promises, contradicting Clause 3(a), but rather apply only to the promises in Clause 2(a)(v) and (vi)

which were added to Shelltime 4 at the same time. Those promises are that the ship's officers and crew will always be employed on terms acceptable to the ITF, that the ship will always carry an ITF Blue Card, and that the nationality of the ship's officers given in the Vessel Questionnaire referred to in Clause 1(h) will not change during the charter except with the charterers' prior agreement. In other words, Line 45 is to be read as "At the date of delivery of the vessel under this charter and, *in the case of (v) and (vi) below*, throughout the charter period:".

37.20 Like the promises in Clause 2(a)(v) and (vi), the 'guarantee' in Clause 2(b) is not concerned with the state of affairs at the date of delivery, but with the duties of the ship's officers and crew throughout the charter service. It is submitted that the use of the word "guarantee" in Clause 2(b) indicates only that the obligation is intended to be absolute and not that it should be construed as a condition rather than an intermediate term: for the significance of this distinction, see paragraphs G.2 and G.18, below. That said, in an early case under a tanker time charter, *Pennsylvania Shipping* v. *Cie Nationale de Navigation* (1936) 55 Ll.L.Rep. 271 (the facts of which are set out at paragraph 8.70, above), it was held the use of the word "guaranteed" in relation to the diameter of the ship's cargo lines and the position of heating coils gave the term the status of a condition.

37.21 For comments on the obligations to prosecute all voyages with the utmost despatch and render all customary assistance, see chapter 18, above.

37.22 Clause 3 – Duty to Maintain

3. (a) Throughout the charter service Owners shall, whenever the passage of time, wear and tear or any event (whether or not coming within Clause 27 hereof) requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain or restore the vessel.

(b) If at any time whilst the vessel is on hire under this charter the vessel fails to comply with the requirements of Clauses 1, 2(a) or 10 then hire shall be reduced to the extent necessary to indemnify Charterers for such failure. If and to the extent that such failure affects the time taken by the vessel to perform any services under this charter, hire shall be reduced by an amount equal to the value, calculated at the rate of hire, of the time so lost.
Any reduction of hire under this sub-Clause (b) shall be without prejudie to any other remedy available to Charterers, but where such reduction of hire is in respect of time lost, such time shall be excluded from any calculation under Clause 24.

(c) If Owners are in breach of their obligations under Clause 3(a), Charterers may so notify Owners in writing and if, after the expiry of 30 days following the receipt by Owners of any such notice, Owners have failed to demonstrate to Charterers' reasonable satisfaction the exercise of due diligence as required in Clause 3(a), the vessel shall be off-hire, and no further hire payments shall be due, until Owners have so demonstrated that they are exercising such due diligence.

(d) Owners shall advise Charterers immediately, in writing, should the vessel fail an inspection by, but not limited to, a governmental and/or port state authority, and/or terminal and/or major charterer of similar tonnage. Owners shall simultaneously advise Charterers of their proposed course of action to remedy the defects which have caused the failure of such inspection.

(e) If, in Charterers reasonably held view:
(i) failure of an inspection, or,
(ii) any finding of an inspection,
referred to in Clause 3(d), prevents normal commercial operations then Charterers have the option to place the vessel off-hire from the date and time that the vessel fails such inspection, or becomes commercially inoperable, until the date and time that the vessel passes a re-inspection by the same organisation, or becomes commercially operable, which shall be in a position no less favourable to Charterers than at which she went off-hire

(f) Furthermore, at any time while the vessel is off-hire under this Clause 3 (with the exception of Clause 3(e)(ii), Charterers have the option to terminate this charter by giving notice in writing with effect from the date on which such notice of termination is received by Owners or from any

later date stated in such notice. This sub-Clause (f) is without prejudice to any rights of Charterers or obligations of Owners under this charter or otherwise (including without limitation Charterers' rights under Clause 21 hereof).

Sub-Clause (a)

37.23 Unlike the obligations under Clauses 1 and 2 of the Shelltime 4, the obligation to maintain under Clause 3(a) is not 'absolute'. The owners' obligation is only to exercise due diligence. The obligation to maintain under Clause 2 of the Shelltime 3 form was similarly limited to the exercise of due diligence. Whether, if other terms of the charter impose on the owners an obligation to carry out specific work, such obligations are absolute or limited to the exercise of due diligence, depends upon the construction of the charter as a whole.

The *Bridgestone Maru No. 3* was chartered for one year on the Shelltime 3 form, Clause 2 of which provided: "Owners shall, before and at the date of delivery of the vessel under this charter, exercise due diligence to make the vessel in every way fit to carry fully refrigerated Butane and/or Propane and. . . in every way fit for . . . service . . . Owners undertake that throughout the period of service under this charter they will . . . require steps to be taken to maintain the vessel as stipulated in clause 1 hereof . . . " Clause 1, *inter alia*, required the ship to be in class at the date of delivery. By an additional typewritten clause the charter further provided: "Owners agree at a subsequent date that booster pump(s) shall be fitted . . ."

The charterers contended that, on a proper construction of the charter, terms were to be implied imposing on the owners an 'absolute' obligation that the booster pump would be properly and carefully installed and that the approval of the ship's classification society would be sought and obtained for that installation.

Hirst, J., in rejecting this contention, said at page 76: "In my judgment, business efficacy is fully met by the express obligation to exercise due diligence, and there is no necessity to superimpose more rigorous terms specifically applicable to the mode of installation and the class aspects of the booster pump. I therefore hold that the implied terms are not made good and that the defendants' obligations in these respects are to be found in cl. 2, though I should add that I think that the due diligence obligation in relation to class can properly be construed as including an obligation to exercise due diligence to seek and obtain any requisite class approval for any given installation."

The Bridgestone Maru No. 3 [1985] 2 Lloyd's Rep. 62.

37.24 Clause 3(a) of Shelltime 4 is applicable only to deficiencies which arise after delivery. It is not applicable to deficiencies which existed at the time of delivery and which amount to breaches of the absolute obligations under Clauses 1(a) to (h) and 2(a)(i) to (iv); see the next paragraph. It is suggested, moreover, that although Clause 3(a) refers to "Clauses 1 and 2(a)" apparently generally, in fact it cannot meaningfully apply to the promises in Clauses 1(i) to (m) and 2(a)(v) and (vi), which are quite different in nature (see paragraph 37.12, above). The draftsman appears to have overlooked this and so failed to make a necessary consequential change to Clause 3(a) when introducing those promises into the form. If, contrary to the view just expressed, Clause 3(a) is read as applying equally to those new requirements, the consequence would seem to be that they are, after all, due diligence obligations only.

37.25 In considering the equivalent Clause 3(i) of the original Shelltime 4 form in *The Fina Samco* [1994] 1 Lloyd's Rep. 153 and [1995] 2 Lloyd's Rep. 344 (C.A.) (the facts of which are set out under sub-clause (b) below), Colman, J., said, at page 158 of the first instance report: "That clause expressly contemplates that in the course of the charter service the passage of time or wear and tear or an event make it necessary for the owners to take action so that the vessel is maintained in the condition which she was required to have on delivery or, having lost that condition, is restored to it. The clause directs itself to a need to act which arises *after* delivery. It assumes that at delivery the vessel did have the required characteristics but that after delivery something has happened which either has already caused the vessel to lose one or other of those characteristics or will in future do so unless the owners act to maintain that characteristic. It is in those circumstances

that the owner's duty to exercise due diligence arises." This construction of Clause 3(a) was affirmed by Colman, J., himself in *The Trade Nomad* [1998] 1 Lloyd's Rep. 57 and, on appeal, the Court of Appeal [1999] 1 Lloyd's Rep. 723 upheld his decision.

37.26 In its application to the ship, Clause 3(a) is not confined to cases where the physical condition of hull, machinery or equipment has deteriorated since delivery. If legal or regulatory changes, or (it is suggested) changes in market practice, render a ship no longer fit, then diligent effort must be made to restore full fitness, even if that means substantial modification works: see *The Elli and The Frixos* [2008] 1 Lloyd's Rep. 262, [2008] 2 Lloyd's Rep. 119 (C.A.), and paragraph 11.16, above. The steps required of the owners by Clause 3(a) are not limited by cost, or by the agreed description of the ship at the outset. Similarly, if regulation or market come to demand different or additional crew for a ship to be accepted as fit for the chartered service, Clause 3(a) would require the owners to exercise due diligence to hire the extra men, whatever any agreed crew list at the outset might have included.

37.27 The charterers' remedies for breach of the owners' obligations under Clause 3(a) (which are, provided valid notices are given, to put the ship off hire and then to terminate the charter) are contained in Clauses 3(c) and (f). For the circumstances in which the charterers might be able to treat the charter as discharged for failure on the part of the owners to comply with their maintenance obligation, apart from Clause 3(f), see paragraphs 11.12 *et seq*., above.

37.28 For a case under a charter on the Shelltime 4 form on failure to exercise due diligence in cleaning after the carriage of cargoes of palm oil, see *The Liepaya* [1999] 1 Lloyd's Rep. 649.

Sub-Clause (b)

37.29 The provisions in Clause 3(b) for reduction in hire apply to deficiencies in respect of the requirements of Clause 1(a) to (h) or Clause 2(a)(i) to (iv) existing at the time of delivery, but not to any such deficiencies which arise only after delivery: see *The Fina Samco*, below. The provisions of Clause 3(b) also apply to deficiencies constituting a breach of Clause 10 (space available to charterers) which occur at any time and, it is suggested, likewise to a failure at any time to comply with the ongoing requirements of Clause 1(i) to (m) or Clause 2(a)(v) or (vi).

The *Fina Samco* was chartered on the original Shelltime 4 form. In the course of the charter she was ordered to discharge crude oil at two Japanese ports, Tomakomai and Nagoya. The ship arrived at Tomakomai on 21 October 1990 and commenced discharge at 0112 on 22 October. Between the time of commencing discharge and 0848 on 22 October, there was a total of 11 stoppages of discharge, ranging in length from 6 minutes to 36 minutes, due to boiler trouble. By 0830 the stoppages had amounted in aggregate to 3 hours 2 minutes. After 0848 the stoppage continued whilst attempts were made to diagnose the cause of the trouble. At 1115 on 22 October the berthing master ordered the ship to leave the berth due to deteriorating weather and sea conditions.

The arbitrator found that even if the boiler problem had not arisen, the berthing master would have ordered the ship off the berth at that time. The ship then lay off the berth unable to return because of the weather and sea conditions until 8 November. In the meantime, the cause of the trouble was identified and repairs were carried out. The arbitrator found that the defect had not existed at the time of delivery of the ship. The charterers claimed that the vessel was off hire from 22 October until 8 November (see paragraph 37.106, below, for a discussion of the off-hire aspects of the case). In the alternative, the charterers relied on the indemnity provided by Clause 3(b), which was then Clause 3(ii) of the form, contending that there was loss of time caused by the failure of the ship to comply with the requirements of Clause 1 of the charter.

It was held by Colman, J., and the Court of Appeal, that Clause 3(ii), as it was then, applied only to loss suffered by the charterers from breaches of Clauses 1, 2(a) or 10 and thus to deficiencies in the Clauses 1 or 2(a) characteristics which existed at the time of delivery under the charter. It did not apply to such deficiencies arising after the date of delivery and therefore did not apply to the boiler defects which had caused the stoppages in the discharging operation. (Clauses 1 and 2(a) of the original Shelltime 4 form contained only delivery requirements and nothing equivalent to what is now Clause 1(a)(i) to (m) or Clause 2(a)(v) and (vi).)

The Fina Samco [1994] 1 Lloyd's Rep. 153 and [1995] 2 Lloyd's Rep. 344 (C.A.).

37.30 In *The Fina Samco*, above, Colman, J., said, at page 159 of the first instance report: "[Clause 3(ii)] provides a remedy by way of indemnity for losses sustained while the vessel is on hire caused by breach of a group of obligations under the charter which are of an unqualified nature. So construed it is not concerned with the actual or potential loss of the cll. 1 or 2(a) characteristics after delivery where there was no deficiency at the time of delivery. That eventuality falls within cl. 3(i) and gives rise to a quite separate due diligence obligation to which cl. 3(iii) is an ancillary sanction. If there is loss of time due to non-compliance with the cll. 1, 2(a) or 10 obligations there will be a cl. 3(ii) indemnity and the vessel may also go off-hire under the off-hire clause. If there is loss of time due to non-compliance with a cl. 3(i) obligation, the vessel may go off-hire under cl. 3(iii) or under the off-hire clause. In my judgment, however, there is nothing in cl. 3(ii) which provides, in addition to those remedies for breach of cl. 3(i), an indemnity by way of reduction of hire." (Clauses 3(i), 3(ii) and 3(iii) of the original Shelltime 4 form were equivalent to current Clauses 3(a), 3(b) and 3(c).)

37.31 The Court of Appeal in affirming the judge's construction of Clause 3(ii) acknowledged that it did not fit easily with the words in the sub-clause "If at any time. . .the vessel fails to comply with the requirements. . ." of Clauses 1 or 2(a). But the Court of Appeal concluded that if Clause 3(ii) did apply to deficiencies in Clauses 1 or 2(a) characteristics arising after delivery, as the charterers contended, it would in effect transform the maintenance obligation in Clause 3(i), in terms a due diligence obligation, into an absolute obligation to maintain the ship throughout the charter period in the state she was required to be in on delivery. Therefore, construing Clause 3 as a whole, sub-clause (ii) could only make business sense if it was restricted to deficiencies in Clause 1 or Clause 2(a) characteristics which existed at the time of delivery but continued thereafter, and to deficiencies constituting a breach of Clause 10 which occurred at any time. It is suggested that the reasoning and conclusions of the Court of Appeal hold true for the revised Shelltime 4, but with the necessary adaptation indicated in paragraph 37.29 above to take account of the new, and ongoing, undertakings in Clause 1(i) to (m) and Clause 2(a)(v) and (vi).

Sub-Clause (c)

37.32 Clause 3(c) entitles the charterers to put the ship off hire if the owners have failed to exercise due diligence to restore full fitness, have been notified by the charterers of that failure and then fail within 30 days to demonstrate to the charterers' reasonable satisfaction that due diligence is now being exercised. A notice under Clause 3(c) alleging a breach of the owners' obligations under Clause 3(a) must identify in what way the owners are in breach, so that the nature of the charterers' complaint is known. Tuckey, J., so held in *Bocimar* v. *Anders Wilhelmsen (The Ensor, Permeke and Vesalius)* (1993), unreported, affirming the decision of an arbitrator that it was necessary to imply such a term in Clause 3(iii), the equivalent of Clause 3(c) in the original Shelltime 4 form, in order to give the contract business efficacy. In that case, under a charter on the original Shelltime 4 form, the charterers had in the past communicated complaints to the owners regarding deficiencies in the hatch covers, which they alleged made the ships unfit to carry oil cargoes. Subsequently the charterers gave notices to the owners under Clause 3(iii), which referred to complaints, but did not specifically refer to the earlier complaints. It was held by the arbitrator that the notices were invalid and that consequently the ships were not put off hire under Clause 3(iii) and Tuckey, J., affirmed his decision.

Sub-Clauses (d) and (e)

37.33 In an age of ever-increasing vigilance as to the condition of the world tanker fleet, these provisions, which were not in the original Shelltime 4, grant the charterers important rights should

external agencies or commercial parties find fault with the ship on inspection. The general scheme of the provisions is clear enough: the owners agree to notify the charterers at once if an inspection is failed, advising the charterers of their plan to set things right; if the charterers reasonably judge that their normal commercial operations are prevented, they may put the ship off hire. There are, however, two ambiguities in the drafting that could give rise to dispute.

37.34 First, Clause 3(d) applies if the ship fails "an inspection by, but not limited to" stated types of entity. The phrase "by, but not limited to" leaves it unclear whose inspections other than those of the stated types will trigger the owners' obligations. Moreover, there could no doubt be costly and time-consuming argument over who is or is not a "major charterer" or over how wide is the net of "similar tonnage". It is, perhaps, possible that Clause 3(e) will assist in construing these provisions, leading to a conclusion that all inspections failure of which is liable to render the ship "commercially inoperable", and only such inspections, fall within Clause 3(d). It would, though, be more helpful if Clause 3(d) itself were clear. It has become common for additional clauses to be incorporated which refer, as does Clause 43, to "any Oil Major" (as to which see paragraph 37.194, below) and draw on the SIRE tanker inspection and vetting system established by the Oil Companies International Marine Forum (OCIMF); see, for example, *The Savina Caylyn* [2011] 1 Lloyd's Rep. 550.

37.35 Second, Clause 3(e)(ii) entitles the charterers to put the ship off hire when "any finding of an inspection, referred to in Clause 3(d)" prevents normal commercial operation of the ship. It is unclear whether that is limited to inspections that have been failed. For example, a major charterer of similar tonnage might find on inspection defects in equipment that is often important but not to that charterer. The owners have no obligation to report the inspection result or provide an action plan under Clause 3(d), but the defect could disrupt the charterers' normal commercial operations. It is suggested that Clause 3(e)(ii) probably does not then apply and the charterers must rely on Clause 3(a) and (c), or the off-hire clause, which may be sufficient to protect their interests, but the wording of Clause 3(e) is not as clear as it could be.

Sub-Clause (f)

37.36 This confers on the charterers a right to terminate the charter by notice to the owners if the ship is "off-hire under this Clause 3 (with the exception of Clause 3(e)(ii))".

37.37 That is straightforward, so far as Clause 3(c) and Clause 3(e) are concerned. But is Clause 3(f) engaged by Clause 3(b)? It is perhaps tempting to say so, since only Clause 3(e)(ii) is expressly excluded from the operation of Clause 3(f). It is suggested that is not the correct reading, however. Clause 3(b) does not refer to "off-hire" or to putting the ship off hire, but operates to extend the charterers' rights of set-off against hire, where there has been a breach of Clause 1, 2(a) or 10. (See chapter 16 on rights of set-off against hire.) In *The Fina Samco* at first instance, Colman, J., indicated that in a case falling within Clause 3(ii), as it was in the original Shelltime 4 form, off-hire was governed by the off-hire clause (Clause 21), in other words not by Clause 3; see paragraph 37.30, above.

37.38 Clause 4 – Period, Trading Limits and Safe Places

4. (a) Owners agree to let and Charterers agree to hire the vessel for a period of ____ 110
plus or minus ____ days in Charterers' option, commencing from the time and date of delivery 111
of the vessel, for the purpose of carrying all lawful merchandise (subject always to Clause 28) 112
including in particular; 113
_____ 114
in any part of the world, as Charterers shall direct, subject to the limits of the current British 115
Institute Warranties and any subsequent amendments thereof. Notwithstanding the foregoing, 116

but subject to Clause 35, Charterers may order the vessel to ice-bound waters or to any part of the world outside such limits provided that Owner's consent thereto (such consent not to be unreasonably withheld) and that Charterers pay for any insurance premium required by the vessel's underwriters as a consequence of such order.

(b) Any time during which the vessel is off-hire under this charter may be added to the charter period in Charterers' option up to the total amount of time spent off-hire. In such cases the rate of hire will be that prevailing at the time the vessel would, but for the provisions of this Clause, have been redelivered.

(c) Charterers shall use due diligence to ensure that the vessel is only empoloyed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid. Subject as above, the vessel shall be loaded and discharged at any places as Charterers may direct, provided that Charterers shall exercise due diligence to ensure that any ship-to-ship transfer operations shall conform to standards not less than those set out in the latest published edition of the ICS/OCIMF Ship-to-Ship Transfer Guide.

(d) Unless otherwise agreed, the vessel shall be delivered by Owners dropping outward pilot at a port in

_____

at Owners' option and redelivered to Owners dropping outward pilot at a port in _____ ,

at Charterers' option.

(e) The vessel will deliver with last cargo(es) of _____ and will redeliver with last cargo(es) of _____

(f) Owners are required to give Charterers _____ days prior notice of delivery and Charterers are required to give Owners _____ days prior notice of redelivery.

37.39 Questions which may arise under Clause 4(a), Lines 110 to 120, of Shelltime 4 are dealt with in the earlier chapters of this book under Duration (chapter 4), Lawful Merchandise (chapter 9) and Trading Limits (chapter 5). Under Lines 115 and 116, trading is restricted to British Institute Warranty limits, but notwithstanding that, and subject to Clause 35 (the war risks clause), the charterers may order the ship not only to ice-bound ports but to 'any part of the world' outside Institute Warranty limits, provided that the owners consent and that the charterers pay any additional insurance premium. A general consent to trade outside the trading limits specified in the charter may not release the charterers from their obligations in regard to the safety of ports, even if they pay the premium required for breaching the limits: see paragraph 35.16, above. The position may however be different if the owners consent to go to a specified port.

37.40 Clause 4(b), Lines 121 to 124, grants to charterers the option to add off-hire periods to the end of the charter and stipulates that if that option is exercised, hire for the extra time is to be paid at the rate prevailing when the ship would otherwise have been redelivered, that is to say at the end of the primary charter period, rather than (if different) when the off-hire period occurred.

37.41 Clause 4(c), Lines 125 to 135, deals with the obligation upon the charterers to exercise due diligence to ensure that the ship is employed only between safe ports and places. This obligation, which is common to most tanker charters, is narrower than the usual obligation as to the safety of ports undertaken by charterers under dry cargo time charters. It may be overridden, so that an absolute undertaking is imposed after all, by unqualified language as to safety in the fixture recap: see *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, *per* Colman, J., *obiter*, at [315]. If charterers fixing for trading within "safe ports" (or some equivalent shorthand) and incorporating Shelltime 4 terms intend Clause 4(c) to apply, they would be well advised to ensure that is spelt out in the recap. Where Clause 4(c) does apply, the exclusion of liability in respect of unsafety, except for loss or

damage caused by charterers' failure to exercise due diligence, together with "Subject as above" in Line 131, probably rules out a claim for an implied indemnity of the sort considered in chapter 19, above, in the context of Clause 8 of the New York Produce form. (That point does not appear to have been considered in the case law. It could have arisen in *The Chemical Venture*, below, but it would seem that no claim on the basis of an implied indemnity was even put forward by the owners in that case.) It is suggested, however, that the restriction of the charterers' responsibility to the exercise of due diligence does not mean that the master is obliged to use an unsafe port or berth, although it is perhaps possible to read Lines 131 and 132 literally as having that effect.

37.42 Where damages are sought by the owners under Clause 4(c) in respect of loss or damage resulting from an order to an unsafe port, the correct approach is to consider first whether the port is safe, applying the criteria laid down in *The Eastern City* [1958] 2 Lloyd's Rep. 127, *The Evia (No. 2)* [1982] 2 Lloyd's Rep. 307 and other relevant authorities (see chapter 10, above). If, on those criteria, the port is unsafe, the question then has to be considered whether the charterers have exercised due diligence: see *The Saga Cob* [1992] 2 Lloyd's Rep. 545 (C.A.), and *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, *per* Gatehouse, J., at page 510.

37.43 Due diligence in this context means the same as reasonable care; see *The Saga Cob*, above, *per* Parker, L.J., at page 551 and *The Chemical Venture*, *per* Gatehouse, J., at page 519. A due diligence clause thus protects charterers who do not know of the unsafety of the port unless prudent charterers, giving the matter careful consideration after due enquiry, would have concluded that the port was unsafe. In *The Saga Cob*, the Court of Appeal did not have to decide whether due diligence had been exercised, but expressed the opinion that even if the charterers know the facts giving rise to the risk that renders the port unsafe, it does not necessarily follow that they have failed to exercise due diligence. If the charterers order the ship to a port regarded generally by the owners as safe, the Court of Appeal considered that they might well be protected. But clearly charterers could only be protected in such circumstances if those owners who regard the port as safe also know the facts giving rise to the prospective unsafety. Moreover, the Court of Appeal's observation should not be taken too far. First, a due diligence clause does not entitle charterers, who know or reasonably ought to appreciate that a port is unsafe, to decide for the owners that the degree of unsafety is such that the risk should be undertaken: see *The Saga Cob*, *per* Judge Diamond, Q.C., at page 408 of the first instance report. Second, if the charterers know the facts giving rise to the risk that renders a port unsafe, the natural inference may be that they ought to realise the port is unsafe, in which case (as in *The Chemical Venture*, below) they may be held in breach if they do not adduce evidence to justify their order. Third, it would not be sufficient for the charterers to adduce some opinions that the port was safe if there was evidence that other users, qualified to give an opinion, held a contrary view.

The *Saga Cob* was time chartered on the Shelltime 3 form. Clause 3 of that form (the relevant part of which was similar to Clause 4(c) of the Shelltime 4) provided: "Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports. . . where she can always lie safely afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any port. . . and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

The ship was to be employed under the charter in the Red Sea, the Gulf of Aden and East Africa for the carriage of clean petroleum products. In the course of the charter, she called about 20 times at Massawa without incident. On 26 August 1988 she was again ordered to proceed to Massawa, but while anchored off the port on 7 September she was attacked by armoured boats of the Eritrean Peoples' Liberation Front (EPLF) – an anti-government guerrilla movement – and was damaged. Prior to this date there had been sporadic attacks on the town of Massawa, but insufficient to make it an unsafe port. As for attacks at sea, on 31 May 1988 another vessel had been attacked by EPLF boats 65 miles south of Massawa whilst in a convoy of which the *Saga Cob* formed part. Thereafter, *Saga Cob* was given a naval escort from time to time but no

further attacks on shipping took place until 7 September 1988 and, apart from that one incident, there were no further attacks on shipping until January 1990.

It was held by Judge Diamond, Q.C., at first instance, that on the date the order was given, 26 August, Massawa was a prospectively unsafe port on the ground that there was on that date a foreseeable risk of seaborne attack by the EPLF which, while not involving a high degree of risk, was a risk which was more than negligible. He further held that since the charterers were aware of the facts and the relevant risks, they had failed to exercise due diligence. He said, at page 408, that the due diligence clause "does not entitle the charterer to treat on behalf of owners any degree of risk of danger to the vessel or crew as constituting an acceptable risk. Nor does the clause confer any discretion on the charterers to determine on behalf of owners whether a port is or is not safe. Nor does it entitle the charterer to decide on behalf of owners that the degree of unsafety is such that the risk ought to be undertaken."

The Court of Appeal, reversing Judge Diamond, Q.C., held that Massawa was a safe port on 26 August and that the judge had adopted an incorrect test by asking whether the risk of attack was foreseeable. The fact that an attack was a foreseeable possibility did not make the risk of attack a characteristic of the port and did not prevent the actual attack on *Saga Cob* from being an abnormal and unexpected event. The court emphasised the absence of any incident between May and August, the absence of any evidence that the naval escort system was in any way defective and the fact that there were no further attacks until January 1990, and concluded that the risk of guerrilla attack on ships using Massawa was not a characteristic of the port. In relation to due diligence, Parker, L.J., giving the judgment of the court, said, at page 551, that "if a charterer knows all the facts and orders the vessel to a port which is regarded generally by owners of vessels to be safe, he might well be protected'. On that basis, it might not be enough to show that the charterers should have concluded that there was a small but appreciable risk of attack and there was 'at least a strong argument that the test [of want of due diligence] should be expressed thus – 'if a reasonably careful charterer *would* on the facts known have concluded that the port was prospectively unsafe'" (original emphasis).

The Saga Cob [1991] 2 Lloyd's Rep. 398 and [1992] 2 Lloyd's Rep. 545 (C.A.).

(See also the comments on this case by Davenport in [1993] LMCLQ 150.)

37.44 The Court of Appeal in *The Saga Cob* regarded subsequent history – the absence of any further incidents for 18 months after the attack on the ship – as relevant not only to the assessment of the safety of the port, but also to the question whether the charterers had exercised due diligence. In *The Chemical Venture*, below, Gatehouse, J., expressed reservations about both aspects of that. He could not see how subsequent events could be relevant to the issue whether the charterers exercised due care at the time they gave the order to go to a port which at that time and for that ship was prospectively unsafe ([1993] 1 Lloyd's Rep. 508, at page 519). That seems a well-founded concern and it is suggested that the Court of Appeal's view that subsequent history is relevant to whether due diligence has been exercised does not represent the law. That may not matter much in practice, however, as subsequent history could still be relevant to causation, where due diligence was not exercised, as it may assist in determining what view about the safety of the port would have been arrived at by reasonably careful charterers. Gatehouse, J., also questioned the Court of Appeal's view that subsequent history could be relevant to the question of the (prospective) safety of the port when the order to go there was given. In that respect, it is suggested that the Court of Appeal's view is correct and Gatehouse, J., was wrong to question it. The subsequent history of a port may throw light on how matters stood in the port, and therefore how safe or unsafe it was for a particular ship, at an earlier date. For example, subsequent incidents might produce evidence, or better evidence, of the nature or extent of hazards not fully appreciated, but nonetheless present, at the earlier time. Or, particularly with new ports or other facilities, subsequent history may be a valuable indication of whether ordinary good navigation is apt to cope with the dangers they present. In *The Chemical Venture* no evidence from other owners, charterers or masters was adduced. The judge considered that the facts constituting unsafety (of which the charterers were fully aware) spoke for themselves and the charterers had failed to exercise due diligence.

The Liberian tanker, *Chemical Venture*, chartered on the Shelltime 3 form, was ordered to load at Mina al Ahmadi in Kuwait during the Iran/Iraq war. Shortly before the order was given, Iran had begun air attacks on any tankers using Saudi Arabian and Kuwaiti terminals. At first the master and crew refused to proceed, but helped by the owners with whom they exchanged several telex messages, the charterers eventually persuaded them to do so against payment of war bonuses. The ship was severely damaged by a missile from an Iranian warplane while in the channel leading to Mina al Ahmadi in which three other tankers had been similarly attacked in the previous 11 days (and in which 11 tankers of various flags were subsequently attacked during the next five months).

In the Commercial Court, Gatehouse, J., held that: (a) Clause 3 of the charter applied in the case of political as well as physical dangers; (b) Mina al Ahmadi was unsafe, Iranian air attacks being a normal characteristic of the approach voyage for a tanker, rather than abnormal or unexpected events; (c) the charterers, who knew the relevant facts, had failed to exercise due diligence and were in breach of Clause 3; but (d) what the owners had said (and not said) in their telex exchanges with the charterers while the crew bonuses were being arranged amounted to an unequivocal representation that they would not treat the orders to Mina al Ahmadi as a breach of Clause 3, and this prevented them from subsequently claiming damages from the charterers (but as to that see paragraph 10.66, above).

The Chemical Venture [1993] 1 Lloyd's Rep. 508.

37.45 One of the arguments raised on behalf of charterers in *The Chemical Venture* in support of their contention that the safe port provisions of the Shelltime form applied only to physical risks and not to political risks, and in particular war risks, was that the war risk provisions of the Shelltime 3 constituted a complete and exhaustive code dealing with the parties' rights in the event that any aspect of performance became affected by a war and that it was therefore unnecessary to look to the safe port provisions of Clause 3. The judge, however, rejected this argument, holding that the terms of the Shelltime 3 charter were materially different from those in the case of *The Evia (No. 2)* in which the House of Lords had held that the war risks clause of the Baltime charter did constitute such a complete code: see, for the judge's reasoning on this point in *The Chemical Venture*, paragraphs 37.173 *et seq.*, below. The war risks clause of the Shelltime 4 form is in similar terms to the war risks clause of Shelltime 3, but the war insurance provisions in Shelltime 4 and the provisions in regard to additional war expenses are different: see paragraph 37.168, below.

Delegation of selection of berths

37.46 This is dealt with at paragraphs 10.89 and 10.90, above, but in the context of Clause 4 of the Shelltime 4 form, Timothy Walker, J., in *Dow Europe* v. *Novoklav*, below, in considering an argument on behalf of time charterers that the due diligence provision in Clause 4 should be construed "in the personal sense", stated at page 309 of the report: "The short answer is, in my judgment, that this clause does not say so. The standard construction of a due diligence provision is that the obligation is one of due diligence 'by whomsoever it may be done' even if the obligation is delegated to an independent contractor (see *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57; [1961] A.C. 807), unless this is ousted by clear words restricting the obligation to one of personal want of due diligence." So an order given by time charterers for the ship to proceed to a particular port where the selection of the berth is in the hands of the port authority or terminal will, under Clause 4, make the charterers responsible for any want of due diligence as to the safety of the berth on the part of the port authority or terminal.

The *Alcina* was time-chartered on the original Shelltime 4 form to Novoklav, who sub-chartered her to Dow. She was ordered by Novoklav to Arzew, which was controlled by Sonotrach, to load condensate. At the berth to which she was ordered by Sonotrach or the port authority, EPA, there was a fire and the ship suffered damage. Novoklav settled the claim of the owners and claimed over against Dow. As arbitrators found, the berth was unsafe because there was no emergency shutdown system in place and this was the cause of the accident. Dow argued that the settlement made by Novoklav was unjustified because their obligation under Clause 4 of the Shelltime 4 was no more than an obligation of due diligence in the selection of the port. It

was found by arbitrators that both Sonotrach and EPA must have known of the deficiencies of the berth and their failure to exercise due diligence in regard to the safety of the berth was in law the failure of Novoklav. Timothy Walker, J., affirmed the arbitrators' decision.

Dow Europe v. *Novoklav* [1998] 1 Lloyd's Rep. 306.

37.47 Delivery and redelivery are dealt with in Clause 4(d), Lines 136 to 141. Where the owners, in exercise of their option, nominate a particular port of delivery, the charterers may be relieved of any obligation as to safety in regard to that port: see paragraphs 10.79 to 10.81, above. Clause 4(e), Line 142, provides the parties with an opportunity to specify what last cargo the ship is to have carried prior to delivery (an obligation on the owners' part) and prior to redelivery (an obligation on the charterers' part). Clause 4(f), Lines 143 to 144, provides a location within the standard form for inserting requirements for the owners to give advance notice of delivery and for the charterers to give advance notice of redelivery, as to which in general see paragraphs 7.18 *et seq.* and 15.13 *et seq.*, respectively.

37.48 Clause 5 – Laydays/Cancelling

5. The vessel shall not be delivered to Charterers before _____ 145
and Charterers shall have the option of cancelling this charter if the vessel is not ready and at their 146
disposal on or before _____ 147

37.49 This clause gives the charterers the option of cancelling if the ship is not ready and at their disposal before the stipulated date. The state of readiness required is, no doubt, that set out in Clauses 1(a) to (h) and 2(a)(i) to (iv) of Shelltime 4. For general comments on readiness and cancelling clauses, see chapters 7, 8 and 24.

37.50 The cancelling clause in the Essotime form in *The Arianna* [1987] 2 Lloyd's Rep. 376 was in somewhat similar terms to that of the Shelltime form. The charter provided:

"3. . . . hire to commence when written notice. . . has been given. . . that the vessel. . . being then ready. . . and in every way fitted for the service and the carriage of see Clause 57, and being on delivery tight, staunch and strong. . . with pipe lines, pumps and heater coils in good working condition, so far as the same can be attained by the exercise of due diligence. . .
4. . . . Charterer shall have liberty to cancel this Charter should Vessel not be ready in accordance with the provisions hereof. . .
57A. The vessel to be employed in general product trading with all liquid cargoes that can safely be handled by product tankers. . .
69. Owner to at all times maintain tank cleaning system in good order such that 6 machines can run simultaneously, at sea water temperature of 180´F at 170 P.S.I. pressure."

37.51 The facts of the case are set out under Clause 1, above, at paragraph 37.8. One of the questions which arose was whether the charterers were entitled to cancel by reason of the fact that the ship was unable to comply with Clause 69 at the time of delivery. In considering the cancelling clause, Webster, J., said, at page 387: "It is common ground that the charterers' right to cancel the charter depends, in the first instance, upon the proper construction of cl. 4. [Counsel], on behalf of the charterers, contended that the reference in cl. 4 to 'the provisions hereof' was to be taken as a reference to all the provisions of the charter-party (which would include a number of very detailed provisions contained in cl. 80), and that in particular it constituted a reference to cl. 69. I reject that contention. In my view, the words 'ready in accordance with the provisions hereof' in cl. 4 are to be construed as a reference to the provisions of cl. 3; and, in my view, those words are to be taken as a reference, therefore, to the words in cl. 3 beginning at the words 'then ready' and ending at the words 'attained by the exercise of due diligence'. This was the conclusion of the arbitrators. . . with which I respectfully agree."

37.52 The arbitrators in their award, which was appealed to the Commercial Court, had stated: "The charterers argued that the words in Clause 4, 'ready in accordance with the provisions hereof" meant that the vessel as tendered had to satisfy every provision of the charter which could be applicable at the delivery date. We do not agree with this very wide construction of the cancelling clause in this charter. In our view this cancelling clause is specially related to those provisions of the charter dealing with readiness for delivery. The Clause is only intended to give an option to cancel if the vessel is not ready for delivery by the cancelling date. The particular term as to readiness for delivery is Clause 3, and in our view the Charterer is only entitled to cancel under Clause 4 if the vessel does not satisfy the provisions as to readiness for delivery specified in Clause 3."

37.53 In the particular circumstances of the case it was held that the charterers were not entitled to cancel: see under Clause 1 above.

37.54 Clause 6 – Owners to Provide

6. Owners undertake to provide and to pay for all provisions, wages (including but not limited to all overtime payments), and shipping and discharging fees and all other expenses of the master, officers and crew; also, except as provided in Clauses 4 and 34 hereof, for all insurance on the vessel, for all deck, cabin and engine-room stores, and for water; for all drydocking, overhaul, maintenance and repairs to the vessel; and for all fumigation expenses and de-rat certificates. Owners' obligations under this Clause 6 extend to all liabilities for customs or import duties arising at any time during the performance of this charter in relation to the personal effects of the master, officers and crew, and in relation to the stores, provisions and other matters aforesaid which Owners are to provide and pay for and Owners shall refund to Charterers any sums Charterers or their agents may have pad or been compelled to pay in respect of any such liability. Any amounts allowable in general average for wages and provisions and stores shall be credited to Charterers insofar as such amounts are in respect of a Period when the vessel is on-hire.

37.55 Clause 7 – Charterers to Provide

7. (a) Charterers shall provide and pay for all fuel (except fuel used for domestic services), towage and pilotage and shall pay agency fees, port charges, commissions, expenses of loading and unloading cargoes, canal dues and all charges other than those payable by Owners in accordance with Clause 6 hereof, provided that all charges for the said items shall be for Owners' account when such items are consumed, employed or incurred for Owners' purposes or while the vessel is off-hire (unless such items reasonably relate to any service given or distance made good and taken into account under Clause 21 or 22); and provided further that any fuel used in connection with a general average sacrifice or expenditure shall be paid for by Owners.
   (b) In respect of bunkers consumed for Owners' purposes these will be charged on each occasion by Charterers on a "first-in-first-out" basis valued on the prices actually paid by Charterers.
   (c) If the trading limits of this charter include ports in the United States of America and/or its protectorates then Charterers shall reimburse Owners for port specific charges relating to additional premiums charged by providers of oil pollution cover, when incurred by the vessel calling at ports in the United States of America and/or its protectorates in accordance with Charterers orders.

37.56 For general comments on such clauses, see chapter 12, above. For observations on the obligation of charterers to provide and pay for agency fees in Clause 20 of the Beepeetime 2 charter, see *The Sagona* [1984] 1 Lloyd's Rep. 194 and paragraph 12.23, above.

37.57 Clause 8 – Rate of Hire

8. Subject as herein provided, Charterers shall pay for the use and hire of the vessel at the rate of United States Dollars ____ per day, and pro rata for any part of a day, from

the time and date of her delivery (local time) to Charterers until the time and date of redelivery (local time) to Owners.

37.58 The stipulation that local time shall be used in the computation of hire avoids the difficulties of construction in charters which contain no such express stipulation: see *The Arctic Skou* [1985] 2 Lloyd's Rep. 478 and chapter 14, above. It is supplemented by a general requirement in Clause 21(f) that all references to "time" in the Shelltime 4 form are references to local time, if nothing to the contrary is stated. For a definition of "delivery", see paragraphs I.13, I.35 and 7.1, above, and for comments on redelivery, paragraphs I.13, I.37 and chapter 15.

37.59 Clause 9 – Payment of Hire

9. Subject to Clause 3(c) and 3(e), payment of hire shall be made in immediately available funds to: ____
____
Account:____
____
in United States Dollars per calendar month in advance, less:
(i) any hire paid which Charterers reasonably estimate to relate to off-hire periods, and;
(ii) any amounts disbursed on Owners' behalf, any advances and commission thereon, and charges which are for Owners' account pursuant to any provision hereof, and;
(iii) any amounts due or reasonably estimated to become due to Charterers under Clause 3(c) or 24 hereof,

any such adjustments to be made at the due date for the next monthly payment after the facts have been ascertained. Charterers shall not be responsible for any delay or error by Owners' bank in crediting Owners' account provided that Charterers have made proper and timely payment.
In default of such proper and timely payment:
(a) Owners shall notify Charterers of such default and Charterers shall within seven days of receipt of such notice pay to Owners the amount due, including interest, failing which Owners may withdraw the vessel from the service of Charterers without prejudice to any other rights Owners may have under this charter or otherwise; and;
(b) Interest on any amount due but not paid on the due date shall accrue from the day after that date up to and including the day when payment is made, at a rate per annum which shall be 1% above the U.S. Prime Interest Rate as published by the Chase Manhattan Bank in New York at 12.00 New York time on the due date, or, if no such interest rate is published on that day, the interest rate published on the next preceding day on which such a rate was so published, computed on the basis of a 360 day year of twelve 30-day months, compounded semi-annually.

37.60 General comments on payment of hire and withdrawal are to be found in chapter 16, above.

37.61 The obligation to pay hire is subject to Clause 3(c), which entitles the charterers to make no further hire payments in certain circumstances when the owners have breached their maintenance obligations, and Clause 3(e), which entitles the charterers to put the ship off hire in certain circumstances following a failed inspection of the ship. Payment of hire is to be made in "immediately available funds". This terminology does not exactly reflect the definition in the authorities of the equivalent of a cash transfer, namely a transfer which gives the owners an unconditional right to the immediate use of the funds transferred: see *The Brimnes* [1972] 2 Lloyd's Rep. 465, [1974] 2 Lloyd's Rep. 241 (C.A.) and *The Chikuma* [1981] 1 Lloyd's Rep. 371 (H.L.), paragraph 16.30, above. In *The Chikuma* the funds transferred were immediately available, but were held not to be unconditional and thus not the commercial equivalent of cash; see paragraph 16.35, above.

37.62 Under Clause 9(i) the charterers cannot make any deduction from a hire payment in

respect of anticipated off-hire, even if the ship is off hire at the time the hire payment is due, since a deduction can be made only in respect of "any hire paid". This is different from the position which has been said to pertain under charters in which the off-hire clause provides that 'the payment of hire shall cease' when time is lost from the specified causes: see *The Lutetian* [1982] 2 Lloyd's Rep. 140 and paragraphs 16.18 and 25.69, above.

37.63 However, under Clause 9(iii), the charterers may deduct amounts due or reasonably estimated to become due in the future under either of two other provisions. The provisions in question are identified as Clause 3(c) and Clause 24. Clause 24 is the Shelltime 4 speed and performance regime, so this makes sense (and indeed makes sense of Clause 24(b); see paragraph 37.120, below). The reference in Clause 9(iii) to Clause 3(c), however, does not make sense. In the original Shelltime 4, the reference was to Clause 3(b) (or, rather, Clause 3(ii), as it was then). Since Clause 3(c) is already catered for, within Clause 9, by the opening words in Line 179, and is not sensible in Clause 9(iii), it is thought the reference to it in Line 189 is to be interpreted as a typographical error for Clause 3(b). Then Clause 9(iii) has the effect, for example, that if a breach of Clause 10 deprives the charterers of space to which they are contractually entitled, they may deduct the value of the unavailable space from advance hire payments.

37.64 Lines 192 and 193, providing that the charterers shall not be responsible for any delay or error on the part of the owners' bank, merely serve to emphasise that the charterers are responsible, as between themselves and the owners, for any delay or error on the part of their own bank. In default of "proper and timely" payment, the owners do not have an immediate right to withdraw, but under Clause 9(a) must give seven days' notice before doing so. A valid notice cannot be given until after the time for payment has expired, which means after 2400 hours on the due date at the place where payment is to be made: see *The Afovos* [1983] 1 Lloyd's Rep. 335 (H.L.) and paragraph 16.94, above. Following the giving of a valid notice, the charterers have seven days within which to make payment, but in addition to the hire due, they must also pay interest calculated in accordance with Clause 9(b) and only that full payment, that is to say, including interest, will prevent the owners from becoming entitled to withdraw.

37.65 Clause 10 – Space Available to Charterers

10. The whole reach, burthen and decks on the vessel and any passenger accommodation (including Owners' suite) shall be at Charterers' disposal, reserving only proper and sufficient space for the vessel's master, officers, crew, tackle, apparel, furniture, provisions and stores, provided that the weight of stores on board shall not, unless specially agreed, exceed ____ tonnes at any time during the charter period.

37.66 If the owners are in breach of Clause 10, the charterers have a right under Clause 3(b) to a reduction of hire, apart from any other remedy they may have for breach: see *The Fina Samco* [1994] 1 Lloyd's Rep. 153 and [1995] 2 Lloyd's Rep. 344 (C.A.). It is thought they may also be able to deduct from advance hire the value of the space not available to them, although this requires recognition of a typographical error in the standard form at Line 189: see under Clause 9(iii) above.

37.67 Clause 11 – Segregated Ballast

11. In connection with the Council of the European Union Regulation on the Implementation of IMO Resolution A747(18) Owners will ensure that the following entry is made on the International Tonnage Certificate (1969) under the section headed "remarks":
"The segregated ballast tanks comply with the Regulation 13 of Annex 1 of the Convention for the prevention of pollution from ships, 1973, as modified by the Protocol of 1978

relating thereto, and the total tonnage of such tanks exclusively used for the carriage of segregated water ballast is ____ The reduced gross tonnage which should be used for the calculation of tonnage based fees is ____ ".

37.68 Clause 12 – Instructions and Logs

12. Charterers shall from time to time give the master all requisite instructions and sailing directions, and the master shall keep a full and, correct log of the voyage or voyages, which Charterers or their agents may inspect as required. The master shall when required furnish Charterers or their agents with a true copy of such log and with properly completed loading and discharging port sheets and voyage reports for each voyage and other returns as Charterers may require. Charterers shall be entitled to take copies at Owners' expense of any such documents which are not provided by the master.

37.69 See generally on this subject chapter 19, above. See also chapter 22, above.

37.70 There may be circumstances in which it may be reasonable for the owners or the master not to comply with instructions immediately. In *The Houda* [1994] 2 Lloyd's Rep. 541, the facts of which are set out under Clause 13, below, the ship was chartered on the original Shelltime 4 form and was issued by the charterers with standing instructions stating: "All instructions relating to the voyages of your vessel will be issued by Kuwait Petroleum Corp. in Kuwait.' When, following the invasion of Kuwait by Iraq, voyage instructions were received by the ship from London, the owners declined to comply with them, questioning whether the instructions were lawful since they did not originate from Kuwait. It was held by the Court of Appeal that in principle owners under a time charter might be entitled to a reasonable time to consider the implications of obeying instructions if they had reasonable doubts about the lawfulness of the orders. Neill, L.J., said, at page 549: 'It is not of course for this Court to decide whether on the facts the owners had reasonable grounds to pause, but I am satisfied that in a war situation there may well be circumstances where the right, and indeed the duty, to pause in order to seek further information about the source of and the validity of any orders which may be received is capable of arising even if there may be no immediate physical threat to the cargo or the ship."

37.71 Clause 13 – Bills of Lading

13. (a) The master (although appointed by Owners) shall be under the orders and direction Charterers as regards employment of the vessel, agency and other arrangements, and shall sign Bills of Lading as Charterers or their agents may direct (subject always to Clauses 35(a) and 40) without prejudice to this charter. Charterers hereby indemnify Owners against all consequences or liabilities that may arise;
    (i) from signing Bills of Lading in accordance with the directions of Charterers or their agents, to the extent that the terms of such Bills of Lading fail to conform to the requirements of this charter, or (except as provided in Clause 13(b)) from the master otherwise complying with Charterers' or their agents' orders;
    (ii) from any irregularities in papers supplied by Charterers or their agents.

    (b) If Charterers by telex, facsimile or other form of written communication that specifically refers to this Clause request Owners to discharge a quantity of cargo either without Bills of Lading and/or at a discharge place other than that named in a Bill of Lading and/or that is different from the Bill of Lading quantity, then Owners shall discharge such cargo in accordance with Charterer's instructions in consideration of receiving the following indemnity which shall be deemed to be given by Charterers on each and every such occasion and which is limited in value to 200% of the CIF value of the cargo carried on board;
    "(i) Charterers shall indemnify Owners and Owners' servants and agents in respect of any liability loss or damage of whatsoever nature (including legal costs as between attorney or solicitor and client and associated expenses) which Owners may sustain by reason of delivering such cargo in accordance with Charterers' request.

(ii) If any proceeding is commenced against Owners or any of Owners' servants or agents in connection with the vessel having delivered cargo in accordance with such request, Charterers shall provide Owners or any of Owners' servants or agents from time to time on demand with sufficient funds to defend the said proceedings.

(iii) If the vessel or any other vessel or property belonging to Owners should be arrested or detained, or if the arrest or detention thereof should be threatened, by reason of discharge in accordance with Charterers instruction as aforesaid, Charterers shall provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such vessel or property and Charterers shall indemnify Owners in respect of any loss, damage or expenses caused by such arrest or detention whether or not same may be justified.

(iv) Charterers shall, if called upon to do so at any time while such cargo is in Charterers' possession, custody or control, redeliver the same to Owners.

(v) As soon as all original Bills of Lading for the above cargo which name as discharge port the place where delivery actually occurred shall have arrived and/or come into Charterers' possession, Charterers shall produce and deliver the same to Owners whereupon Charterers' liability hereunder shall cease.

Provided however, if Charterers have not received all such original Bills of Lading by 24.00 hours on the day 36 calendar months after the date of discharge, that this indemnity shall terminate at that time unless before that time Charterers have received from Owners written notice that:

a) Some person is making a claim in connection with Owners delivering cargo pursuant to Charterers request or,

b) Legal proceedings have been commenced against Owners and/or carriers and/or Charterers and/or any of their respective servants or agents and/or the vessel for the same reason.

When Charterers have received such a notice, then this indemnity shall continue in force until such claim or legal proceedings are settled. Termination of this indemnity shall not prejudice any legal rights a party may have outside this indemnity.

(vi) Owners shall promptly notify Charterers if any person (other than a person to whom Charterers ordered cargo to be delivered) claims to be entitled to such cargo and/or if the vessel or any other property belonging to Owners is arrested by reason of any such discharge of cargo.

vii) This indemnity shall be governed and construed in accordance with the English law and each and any dispute arising out of or in connection with this indemnity shall be subject to the jurisdiction of the High Court of Justice of England".

(c) Owners warrant that the Master will comply with orders to carry and discharge against one or more Bills of Lading from a set of original negotiable Bills of Lading should Charterers so require.

37.72 The stipulation that the master shall be under the orders and directions of the charterers is dealt with in chapter 19, above. For comments on the signing of bills of lading "without prejudice to this charter", see paragraph 21.36, above and for signature of bills of lading generally, see chapter 21, above.

37.73 The fact that under Clause 13(a) the master is under the orders and directions of the charterers does not mean that the master or owners must necessarily comply immediately with such orders: see *The Houda*, paragraphs 37.70, above, and 37.78, below. Clause 13(a) contains an express indemnity. Some tanker time charters contain no express indemnity. As to the indemnity normally implied in favour of the owners against the consequences of complying with the charterers' orders, see paragraphs 19.15 *et seq.*, above.

37.74 In *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), the detailed facts of which are set out at paragraphs 37.111 and 37.112, below, the charter was not on a standard form although it contained many terms common to standard form tanker time charters. The charter in that case contained no express indemnity although it provided, as is common: "Master, although appointed by, and in the employ of Owner, and subject to Owner's direction and control, shall observe the orders of the Charterer as regards employment of the Vessel, Charterer's agents or other

arrangements required to be made by Charterer hereunder." It further provided by the off-hire clause that in the event that a loss of time "not caused by Charterer's fault" should continue, due to a number of stated causes, for more than 24 hours, the vessel should be off hire. The charterers claimed that the ship was off hire during a period of abnormally lengthy tank cleaning following the carriage of a cargo of off-specification or contaminated cargo. One of the arguments advanced by the owners was that since there was no fault on their part, or on the part of the crew, and since the abnormally lengthy tank cleaning required was a consequence of the charterers' order to load the cargo, they were entitled to be reimbursed the amount of off-hire by the charterers (if the vessel was off hire) pursuant to an implied indemnity. The charterers' response was that any implication of an indemnity was inconsistent with the terms of the off-hire clause and the arbitrators accepted the charterers' argument. Steyn, J., at first instance ([1992] 1 Lloyd's Rep. 460, at page 467) took a different view from the arbitrators on the implication of an indemnity, but concluded that in any event the delay which was the subject of the off-hire claim was not directly caused by the charterers' orders. In the Court of Appeal, Staughton, L.J., expressed the view, *obiter*, that the implication of an indemnity under the charter in that particular case was inconsistent with the exception of "Charterer's fault" in the off-hire clause. He said, at page 462 of the Court of Appeal report: "Whatever the correct meaning of the exception of charterers' fault, it is, as it seems to me, expressly dealing with the circumstances in which conduct by the charterers will prevent the vessel being off hire. That in my opinion excludes any implied term that the charterers will indemnify the owners against loss of hire under the clause caused by compliance with the charterers' orders, if there has not been charterers' fault." (Compare *The Marie H* [1998] 2 Lloyd's Rep. 71, the facts of which are set out at paragraph 19.20, above, in which Timothy Walker, J., held that the owners were entitled to be indemnified in respect of off-hire caused by the charterers' loading, at their risk, dangerous cargo; the off-hire clause reading "should the vessel put back whilst on voyage by reason of an accident or breakdown, for which Charterers are not responsible. . .".) Staughton, L.J., also agreed with Steyn, J.'s conclusion that there was no evidence that the delay had been directly caused by the charterers' orders.

37.75 Under Clause 13(a)(ii) the owners are entitled to an indemnity against all consequences arising from "irregularities in papers supplied by the Charterers or their agents". In *The Boukadoura* [1989] 1 Lloyd's Rep. 393, Evans, J., held that a bill of lading that overstated the quantity of oil shipped was an 'irregularity' within the meaning of a similar provision in Clause 20(a) of the STB Voy form: see paragraph 21.53 for a fuller statement of the facts of the case.

37.76 In the original Shelltime 4, Clause 13(b) entitled the owners to "an indemnity in a form acceptable to" them before they could be required to discharge other than at the bill of lading destination against presentation of an original bill of lading. It is suggested that under such open-ended wording, which may still be encountered in other tanker charter forms, the indemnity which the owners may require must be reasonable in amount, having regard to the potential liability to which the owners might be exposed, but that so far as concerns the form of indemnity, they are required to do no more than act bona fide in deciding whether the indemnity is acceptable or not: see *Astra Trust* v. *Adams* [1969] 1 Lloyd's Rep. 81, *per* Megaw, J., at page 87, *The John S. Darbyshire* [1977] 2 Lloyd's Rep. 457, *per* Mocatta, J., at page 466, and *B.V. Oliehandel Jungkind* v. *Coastal International* [1983] 2 Lloyd's Rep. 463, *per* Leggatt, J., at page 469. It is suggested that this might mean, for instance, that the owners could insist that the indemnity be given or countersigned by a bank, P. & I. Club or other strong surety.

37.77 Now, however, Shelltime 4 obliges the owners to discharge against only an indemnity from the charterers themselves, in the terms set out in Clause 13(b). It would seem, therefore, that if the owners have concern as to the charterers' creditworthiness on such an indemnity they must seek to address that at the outset by negotiating an amendment to the standard form or an additional clause.

37.78 Clause 13(b) governs when the owners are obliged to discharge a quantity of cargo without presentation of an original bill of lading, or at a place other than the bill of lading destination or being a quantity other than the bill of lading quantity. In the case which follows, on the original Shelltime 4 form, Clause 13(a) had been amended and Clause 13(b) deleted. The question arose whether, in the absence of contractual provision, the owners and the master could refuse to comply with orders of the charterers to discharge cargo without production of bills of lading, even in circumstances where such discharge involves no infringement of the rights of the parties entitled to the possession of the cargo.

The *Houda* was time chartered by her owners under an amended original Shelltime 4 charter to Kuwait Petroleum Corporation. When Iraq invaded Kuwait in August 1990, the ship was waiting to load at Mina al Ahmadi. She loaded part of the cargo, leaving bills of lading at the loading port, uncompleted. Those bills were never negotiated nor seen again. After the invasion, the management of the charterers' business was moved to London and from there they gave orders to the ship, which had anchored off Fujairah, to proceed to the Red Sea for orders, and subsequently, to discharge the cargo at Ain Sukhna. The owners declined to comply with these orders, questioning whether the orders were authorised. The standing instructions given to the ship were that voyage instructions would come from Kuwait.

After a delay of some five weeks, an agreement was reached between the parties under which the cargo was discharged at Ain Sukhna. The charterers claimed that the ship was off hire for that period. The owners contended that there had been no breach of orders on their part because (a) they were entitled to a reasonable time to check whether the orders from London were properly authorised and (b) the charterers could not in any event give a lawful order to discharge the cargo in the absence of bills of lading. The material provisions of Clause 13 of the Shelltime 4 charter had been amended to read: "The master (although appointed by Owners) shall be under the orders and directions of Charterers as regards employment of the vessel. . . Charterers hereby indemnify Owners against all consequences or liabilities that may arise from the master. . . complying with Charterers' or their agents' orders, (including delivery of cargo without presentation of Bills of Lading). . . Letter of Indemnity to owners' P & I club wording to be incorporated in this charterparty."

The charterers contended that: (a) there was no justification in delaying compliance with their lawful orders when questions of safety were not involved; and (b) since the orders given from London were authorised and were also given with the authority of the party entitled to the possession of the cargo, the orders were lawful and the owners were bound to discharge the cargo without the presentation of an original bill of lading. Only if the time charterers had not had the authority of the parties entitled to possession of the cargo would the owners have been entitled to refuse the order to discharge.

In the course of argument, it was also contended on behalf of the charterers that Clause 13 of the charter, as amended, in itself entitled the charterers to order the owners to deliver the cargo without production of bills of lading. However, Phillips, J., and the Court of Appeal held that the amended Clause 13 did not purport to define or extend the types of order which the charterers were entitled to give. It only made provision for an obligation to indemnify the charterers in respect of compliances with orders, whether those orders were lawful or not.

The Court of Appeal, reversing Phillips, J., on the two main issues, held as follows. (1) While orders ordinarily required immediate compliance, the circumstances in which an order was received, or the nature of it, might make it unreasonable for the master to comply without further consideration or enquiry. The right of the owners or master to delay for a reasonable time before complying with an order was not confined to specific categories of cases. The question to be determined in each case was how a person of reasonable prudence would have acted in the circumstances; and the circumstances of the case in question were capable of constituting reasonable grounds for some delay in compliance. (2) In the absence of contractual provision, the time charterers were not entitled to require the owners or the master to discharge cargo without production of bills of lading, even though such discharge might not infringe the rights of the parties entitled to possession of the cargo.

The Houda [1993] 1 Lloyd's Rep. 333 and [1994] 2 Lloyd's Rep. 541 (C.A.).

37.79 However, it is submitted that if Clause 13 of Shelltime 4 is *not* amended and the charterers provide the owners with an indemnity in the stipulated form, the owners will then be bound to discharge cargo without presentation of original bills of lading if the charterers so require, unless the owners are on notice, or the master is on notice, that doing so will or may infringe the rights of

the parties entitled to possession. Such a situation might arise, for example, if the charterers seek to insist that discharge be made to party A without presentation of any bill of lading, but party B, claiming to be entitled to possession and able to present a bill of lading, objects or simply indicates that he will be requiring discharge to be made to him.

37.80 Clause 14 – Conduct of Vessel's Personnel

14. If Charterers complain of the conduct of the master or any of the officers or crew, Owners shall immediately investigate the complaint. If the complaint proves to be well founded, Owners shall, without delay, make a change in the appointments and Owners shall in any event communicate the result of their investigations to Charterers as soon as possible.

37.81 Clause 15 – Bunkers at Delivery and Redelivery

15. Charterers shall accept and pay for all bunkers on board at the time of delivery, and Owners shall on redelivery (whether it occurs at the end of the charter or on the earlier termination of this charter) accept and pay for all bunkers remaining on board, at the price actually paid, on a "first-in-first-out" basis. Such prices are to be supported by paid invoices.
Vessel to be delivered to and redelivered from the charter with, at least, a quantity of bunkers on board sufficient to reach the nearest main bunkering port.
Notwithstanding anything contained in this charter all bunkers on board the vessel shall, throughout the duration of this charter, remain the property of Charterers and can only be purchased on the terms specified in the charter at the end of the charter period or, if earlier, at the termination of the charter.

37.82 The phrase "Charterers shall accept and pay for" bunkers on board at the time of delivery, in the context of the equivalent Clause 14 of the Shelltime 3 was construed in *The Saint Anna* [1980] 1 Lloyd's Rep. 180 (approved by the House of Lords in *The Span Terza* [1984] 1 Lloyd's Rep. 119) as meaning that the property in bunkers at the time of delivery is transferred from the owners to the charterers. The position is the same under the Shelltime 4, although in other respects Clause 15 of the Shelltime 4 differs from Clause 14 of the Shelltime 3.

37.83 It was also held in *The Saint Anna* that bunkers put on board during the currency of the charter normally remain the property of the charterers, although, as explained by Lord Diplock in *The Span Terza*, at page 122: "Possession of all bunkers once they are on board the vessel is no doubt vested in the shipowners as bailees who are under a duty to procure that they are used by the master in carrying out the orders which the charterers are authorised by the charter-party to give him as to the employment of the vessel." The property in the bunkers remains with the charterers until they are purchased by the owners on redelivery: see *The Saetta* [1993] 2 Lloyd's Rep. 268. That is confirmed and reinforced by Lines 293 to 296 at the end of Clause 15.

37.84 The words in parenthesis in Line 288 of Shelltime 4 did not appear in Shelltime 3. In *The Saetta* it was held that these words in parenthesis, in the original Shelltime 4, applied to a termination of the charter by withdrawal prior to the contractual date for redelivery, so as to transfer to the owners the property in any bunkers belonging to the charterers at the time of withdrawal. As the case demonstrates, however, property in bunkers may not always pass to the charterers from bunker suppliers and hence owners may not acquire title to bunkers on withdrawal or on any other termination of the charter to which the charterers do not accede.

The *Saetta* was chartered on the original Shelltime 4 form with an additional Clause 53 reading: "Bunkers on delivery about 250/350 tons Fuel Oil and about 70/150 tons MDO to be paid by Charterers at. . . US$80 and US$165 respectively. . . About same quantities and same prices on redelivery."

The plaintiffs in the case were bunker suppliers who supplied bunkers to the charterers during the currency of the charter under a contract with a retention of title clause. The charterers failed to pay for the bunkers, as

the owners knew, but the owners were not aware of the retention of title clause in the bunker supply contract. The owners withdrew the vessel for non-payment of hire and set off the value of the bunkers against amounts owing to them, claiming that they were entitled to the bunkers on board.

It was held by Clarke, J., that: (1) On withdrawal, any property which the charterers had in the bunkers on board, together with the right to possession of the bunkers, passed to the owners since Clause 15 of the charter defined "redelivery" to include earlier termination of the charter. (2) Since the charterers did not have property in the bunkers by reason of the retention of title clause in the bunker supply contract, the owners were guilty of conversion of the bunkers on assuming the property in them at the time of withdrawal and on consuming them, subject to the provisions of Section 25 of the Sale of Goods Act 1979, which gives certain rights to parties receiving goods under a sale or other disposition in good faith and without notice of lien or other right of the original sellers. (3) But the transfer of the right of possession from the charterers to the owners on withdrawal was involuntary and was not achieved by any act or even acquiescence on the part of the charterers so that there was no "delivery" of the bunkers by the charterers to the owners under Section 25(1) of the 1979 Act, "delivery" being defined in Section 61(3) of the same Act as a 'voluntary transfer of possession from one person to another'.

The Saetta [1993] 2 Lloyd's Rep. 268.

37.85 The original Shelltime 4 required payment for bunkers to be at market prices current at delivery or redelivery, as the case may be, at the port of delivery or redelivery respectively. That has been replaced in the revised form here quoted by a provision for payment of the price originally paid for the bunkers by (or on behalf of) the owners or the charterers, respectively; see Line 289. For that purpose, Lines 289 and 290 require a "first-in-first-out" rule to be applied to determine what bunkers are being taken over. The paid invoices that Line 290 requires to be produced to support the bunker prices claimed will therefore be for the most recent purchase prior to delivery, or redelivery, as the case may be, unless that was for less than the quantity being taken over, in which case that purchase and the next most recent as well, and so on. This interpretation of Line 289 has been confirmed by Eder, J., in *The Bonnie Smithwick* [2012] 1 Lloyd's Rep. 407, rejecting a contention that "price actually paid" referred to the price paid by the charterers, as disponent owners, on redelivery at the end of a sub-charter that specified a price for redelivery bunkers.

37.86 Lines 291 to 292 of Clause 15 also now provide a "default provision" for the bunkers required to be on board at delivery and redelivery, namely "at least. . . sufficient to reach the nearest main bunkering port". However, it remains a common practice to agree in the fixture negotiations specific (exact or approximate) quantities for delivery and redelivery bunkers, in which case the default provision is overridden.

37.87 Clause 16 – Stevedores, Pilots, Tugs

16. Stevedores, when required, shall be employed and paid by Charterers, but this shall not relieve Owners from responsibility at all times for proper stowage, which must be controlled by the master who shall keep a strict account of all cargo loaded and discharged. Owners hereby indemnify Charterers, their servants and agents against all losses, claims, responsibilities and liabilities arising in any way whatsoever from the employment of pilots, tugboats or stevedores, who although employed by Charterers shall be deemed to be the servants of and in the service of Owners and under their instructions (even if such pilots, tugboat personnel or stevedores are in fact the servants of Charterers their agents or any affiliated company); provided, however, that;
    (a) the foregoing indemnity shall not exceed the amount to which Owners would have been entitled to limit their liability if they had themselves employed such pilots, tugboats or stevedores, and;
    (b) Charterers shall be liable for any damage to the vessel caused by or arising out of the use of stevedores, fair wear and tear excepted, to the extent that Owners are unable by the exercise of due diligence to obtain redress therefor from stevedores.

37.88 In the absence of express terms, the owners are responsible for the operation of loading, stowage and discharging cargo: see paragraph 20.1, above. Where, however, a charter requires the

charterers to provide and pay for stevedores, that, it is thought, ordinarily transfers to the charterers responsibility for operations performed by the stevedores: see paragraphs 20.2 and 20.13, above. Thus, if the first sentence of Clause 16 stood alone, while the owners would remain responsible for stowage, the responsibility for other operations performed by stevedores employed and paid for by the charterers would probably be transferred to the charterers. However, any such implication is negatived by the second sentence. Of course, if the charterers themselves were negligent in regard to such operations, the position might be different. In particular, it is suggested that the charterers would retain a liability if they negligently appointed incompetent stevedores (see paragraph 20.30, above).

37.89 Clause 17 – Supernumeraries

17. Charterers may send representatives in the vessel's available accommodation upon any voyage made under this charter, Owners finding provisions and all requisites as supplied to officers, except alcohol. Charterers paying at the rate of United States Dollars 15 (fifteen) per day for each representative while on board the vessel.

37.90 Clause 18 – Sub-letting/Assignment/Novation

18. Charterers may sub-let the vessel, but shall always remain responsible to Owners for due fulfilment of this charter. Additionally Charterers may assign or novate this charter to any company of the Royal Dutch/Shell Group of Companies.

37.91 For comments on sub-letting, see chapter 6, above. The standing permission to the charterers to assign or novate the charter to any company in the Royal Dutch/Shell Group reflects, obviously, the parentage of the Shelltime form.

37.92 Clause 19 – Final Voyage

19. If when a payment of hire is due hereunder Charterers reasonably expect to redeliver the vessel before the next payment of hire would fall due, the hire to be paid shall be assessed on Charterers' reasonable estimate of the time necessary to complete Charterers' programme up to redelivery, and from which estimate Charterers may deduct amounts due or reasonably expected to become due for;
    (a) disbursements on Owners' behalf or charges for Owners' account pursuant to any provision hereof, and;
    (b) bunkers on board at redelivery pursuant to Clause 15.

    Promptly after redelivery any overpayment shall be refunded by Owners or any underpayment made good by Charterers.

    If at the time this charter would otherwise terminate in accordance with Clause 4 the vessel is on a ballast voyage to a port of redelivery or is upon a laden voyage, Charterers shall continue to have the use of the vessel at the same rate and conditions as stand herein for as long as necessary to complete such ballast voyage, or to complete such laden voyage and return to a port of redelivery as provided by this charter, as the case may be.

37.93 The question of the legitimacy or otherwise of orders for a final voyage under a time charter is considered at paragraphs 4.64 *et seq*., above, and 'last voyage clauses' are dealt with generally at paragraphs 4.79, *et seq*. In *The World Symphony* [1992] 2 Lloyd's Rep. 115, where the charter was on the Shelltime 3 form, Lord Donaldson, M.R., in the Court of Appeal, set out, at page 118, the principles which he considered were to be drawn from the decisions in *The Dione* [1975] 1 Lloyd's Rep. 115 (the facts of which are set out at paragraph 4.14, above) and *The Peonia* [1991] 1 Lloyd's Rep. 100 (see paragraph 4.46, above) in the following terms: "1. A charter for a fixed period will have a small implied tolerance or margin in its duration. 2. A

charter for a fixed period with an expressed tolerance or margin – in this case '15 days more or less' – will have no further implied tolerance or margin. 3. In either of these cases, in the absence of a 'last voyage' clause, charterers will be in breach of contract if the vessel is redelivered after the expiry of the fixed period extended by the implied or expressed tolerance or margin, unless the late delivery arises out of a cause for which the owners are responsible. 4. A 'last voyage' clause is needed and will protect the charterer if he orders the vessel to undertake a last voyage which can reasonably be expected to enable the vessel to be redelivered punctually, but without fault on his part, in the event such redelivery proves impossible. 5. If a 'last voyage' clause is to protect a charterer from being in breach by late redelivery in circumstances in which he has ordered a voyage which is likely to or must have this result, the intention to provide this protection must be clearly expressed."

37.94 In *The World Symphony*, above, the Court of Appeal held that the final voyage clause in the Shelltime 3 form, Clause 18, did allow the charterers to order a ship on a last voyage which was likely to exceed the fixed period of the charter (as extended by any express or implied margin), without becoming liable to damages if the market rate was higher than the charter rate during any excess period, because Clause 18 applied expressly "Notwithstanding the provisions of clause 3 [the period clause] hereof". But Clause 19 of Shelltime 4 is worded differently from Clause 18 of Shelltime 3 and does not have the same effect.

The *Ambor* (substituted by the *Once*) was chartered on the original Shelltime 4 form. The period of the charter was described in Clause 4 as "a period of 12 months (+/-20 days charterers' option) with additional option of 6 months to be declared at least 45 days prior to end of the first period, commencing from the time and date of delivery of the vessel. . .". The charterers exercised the option for the additional six months and, towards the end of the charter, gave orders for a last voyage which would exceed the maximum period of the charter, as extended by the express 20 days margin. The owners refused to accept the charterers' orders and the charterers, maintaining that the owners were in repudiation, redelivered the ship within the range of dates provided for by Clause 4. The charterers argued that, although Clause 19 of the Shelltime 4 differed from Clause 18 of Shelltime 3, it was a distinction without a difference and that the court was bound by *The World Symphony*. However, it was held by Peter Gross, Q.C., sitting as a Deputy Judge, that the owners were correct in their interpretation and that, since Clause 19 of Shelltime 4 did not contain the crucial words found in Clause 18 of the Shelltime 3, it did not override the provisions of Clause 4 so as to make legitimate, orders that otherwise were illegitimate.

The Ambor (2000) LMLN 549.

37.95 Clause 20 – Loss of Vessel

20. Should the vessel be lost, this charter shall terminate and hire shall cease at noon on the day of her loss; should the vessel be a constructive total loss, this charter shall terminate and hire shall cease at noon on the day on which the vessel's underwriters agree that the vessel is a constructive total loss; should the vessel be missing, this charter shall terminate and hire shall cease at noon on the day on which she was last heard of. Any hire paid in advance and not earned shall be returned to Charterers and Owners shall reimburse Charterers for the value of the estimated quantity of bunkers on board at the time of termination, at the price paid by Charterers at the last bunkering port.

37.96 Even where there is no express equivalent to Clause 20, the loss of ship will normally bring about the termination of the charter: see the discussion in chapter 26, above.

37.97 Clause 20 of Shelltime 4 differs from the equivalent Clause 19 of Shelltime 3 in that the latter contained no express provision for termination in the event of a constructive total loss of the ship, nor did it contain provisions in regard to advance hire and bunkers. Other tanker time charters stipulate that in the event of constructive total loss, hire shall cease at the time of the casualty resulting in the loss (see for instance the ExxonMobil Time 2005 form, paragraph 38.17 below). This has given rise to problems in connection with substitution clauses: see *The Badagry* [1985] 1 Lloyd's Rep. 395 (C.A.),

the facts of which are set out at paragraph 3.6, above. See also *Court Line* v. *The King* (1945) 78 Ll.L.Rep. 390 and *Niarchos* v. *Shell Tankers* [1961] 2 Lloyd's Rep. 496 and paragraph 26.12, above.

37.98 The provision in Clause 20 of Shelltime 4 that in the event of a constructive total loss the charter shall terminate and hire cease on the day on which the ship's underwriters agree that she is a constructive total loss may involve consideration of Section 61 of the Marine Insurance Act 1906. Under that Section the assured has the option either to treat the loss as a partial loss or as a total loss and the acceptance of the loss by underwriters as a constructive total loss generally only arises if the owners give notice of abandonment to underwriters under Section 62 of the Act. It seems therefore that the time of termination of the charter might in some circumstances be a matter within the control of the owners themselves. The provision might also, in cases of lengthy detainment, defeat any contention that the charter was frustrated at an earlier date than the date on which the underwriters agree a constructive total loss. Clause 20 does not deal with the case where the ship is a constructive total loss but her underwriters refuse to agree that. It is suggested that, in those circumstances, the charter may still be frustrated if the ship is so badly damaged that she cannot be used again for the purposes of the charter (see the discussion in paragraphs 26.13 to 26.20 above).

37.99 For the effect of the Law Reform (Frustrated Contracts) Act 1943, see paragraphs 26.79 to 26.81, above. Like Clause 16 of the New York Produce form, Clause 20 of the Shelltime 4 form would, it is suggested, be a provision to which Section 2(3) of the Act would apply (see paragraph 26.82, above).

37.100 Clause 21 – Off-hire

21. (a) On each and every occasion that there is loss of time (whether by way of interruption in the vessel's service or, from reduction in the vessel's performance, or in any other manner);
    (i) due to deficiency of personnel or stores; repairs; gas-freeing for repairs; time in and waiting to enter dry dock for repairs; breakdown (whether partial or total) of machinery, boilers or other parts of the vessel or her equipment (including without limitation tank coatings); overhaul, maintenance or survey; collision, stranding, accident or damage to the vessel; or any other similar cause preventing the efficient working of the vessel; and such loss continues for more than three consecutive hours (if resulting from interruption in the vessel's service) or cumulates to more than three hours (if resulting from partial loss of service); or;
    (ii) due to industrial action, refusal to sail, breach of orders or neglect of duty on the part of the master, officers or crew; or;
    (iii) for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a Charterers' representative carried under Clause 17 hereof) or for the purpose of landing the body of any person (other than a Charterers' representative), and such loss continues for more than three consecutive hours; or;
    (iv) due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents, or to any detention by customs or other authorities caused by smuggling or other infraction of local law on the part of the master, officers, or crew; or;
    (v) due to detention of the vessel by authorities at home or abroad attributable to legal action against or breach of regulations by the vessel, the vessel's owners, or Owners (unless brought about by the act or neglect of Charterers); then;
    without prejudice to Charterers' rights under Clause 3 or to any other rights of Charterers hereunder, or otherwise, the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced; provided, however, that any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire.
    (b) If the vessel fails to proceed at any guaranteed speed pursuant to Clause 24, and such failure

arises wholly or partly from any of the causes set out in Clause 21(a) above, then the period for which the vessel shall be off-hire under this Clause 21 shall be the difference between;
(i) the time the vessel would have required to perform the relevant service at such guaranteed speed, and;
(ii) the time actually taken to perform such service (including any loss of time arising from interruption in the performance of such service).
For the avoidance of doubt, all time included under (ii) above shall be excluded from any computation under Clause 24.

(c) Further and without prejudice to the foregoing, in the event of the vessel deviating (which expression includes without limitation putting back, or putting into any port other than that to which she is bound under the instructions of Charterers) for any cause or purpose mentioned in Clause 21(a), the vessel shall be off-hire from the commencement of such deviation until the time when she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which the deviation commenced, provided, however, that any service given or distance made good by the vessel whilst so off-hire shall be taken into account in assessing the amount to be deducted from hire. If the vessel, for any cause or purpose mentioned in Clause 21(a), puts into any port other than the port to which she is bound on the instructions of Charterers, the port charges, pilotage and other expenses at such port shall be borne by Owners. Should the vessel be driven into any port or anchorage by stress of weather hire shall continue to be due and payable during any time lost thereby.

(d) If the vessel's flag state becomes engaged in hostilities, and Charterers in consequence of such hostilities find it commercially impracticable to employ the vessel and have given Owners written notice thereof then from the date of receipt by owners of such notice until the termination of such commercial impracticability the vessel shall be off-hire and Owners shall have the right to employ the vessel on their own account.

(e) Time during which the vessel is off-hire under this charter shall count as part of the charter peeriod except where Charterers declare their option to add off-hire periods under Clause 4(b).

(f) All references to "time" in this charter party shall be references to local time except where otherwise stated.

37.101 Lines 339 and 340 of Clause 21 define "loss of time" as including not only interruption in service, but also reduction in performance. Consistently with this Lines 366 to 368 require that in the calculation of off-hire "any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire". Clause 21 of the Shelltime 4 form is, therefore, framed as a 'net loss of time' off-hire clause. The "loss of time" required has reference to the service immediately required of the ship when the off-hire cause operates on her: see *The Berge Sund*, paragraphs 37.111 and 37.112, below; and so *The Athena* [2013] 1 Lloyd's Rep. 145, paragraph 25.57, above, would be decided in the same way under Shelltime 4.

37.102 By contrast, the off-hire clause in Shelltime 3 (also Clause 21) was held to be a 'period' clause rather than a 'net loss of time' clause: see *The Bridgestone Maru No. 3* [1985] 2 Lloyd's Rep. 62. Under Shelltime 3 no hire was payable from the commencement of the off-hire event until the ship was ready and in an efficient state to resume her service from a position not less favourable to the charterers than that at which the loss of time commenced, without the further words quoted in the previous paragraph. That is to say, no hire at all was payable in respect of that period, even if some (partial or slow) service was then provided. For general comments on off-hire provisions, see chapter 25, above, and for particular comment on 'period' and 'net loss of time' clauses, see paragraphs 25.55 *et seq.*, above.

The *Bridgestone Maru* was chartered on the Shelltime 3 form under which the owners guaranteed that at the date of delivery the ship would be classed by NKK and undertook to exercise due diligence to make her fit to carry butane and/or propane. The off-hire clause (Clause 21) provided: "In the event of loss of time . . . due to deficiency of personnel or stores, repairs, breakdown (whether partial or otherwise) of machinery or boilers, collision or stranding or accident or damage to the vessel or any other cause preventing the efficient working of the vessel. . . hire shall cease to be due or payable from the commencement of such loss of time until the

vessel is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced."

In the course of the charter, a portable booster pump was installed on board in order to assist discharge of cargo. On arriving at Livorno to discharge a cargo of propane, the port authority refused to allow the cargo to be discharged because the safety regulations of the Registro Italiano Navale (RINA) required that any pumps used should be fixed plant and the booster pump did not comply with this requirement. It was held that although the booster pump arrangement was in fact reasonably safe, the ship's inability to discharge because of non-compliance with the RINA regulations came within the scope of the words "any other cause preventing the efficient working of the vessel". Hirst, J., said, at page 83: ". . . the incapacity of the ship to discharge was attributable to the suspected condition of the ship itself, and as a result the crew could not use the relevant part of the machinery, namely, the pump."

As to the calculation of off-hire, it was contended by the charterers that the clause was a 'net loss of time' clause and consequently the total loss of time consequent upon the inability of the ship to discharge the cargo at Livorno could be taken into account and the calculation could go "backwards as well as forwards in time". However, the judge held that the clause was a 'period clause' so that the loss of time commenced at the time the vessel docked in Livorno and continued only until she sailed from Livorno to proceed to her other destination. It was then that the ship regained her full efficiency and resumed her service from a position not less favourable to the charterers than that at which the loss of time commenced.

The Bridgestone Maru No. 3 [1985] 2 Lloyd's Rep. 62.

37.103 The expression "any other cause preventing the efficient working of the vessel" in the context of Clause 21(i) of the Shelltime 3 form was construed in *The Manhattan Prince* [1985] 1 Lloyd's Rep. 140 as being confined to matters relating to the physical condition of the ship and excluding time lost as a result of a boycott of the ship imposed by the International Transport Workers Federation (ITF).

The *Manhattan Prince* was chartered on the Shelltime 3 form. In response to an earlier threat of boycott by the ITF, the owners had undertaken to employ crew complying with ITF's terms. Subsequently the owners employed a replacement crew not paid at ITF rates and as a result of ITF action, the ship was boycotted at Oxelsund and suffered delay. It was held that the ship was not off hire. Leggatt, J., held that the phrase "efficient working" in the context of Clause 21(1) of the Shelltime 3 form meant "efficient physical working" and that although the ship was prevented from working in the way the charterers would have wished by the action of the ITF, she was fully operational.

The Manhattan Prince [1985] 1 Lloyd's Rep. 140.

37.104 In construing Clause 21(i) of Shelltime 3 in that case, Leggatt, J., said, at page 146 of the report: "One may take account of the *ejusdem generis* principle in the sense that the causes of loss of time which are specified may indeed throw light on the proper meaning to be ascribed to the phrase 'efficient working of the vessel'." See also Rix, J.'s comments on *The Bridgestone Maru No. 3* and *The Manhattan Prince* in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at pages 149 and 150. Clause 21(a)(i) of the Shelltime 4 form expands the categories of events which will cause the ship to go off-hire but also provides expressly that the concluding category of any other cause preventing the efficient working of the vessel is to be construed by reference to the previous categories referred to in the sub-clause, by use of the phrase "any other *similar* cause preventing the efficient working of the vessel" in Line 345 (emphasis supplied).

37.105 The operation of Clause 21(a)(i) of Shelltime 4 was considered in *The Fina Samco* [1994] 1 Lloyd's Rep. 153. The *Fina Samco* was ordered to discharge crude oil at two Japanese ports, Tomakomai and Nagoya. The ship commenced discharge at Tomakomai at 0112 on 22 October. Between that time and 0848 on the same day there were 11 stoppages of discharge due to boiler trouble. These stoppages in total lasted for more than three hours. From 0848 there was a continuous stoppage while attempts were made to diagnose the cause of the trouble until 1115 when the ship was ordered to leave the berth due to deteriorating weather and sea conditions. The cause was identified and rectified by 2 November but, owing to the adverse weather and sea conditions, the ship did not berth again until 8 November.

37.106 The charterers of the *Fina Samco* claimed that the ship was off hire from 0112 on 22 October on the ground that there was loss of time due to breakdown of boilers under Clause 21(a)(i) for more than three hours. (For their alternative claim for an indemnity, see under Clause 3(b) above.) With regard to the off-hire claim in respect of the period from 0112 to 0848 on 22 October, the charterers argued that since the ship's boilers were inefficient throughout this period, and since what they required was a continuous discharge, there was a "partial loss of service" within the meaning of Clause 21(a)(i) cumulating to more than three hours and thus the off-hire started from the commencement of discharge. Colman, J., however held that what had occurred did not constitute a "partial loss of service" and that the ship was not off hire for this period. He said, at page 160: "It is impermissible to identify as a partial loss of service separate interruptions of service which have been due to the same defect. The assertion that the service required was continuous and that its repeated interruption therefore rendered partial that which should have been continuous is, in my judgment, to give to 'partial loss of service' a meaning which it does not have in the context of cl. 21(a)."

37.107 With regard to the period from 0848 on 22 October, the charterers argued that it was irrelevant that the ship had been ordered off the berth at 1115, less than three hours later, owing to the weather conditions, because if there had been no boiler trouble the ship would have been ordered to discharge the balance of the Tomakomai cargo at Nagoya. The judge rejected the charterers' argument on this point also, emphasising that what had to be considered in a claim for off-hire was the service immediately required. Up until 1115, the service immediately required was the discharge of cargo, which the ship could not perform because of her boiler trouble; but from 1115 onwards the service immediately required was waiting at anchor for the weather conditions to improve, and this the ship was capable of performing, irrespective of the fact that her boilers remained unrepaired until 2 November.

37.108 The provision in Clause 21(ii) of the Shelltime 3 form that the ship will be off hire in the event of loss of time due to "breach of orders or neglect of duty on the part of the master, officers or crew", which is reproduced in Clause 21(a)(ii) of the Shelltime 4, was the basis for a claim for off-hire in *The Aditya Vaibhav* [1993] 1 Lloyd's Rep. 63, in which it was alleged that there was a "neglect of duty" on the part of the master and crew in cleaning a vessel's tanks after the carriage of palmoline and palm oil. In *The Sargasso* [1994] 1 Lloyd's Rep. 412 it was also alleged that the ship was off hire under Clause 21(a)(ii) of Shelltime 3 due to "neglect of duty" of crew. Part of a cargo could not be discharged at its port of destination because of contamination and had to be discharged at a second port. Clarke, J., considered that if the contamination was due to neglect of duty on the part of the crew, the ship would be off hire for the period of the voyage to the second port and the period of discharge there; alternatively, he considered that a claim for damages equivalent to the hire for these periods could be set off against hire under the doctrine of equitable set-off: see paragraphs 16.58 *et seq.*, generally, on deductions from hire. See also *The Liepaya* [1999] 1 Lloyd's Rep. 649 (alleged neglect of duty in cleaning tanks under Clause 21(a)(ii) of Shelltime 4).

37.109 For a case on an off-hire claim for alleged breach of orders under Clause 21(a)(ii) of Shelltime 4, see *The Houda* [1993] 1 Lloyd's Rep. 333 and [1994] 2 Lloyd's Rep. 541 (C.A.), the facts of which are set out under Clause 13, above, at paragraph 37.78.

37.110 Off-hire was claimed under Clause 21(a)(v) by the charterers in *The Greek Fighter* [2006] 1 Lloyd's Rep. Plus 99, summarised at paragraph 9.1, above. At [368], Colman, J., rejected that claim since the cause of the ship's detention was the loading of an impermissible cargo in breach of Clauses 4 and 28. However, he also set out what the position would have been without that breach. The ship had been detained by the UAE Coastguard enforcing UN sanctions against Iraq. Such enforcement was a matter of administrative law in the UAE. No court proceedings (civil or criminal) were brought by the Coastguard. The owners argued that this detention was not

attributable to "legal action against. . . the vessel" within Clause 21(a)(v). Colman, J., disagreed. Like Clause 21(a)(iv), sub-clause (v) extended to the "deprivation of availability of the vessel when it has been detained by the authorities in the course of procedures involving enforcement of local laws or regulations". So the ship was off hire under Clause 21(a)(v) unless the proviso applied which excludes detention "brought about by the act or neglect of Charterers". The judge concluded that if there had been no breach, so that the charterers had acted in all respects lawfully, that proviso would not have applied and the ship would have been off hire. The owners said the proviso was engaged because the Coastguard acted out of suspicions over the charterers' conduct. The judge considered that might defeat the off-hire claim if the charterers had committed "the kind of act that could in all the circumstances be expected to cause the authorities to intervene by detaining the vessel on predictable grounds. . . , whereas if, in all the circumstances, the intervention of the authorities by detention of the vessel was capricious and not to be anticipated, the proviso would not apply".

37.111 Some tanker time charters provide more generally in the off-hire clause that the ship shall not be off hire in the event of loss of time "caused by Charterer's fault". In *The Berge Sund* [1993] 2 Lloyd's Rep. 453, the Court of Appeal considered the meaning of this expression in the context of the off-hire clause in the Mobiltime charter and expressed the view that that clause required only a causal connection between the time lost and something done or omitted by the charterers as "fault" and probably did not require proof of a breach of contract, let alone of moral blameworthiness. (For a decision upon a similar but different addition to an off-hire clause, see *The Marie H* [1998] 2 Lloyd's Rep. 71 and paragraph 19.20, above.)

37.112 *The Berge Sund* was another case concerned with tank cleaning. The ship was employed under a long-term time charter which incorporated various clauses from the Mobiltime 2 form, including the off-hire clause. Whilst under charter, she was ordered to load a cargo of butane which was known to the charterers and to the master as being either contaminated or off specification. After discharge of that cargo, some tank cleaning took place on a ballast voyage, but when she was inspected prior to loading another cargo, certain tanks were found to be contaminated. A considerable amount of further cleaning had to be carried out before the tanks were accepted as sufficiently clean to carry the next cargo and as a result the ship was delayed. The charterers maintained that the ship was off hire during the delay since there was a loss of time due to "any other cause preventing the efficient working of the vessel". Arbitrators to whom the dispute was referred held that there was no negligence on the part of the crew in their cleaning of the tanks on the ballast voyage, but, on the evidence, they were unable to reach any conclusion as to the cause of the continuing contamination which necessitated the extra cleaning. The arbitrators and Steyn, J., at first instance ([1992] 1 Lloyd's Rep. 460), concluded that the ship was not in an efficient state to provide the service next expected of her, namely to begin loading her next cargo, and that consequently the vessel was off hire for the period of delay. The Court of Appeal reversed that decision on the ground that the efficient working of the vessel was not prevented by the necessity to undertake further tank cleaning: the carrying out of the further tank cleaning was in fact the very service which the charterers required. Staughton, L.J., said, at page 461 of the Court of Appeal report: "In my opinion the critical question is, what was the service required of the vessel on Dec. 20, 1982? What were the charterers' orders? They were not to load cargo; as I have said, that was the very last thing that the charterers would have ordered, since the copper strip test had been failed. The orders were, in part expressly and at all relevant times by implication, to carry out further cleaning. That was the service required, and the vessel was fully fit to carry it out. . . . [C]leaning is in the ordinary way an activity required by a time charterer. It is his choice what cargoes are loaded, and consequently when and what cleaning is required. If in a particular case the charterer declines to load until there has been further or extraordinary cleaning, the service

required is that cleaning. Of course there may be cases where the need for such extra cleaning results from a breach of contract on the part of the owner or even from 'neglect of duty on the part of the master, officers and crew'. In that event the charterer has a remedy. But here the arbitrators rejected the charterers' case that there had been negligence or want of due diligence in cleaning on the ballast voyage. Once they had reached that conclusion, the argument that the vessel was off hire or that the charterers could recover the hire paid was in my opinion doomed to failure."

"From a position not less favourable to Charterers"

37.113 The requirement in Lines 365 and 366 of Clause 21(a) that for hire to recommence the ship shall be in an efficient state to resume her service from a position not less favourable to charterers than that at which the loss of time commenced does not necessarily require that the ship must return to the same berth as the one she was at when she was put off the berth and went off hire. Nor, in considering whether a position is less favourable to charterers is it relevant that an extraneous supervening event, such as changed navigational conditions, may limit the ship's movement at that position and so cause delay that would not have been encountered in the absence of the off-hire event.

During the charter of the *Trade Nomad*, which was on the Shelltime 4 form, two disputes arose regarding the resumption of hire after periods of off-hire. In the first case, the ship was discharging at a berth in Singapore when, on 30 June, discharging was interrupted by a boiler breakdown and she was put off the berth by the authorities, because it was not known how long repairs would take to complete. In the event, repairs were completed on 1 July and she could have returned to the same berth on 5 July, but the charterers ordered her to a second berth where she resumed discharging on 4 July. She left the second berth on 5 July and returned to the original berth on 9 July. The charterers argued that the ship was off hire from 30 June to 9 July, but it was held by the arbitrator that since the charterers altered their discharging schedule instead of waiting for the original berth to come free, the second berth was a position not less favourable to the charterers and the ship came on hire again on 4 July.

In the second case, the ship was damaged in a collision whilst navigating down the Mississippi. She had to put back to undertake repairs but by 5 March was as far down the Mississippi as she had been at the time of the collision and again ready and in an efficient state to resume her service. However, the coastguard had in the meantime restricted shipping movements in the river due to a sunken barge and the ship was unable to sail until 6 March. The charterers argued that it was not until she was able to sail on 6 March that the position in which she was then at anchor could be said to be not less favourable than her position at the time of the collision. It was held by the arbitrator that the ship came on hire again on 5 March because the fact that she could not resume her service had nothing to do with the condition of the ship and was attributable to an entirely extraneous cause.

On appeal Colman, J., held that the arbitrator's decisions on these two points disclosed no errors of law and he upheld the decisions.

The Trade Nomad [1998] 1 Lloyd's Rep. 57.

37.114 Clause 22 – Periodical Drydocking

22. (a) Owners have the right and obligation to drydock the vessel at regular intervals of ____ 399
On each occasion Owners shall propose to Charterers a date on which they wish to drydock the 400
vessel, not less than ____ before such date, and Charterers shall offer a port for such 401
periodical drydocking and shall take all reasonable steps to make the vessel available
as near to 402
such date as practicable. 403
Owners shall put the vessel in drydock at their expense as soon as practicable after Charterers 404
place the vessel at Owners' disposal clear of cargo other than tank washings and residues. 405
Owners shall be responsible for and pay for the disposal into reception facilities of such tank 406
washings and residues and shall have the right to retain any monies received therefor, without 407
prejudice to any claim for loss of cargo under any Bill of Lading or this charter. 408
(b) If a periodical drydocking is carried out in the port offered by Charterers (which must have 409

suitable accommodation for the purpose and reception facilities for tank washings and residues), the vessel shall be off-hire from the time she arrives at such port until drydocking is completed and she is in every way ready to resume Charterers' service and is at the position at which she went off-hire or a position no less favourable to Charterers, whichever she first attains. However;

(i) provided that Owners exercise due diligence in gas-freeing, any time list in gas-freeing to the standard required for entry into drydock for cleaning and painting the hull shall not count as off-hire, whether lost on passage to the drydocking port or after arrival there (notwithstanding Clause 21), and;

(ii) any additional time lost in further gas-freeing to meet the standard required for hot work or entry to cargo tanks shall count as off-hire, whether lost on passage to the drydocking port or after arrival there.

Any time which, but for sub-Clause (i) above, would be off-hire, shall not be included in any calculation under Clause 24.

The expenses of gas-freeing, including without limitation the cost of bunkers, shall be for Owners account.

(c) If Owners require the vessel, instead of proceeding to the offeered port, to carry out periodical drydocking at a special port selected by them, the vessel shall be off-hire from the time when she is released to proceed to the special port until she next presents for loading in accordance with Charterers' instructions, provided, however, that Charterers shall credit Owners with the time which would have been taken on passage at the service speed had the vessel not proceeded to drydock. All fuel consumed shall be paid for by Owners but Charterers shall credit Owners with the value of the fuel which would have been used on such notional passage calculated at the guaranteed daily consumption for the service speed, and shall further credit Owners with any benefit they may gain in purchasing bunkers at the special port.

(d) Charterers shall, insofar as cleaning for periodical drydocking may have reduced the amount of tank-cleaning necessary to meet Charterers' requirements, credit Owners with the value of any bunkers which Charterers calculate to have been saved thereby, whether the vessel drydocks at an offered or a special port.

37.115 Problems may arise under this clause if the drydocking port offered by the charterers under Clause 22(a) has all the necessary facilities for drydocking the ship, but these facilities are occupied and not available at or near the time the charterers put the ship at the owners' disposal. Under Clause 22(b) such port must have "suitable accommodation" for the periodical drydocking referred to in Clause 22(a), that is a drydocking commencing as soon as practicable after the charterers place the ship at the owners' disposal. It is suggested that if any physically appropriate drydock is unavailable to the ship at that time, then the accommodation at the port selected by the charterers is not "suitable". Of course, the charterers will not normally know exactly what work the owners intend to have carried out or how long it will take to complete. If the charterers offer in good faith a port at which there is no suitable dry dock free because of particular needs uncommunicated to the charterers and which they could not reasonably be expected to plan for without specific notice, then it is suggested the owners must bear the risk of delay in waiting for the dry dock to become free or select a "special port" of their own choosing under Clause 22(c). The true cause of delay, in that case, is the owners' failure, in breach of their duty of co-operation, to take proper care in providing information to enable the charterers to perform their obligation to provide suitable accommodation. If, however, the charterers cannot excuse the lack of promptly available accommodation on that basis, it is suggested they are in breach and the resulting loss of hire under Line 411 would be recoverable by owners in damages.

37.116 Clause 23 – Ship Inspection

23. Charterers shall have the right at any time during the charter period to make such inspection of the vessel as they may consider necessary. This right may be exercised as often and at such intervals as

Charterers in their absolute discretion may determine and whether the vessel is in port or on passage. Owners affording all necessary co-operation and accommodation on board provided, however:

(a) that neither the exercise nor the non-exercise, nor anything done or not done in the exercise or non-exercise, by Charterers of such right shall in any way reduce the master's or Owners' authority over, or responsibility to Charterers or third parties for, the vessel and every aspect of her operation, nor increase Charterers' responsibilities to Owners or third parties for the same; and;

(b) that Charterers shall not be liable for any act, neglect or default by themselves, their servants or agents in the exercise or non-exercise of the aforesaid right.

37.117 Under Clause 23 the charterers have the right to make such inspections of the ship as they consider necessary, whether in port or on passage. It is provided, however, by Clause 23(b) that the charterers shall not be liable for any act, neglect or default by themselves, their servants or agents in the exercise or non-exercise of that right. It is suggested that this exemption would be narrowly construed and that negligence on the part of a representative of the charterers on board the ship for the purposes of an inspection would not be excepted unless it occurred in the actual exercise of the right of inspection.

37.118 Clause 24 – Detailed Description and Performance

24. (a) Owners guarantee that the speed and consumption of the vessel shall be as follows:-

Average speed in knots	Maximum average bunker consumption per day main propulsion fuel oil/diesel oil	auxiliaries fuel oil/diesel oil
Laden	tonnes	tonnes
____	____ /____	____ /____
____	____ /____	____ /____
____	____ /____	____ /____
Ballast		
____	____ /____	____ /____
____	____ /____	____ /____
____	____ /____	____ /____

The foregoing bunker consumptions are for all purposes except cargo heating and tank cleaning and shall be pro-rated between the speeds shown.

The service speed of the vessel is ____ knots laden and ____ knots in ballast and in the absence of Charterers' orders to the contrary the vessel shall proceed at the service speed. However if more than one laden and one ballast speed are shown in the table above Charterers shall have the right to order the vessel to steam at any speed within the range set out in the table (the "ordered speed").

If the vessel is ordered to proceed at any speed other than the highest speed shown in the table, and the average speed actually attained by the vessel during the currency of such order exceeds such ordered speed plus 0.5 knots (the "maximum recognised speed"), then for the purpose of calculating a decrease of hire under this Clause 24 the maximum recognised speed shall be used in place of the average speed actually attained.

For the purposes of this charter the "guaranteed speed" at any time shall be the then-current ordered speed or the service speed, as the case may be.

The average speeds and bunker consumptions shall for the purposes of this Clause 24 be calculated by reference to the observed distance from pilot station to pilot station on all sea passages during each period stipulated in Clause 24(c), but excluding any time during which the vessel is (or but for Clause 22(b)(i) would be) off-hire and also excluding "Adverse Weather Periods", being;

(i) any periods during which reduction of speed is necessary for safety in congested waters or in poor visibility;

(ii) any days, noon to noon, when winds exceed force 8 on the Beaufort Scale for more than 12 hours.

(b) If during any year from the date on which the vessel enters service (anniversary to anniversary) the vessel falls below or exceeds the performance guaranteed in Clause 24(a) then if such shortfall or excess results;
  (i) from a reduction or an increase in the average speed of the vessel, compared to the speed guaranteed in Clause 24(a), then an amount equal to the value at the hire rate of the time so lost or gained, as the case may be, shall be included in the performance calculation;
  (ii) from an increase or a decrease in the total bunkers consumed, compared to the total bunkers which would have been consumed had the vessel performed as guaranteed in Clause 24(a), an amount equivalent to the value of the additional bunkers consumed or the bunkers saved, as the case may be, based on the average price paid by Charterers for the vessel's bunkers in such period, shall be included in the performance calculation.

The results of the performance calculation for laden and ballast mileage respectively shall be adjusted to take into account the mileage steamed in each such condition during Adverse Weather Periods, by dividing such addition or deduction by the number of miles over which the performance has been calculated and multiplying by the same number of miles plus the miles steamed during the Adverse Weather Periods, in order to establish the total performance calculation for such period.

Reduction of hire under the foregoing sub-Clause (b) shall be without prejudice to any other remedy available to Charterers.

(c) Calculations under this Clause 24 shall be made for the yearly periods terminating on each successive anniversary of the date on which the vessel enters service, and for the period between the last such anniversary and the date of termination of this charter if less than a year. Claims in repsect of reduction of hire arising under this Clause during the final year or part year of the charter period shall in the first instance be settled in accordance with Charterers' estimate made two months before the end of the charter period. Any necessary adjustment after this charter terminates shall be made by payment by Owners to Charterers or by Charterers to Owners as the case may require.

(d) Owners and Charterers agree that this Clause 24 is assessed on the basis that Owners are not entitled to additional hire for performance in excess of the speeds and consumptions given in this Clause 24.

37.119 Whereas Clause 24 of Shelltime 3 provided for a guaranteed average speed with a maximum bunker consumption to be calculated on all sea passages over the whole of the time the ship was on hire, Clause 24(a) of the Shelltime 4 form provides for the exclusion from performance calculations of off-hire periods and "Adverse Weather Periods", being periods when the ship's speed is reduced for safety in congested waters or poor visibility and days (noon to noon) when winds exceed Beaufort Scale Force 8 for more than 12 hours. Provision is then made in Clause 24(b), Lines 496 to 501, for a pro rata adjustment to be made in the "performance calculation" to take into account the mileage steamed during Adverse Weather Periods. (For a case concerning whether an additional clause and the incorporation of Gas Form C changed Clause 24 of Shelltime 3, as amended, from an 'all weather warranty' into a warranty applying only in specified weather conditions, see *The Gaz Energy* [2012] 1 Lloyd's Rep. 211). It is to be noted that the exceptions in Clause 27(a) and (b) are not applicable to the provisions relating to off-hire or reduction of hire (see Clause 27(d)).

37.120 Remarkably, given the length and detail of Clause 24, it no longer provides in so many words that the charterers are to be paid any balance in their favour. This seems to be a by-product of drafting changes aimed at cutting out the right, given to the owners by Clause 24 of the original Shelltime 4 form, to an increase in hire if time or bunkers are saved when compared with the guarantees. Clause 24(d) now provides specifically that there is no such right, if the inaccuracy in the phrase "performance in *excess* of the speeds and *consumptions* [guaranteed]" is overlooked (emphasis supplied). But changes have also been made to Clause 24(b), so that it no longer states that the charterers are entitled to any payment. At the same time, the last sentence of Clause 24(b), now at Lines 502 and 503, is retained, which refers to a "Reduction of hire under. . . sub-Clause (b)" although no reduction of hire is in fact provided for. Read with Clause 9(iii) (see paragraph

37.63, above), the overall effect is probably as follows: an annual performance calculation is to be carried out in accordance with Clause 24(b); in that calculation the value of time lost (or saved) and the value of bunkers over (or under) consumed is to be netted off, leaving an overall balance (contrast paragraph 25.83, above in relation to setting bunkers saved against time lost); if that is a balance in the charterers' favour, the owners must pay it and the charterers may deduct it from future hire payments; if it is a balance in the owners' favour, however, the owners are *not* entitled to anything for it.

37.121 In none of the decided cases on this topic has Clause 24 of the Shelltime 4 form had to be considered. These decided cases have been mainly concerned with tanker time charter forms in which the application of speed and consumption penalty or bonus provisions to adverse weather periods was not made clear. The courts have approached these cases on the footing that, in principle, the ship's performance during heavy weather periods should be taken into account.

37.122 In *Didymi Corporation* v. *Atlantic Lines & Navigation* [1987] 2 Lloyd's Rep. 166 and [1988] 2 Lloyd's Rep. 108 (C.A.), the dry cargo time charter incorporated an additional clause more typical of a tanker time charter. That clause provided as follows:

"(1) The. . . speed and fuel consumption of the vessel, as stipulated in this Charter Party, are representations by the Owners. Should the actual performance of the vessel taken on an average basis throughout the duration of the Charter Party show any failure to satisfy one or more of such representations, the hire shall be equitably decreased by an amount to be mutually agreed between Owners and Charterers but in any case no more than that required to indemnify the Charterers to the extent of such failure. . .

(2) The Owners stipulate that the vessel is capable of maintaining in good weather conditions and shall maintain throughout the period of this Charter Party on all sea passages from seabuoy to seabuoy (speed will be determined by taking the total miles at sea divided by the total hours at sea as shown in the logbooks) a guaranteed average speed of 15.5 knots in good weather conditions (smooth seas, winds less than 3 on the Beaufort Scale) on a guaranteed daily consumption of 40/41 long tons of best grade Fuel Oil having a maximum viscosity of 1,500 seconds, provided the vessel will not remain immobilised for lengthy periods in port(s) and/or anchorage(s).

(3) The speed and consumption, as guaranteed by the Owners in paragraph (2) above, will be reviewed by Charterers at the end of the duration of this Charter Party, and if it is found that the vessel has failed to maintain as an average during the period of the Charter Party the speed and/or consumption stipulated above, the Charterers shall be indemnified by way of reduction of hire, in accordance with paragraph (1) above.

(4) Similarly, if it is found that the vessel has maintained as an average during the period of the Charter Party a better speed and/or consumption [than] those stipulated in paragraph (2) above, then Owners shall be indemnified by way of increase of hire, such increase to be calculated in the same way as the reduction provided in the preceding sentence."

37.123 One of the matters which arose for decision in that case was how the clause was to be applied to periods when the weather conditions did not consist of smooth seas with winds less then Force 3. It was held by Hobhouse, J., and the Court of Appeal that when considering the extent of the ship's under- or overperformance, it was not right to include periods when the wind was at Force 3 or above, but that once that under- or overperformance had been ascertained it was necessary to assess what loss or gain had been suffered by the parties throughout the whole period of the charter resulting from the under- or overperformance of the ship, calculated in accordance with the contractual yardstick. Hobhouse, J., at page 171 of the first instance report, said: "As regards periods at sea other than in good weather conditions, a similar logic is to be followed. *Ex hypothesi* the vessel has proved incapable of maintaining the guaranteed speed and/or consumption in good weather conditions. That incapacity can give rise to a loss not only in good conditions but in bad conditions as well. Therefore once the breach of guarantee has been established by reference to performance in good conditions, the loss is capable of being proved for all conditions. This is a normal exercise under the simple form of charterparty speed warranty, which relates to capacity of the vessel to achieve the warranted speed in good conditions. That capacity and any consequent

loss may have to be determined from evidence, including expert evidence, about performance in less good conditions. . . The periods of time, therefore, by reference to which the loss to charterers resulting from the underperformance in good conditions should be calculated can, and *prima facie* should include the bad weather periods as well. Expert evidence may be needed to prove how this should be done."

37.124 Similar principles were applied in construing the Revised Clause 5 of the Beepeetime 2 in *The Gas Enterprise* [1993] 2 Lloyd's Rep. 352. Sub-clause 1 of Clause 5 contains undertakings by the owners that at the date of delivery the ship shall conform to the description set out in the attached Gas Form C and that the owners will ". . . so. . . maintain the vessel during the period of service under this Charter". Sub-clauses 2 and 3 of Clause 5 set out the warranted average speed and consumption figures. Sub-clauses 4 and 5 then provide:

"4) For the purpose of assessing the performance of the vessel, the average speed and bunker consumption of the vessel shall be calculated upon the distance made, the time taken and the quantity of bunkers consumed by the vessel on each sea passage as ordered to be performed by Charterers. . . from Pilot Station to Pilot Station up to and including Beaufort Force 4 wind and wave. There shall be excluded from such assessment any period (and any distance made or bunkers consumed by the vessel during such period) in respect of which the vessel is off-hire under Clause 23 or during which the vessel is delayed by a reduction in engine speed and necessary for the safe navigation of the vessel in poor visibility or in congested waters. . .

5) If during any passage reviewed under sub-clause (4)

(a) the average speed of the vessel is less than or exceeds the average speed based upon Charterers' instructions to the Master from time to time during the passage then the resulting loss or saving in time expressed in hours and/or portions thereof shall be multiplied by the hourly rate of hire and in the case of loss of time the resulting sum shall become payable by Owners to Charterers . . .

(b) the total bunker consumption of the vessel is less than or exceeds the quantity of bunkers which would have been consumed by the vessel had she performed at average speed based on Charterers' instructions as aforesaid and the average bunker consumption applicable to such speed in accordance with the table set out in sub-clause (2) hereof, an amount equal to the value of any excess in bunkers consumed shall become payable by Owners to Charterers. . ."

37.125 It was contended on behalf of the owners that since sub-clause 5 required the assessment of loss of time to be confined to "the passage reviewed under sub-clause 4", the assessment necessarily had to exclude all adverse weather periods, because the 'passage' defined in sub-clause 4 excluded such periods. It was further contended that to include the adverse weather periods in the assessment under sub-clause 5 would involve uncertainty in the calculation of loss. The Court of Appeal rejected the owners' interpretation. Lloyd, L.J., said, at page 366: "The words on which [Counsel for the owners] relies are the words 'If during any passage reviewed under sub-clause 4'. But I cannot read those words as cutting down or qualifying the calculation of the 'resulting loss' in sub-clause 5(a), that is to say, the loss resulting from the breach of warranty. The first step in the exercise is to find the average speed for each passage in accordance with sub-clause 4 during periods when the weather was force 4 or less. That establishes the speed (and consumption) of which the vessel was capable during the passage in question and therefore determines whether or not the owners were in breach. . . Once the speed of which the vessel was capable in fair weather has been established for each passage, the warranty takes effect. If the speed is less than the warranted speed, or if the consumption of bunkers is greater than the warranted consumption for that speed, the charterers are entitled to recover compensation over the whole of the passage in question, not just that part of the passage which was performed in good weather. . . The warranty is an undertaking as to the speed at which the vessel is *capable* of performing, not the speed at which she will actually perform."

37.126 The question which arose in *The Al Bida* [1986] 1 Lloyd's Rep. 142 and [1987] 1 Lloyd's Rep. 124 (C.A.) was as to the period over which the average bunker consumption was to be calculated. The *Al Bida* was chartered under two one-year time charters, running consecutively,

on the older Standtime form, which contained no specific provisions as to how the average bunker consumption was to be calculated. The preamble to the charters provided that the vessel was to be ". . . capable of maintaining under normal working conditions an average sea speed of about 15.5 knots in moderate weather when fully laden on an average consumption of 53 metric tons IFO 1,500 fully laden and 50 metric tons in ballast. . . per 24 hours". In the Form C. Gas which was incorporated into the charter reference was made to "guaranteed sea speed on a year period abt. 15.5 knots", but in the description of consumption in the Form C. Gas there was no reference to any period. The owners contended that the average bunker consumption should be taken over the two-year total period of the charters so that they would have the benefit of periods when the vessel achieved a better consumption than that warranted to offset periods when the consumption was worse than that warranted. They argued that the fact that the average speed was to be calculated over one year supported their interpretation of the charter. The arbitrators, whose decision on this point was supported by Evans, J., and the Court of Appeal, rejected the owners' contention and calculated damages for breach of the consumption warranty by averaging consumption on a voyage-by-voyage basis. The courts considered that the reference to a one-year period in relation to speed, when there was no such reference in the case of consumption, pointed away from the construction contended for by the owners and that since the warranty was specifically directed towards the *capacity* of the vessel to maintain the stated average consumption, the relevant periods were those during which the vessel failed to measure up to her warranted consumption and when therefore there was a breach of warranty. It was not relevant to take into account those periods when there was no breach of warranty. For comments on that part of the decision which dealt with the meaning of "about" in the speed warranty, see paragraph 3.78, above.

37.127 Two reported cases on the guarantees in Clause 24 of the Shelltime 3 form turned largely on their own special facts. In *The Larissa* [1983] 2 Lloyd's Rep. 325, the relevant parts of an amended Clause 24 of the Shelltime 3 charter provided:

". . . Owners guarantee that the average speed of the vessel will not be less than 14.6 knots . . . with a maximum bunker consumption of 2 tons of diesel oil, 42 tons fuel oil per day. . .

If during any year from the commencement of the charter period the vessel falls below or exceeds the performance guaranteed in this clause then . . . (b) If such shortfall or excess results respectively from an increase or a decrease in the vessel's average daily bunker consumption, as herein defined, in relation to the average daily consumption guaranteed hereunder, hire shall be reduced or increased as may be appropriate by an amount equivalent to the value of the excess or saving in bunkers involved. . ."

37.128 The ship's actual bunker consumption, both prior to the commencement of the charter and during the charter period, was not 42 tons per day, but about 32 tons per day and the charterers' primary contention was that on a proper construction of Clause 24, the word "decrease" in sub-clause (b) was not apt to describe a misdescription when in fact there had been no decrease in bunker consumption from the time the ship entered on the charter service. It was held, however, that the word "decrease" in Clause 24(b) was used to describe any shortfall from the guaranteed maximum consumption inserted earlier in Clause 24 and had no reference to actual consumption.

37.129 The second case, *The Evanthia M* [1985] 2 Lloyd's Rep. 154, was a case on an amended Shelltime 3 form as to the effect upon the consumption guarantee in Clause 24 of an addendum clause which allowed the charterers to use the ship for floating storage.

37.130 Clause 25 – Salvage

25. Subject to the provisions of Clause 21 hereof, all loss of time and all expenses (excluding any damage to or loss of the vessel or tortious liabilities to third parties) incurred in saving or attempting to save life or in successful or unsuccessful attempts at salvage shall be borne equally by Owners and Charterers provided that Charterers shall not be liable to contribute towards any salvage payable by

Owners arising in any way out of services rendered under this Clause 25. 519
All salvage and all proceeds from derelicts shall be divided equally between Owners and Charterers 520
after deducting the master's, officers' and crew's share. 521

37.131 Under Clause 27(b) the ship has liberty to tow or go to the assistance of ships in distress and to deviate for the purposes of saving life or property.

37.132 The scheme of Clause 25 is that the charterers share the expenses of any attempt to salve property or save life, but do not share the cost of loss or damage to the ship, tortious liability to third parties and liabilities of the ship herself to pay salvage remuneration. The consequence is, it seems, that if the ship, in attempting the salvage of another vessel, has to take tug assistance on a salvage basis, the charterers will not be liable to contribute, but if the ship has to take a tug on a contract basis as a result of the attempt to salve the other vessel, the cost of it will be shared by the charterers.

37.133 Clause 26 – Lien

26. Owners shall have a lien upon all cargoes and all freights, sub-freights and demurrage for any 522
amounts due under this charter; and Charterers shall have a lien on the vessel for all monies paid in 523
advance and not earned, and for all claims for damages arising from any beach by Owners of this 524
Charter. 525

37.134 There are conflicting decisions at first instance as to the meaning of "sub-freights" in the context of the lien clause in the New York Produce form charter where it is provided that "the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter": *The Cebu* [1983] 1 Lloyd's Rep. 302 and *The Cebu (No. 2)* [1990] 2 Lloyd's Rep. 316 and see paragraphs 30.28 *et seq*., above. In the second of these cases the judge concluded that "sub-freights" did not include sub-time charter hire, relying on the contemporary understanding as to the meaning of the term "freight". It is suggested that in Clause 26 of the Shelltime 4, the linking of "demurrage" to "sub-freights" in Line 522 would reinforce that conclusion.

37.135 On liens, see generally chapter 30, above.

37.136 Clause 27 – Exceptions

27. (a) The vessel, her master and Owners shall not, unless otherwise in this charter expressly 526
provided, be liable for any loss or damage or delay or failure arising or resulting from any 527
act, neglect or default of the master, pilots, mariners or other servants of Owners in the 528
navigation or management of the vessel; fire, unless caused by the actual fault or privity of 529
Owners; collision or stranding; dangers and accidents of the sea; explosion, bursting of 530
boilers, breakage of shafts or any latent defect in hull, equipment or machinery; provided, 531
however, that Clauses 1, 2, 3 and 24 hereof shall be unaffected by the foregoing. Further, 532
neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter 533
expressly provided, be liable for any loss or damage or delay or failure in performance 534
hereunder arising or resulting from act of God, act of war, seizure under legal process, 535
quarantine restrictions, strikes, lock-outs, riots, restraints of labour, civil commotions or arrest 536
or restraint of princes, rulers or people. 537

(b) The vessel shall have liberty to sail with or without pilots, to tow or go to the assistance of 538
vessels in distress and to deviate for the purpose of saving life or property. 539

(c) Clause 27(a) shall not apply to, or affect any liability of Owners or the vessel or any other 540
relevant person in respect of; 541

(i) loss or damage caused to any berth, jetty, dock, dolphin, buoy, mooring line, pipe or 542
crane or other works or equipment whatsoever at or near any place to which the vessel 543
may proceed under this charter, whether or not such works or equipment belong to 544
Charterers, or; 545

(ii) any claim (whether brought by Charterers or any other peerson) arising out of any loss of or damage to or in connection with cargo. Any such claim shall be subject to the Hague-Visby Rules or the Hague Rules or the Hamburg Rules, as the case may be, which ought pursuant to Clause 38 hereof to have been incorporated in the relevant Bill of lading (whether or not such Rules were so incorporated) or, if no such Bill of Lading is issued, to the Hague-Visby Rules unless the Hamburg Rules compulsorily apply in which case to the Hamburg Rules.

(d) In particular and without limitation, the foregoing subsections (a) and (b) of this Clause shall not apply to or in any way affect any provision in this charter relating to off-hire or to reduction of hire.

37.137 Exceptions are subject to the general rule of construction that they do not cover negligence unless they show a clear intention to do so.

37.138 The terminology of many of the exceptions in Clause 27(a) of the Shelltime 4 reflects the terminology of the exceptions in Article IV, rule 2 of the Hague Rules and the terms will, it is suggested, be given the same meaning (for which see *Bills of Lading*, paragraphs 10.201 to 10.260 and *Voyage Charters*, paragraphs 85.264 to 85.350).

37.139 The *effect* of the exceptions in Lines 527 to 532 of Clause 27(a) may well, however, be different. The exceptions in Article IV, rule 2 of the Hague Rules can be relied on only in circumstances where the loss or damage was not contributed to by want of due diligence on the part of the carrier in making the vessel seaworthy before and at the beginning of the voyage. The exceptions in Lines 527 to 532, however, can be relied upon only if the loss or damage was not contributed to by any breach of Clauses 1, 2, 3 or 24. Clauses 1(a) to (h) and 2(a)(i) to (iv) are 'absolute' requirements of seaworthiness and fitness at the time of delivery under the charter (see paragraph 37.5, above); Clauses 1(a)(i) to (m), 2(a)(v) and (vi) and 2(b) impose 'absolute' obligations in regard to service throughout the period of the charter (subject to the *caveat* at paragraph 37.24, above in respect of Clauses 1 and 2(a)); and Clause 3(a) imposes a continuing obligation throughout the period of the charter to exercise due diligence to maintain or restore the conditions set out in Clauses 1(a) to (h) and 2(a)(i) to (iv) (see again paragraph 37.24 above).

37.140 With regard to Clause 27(b) it is not considered that the concept of deviation is relevant to an ordinary period time charter, although it might apply to a time charter for a trip or voyage: see paragraphs 18.12 and 28.1, above. The liberties included in Clause 27(b) appear therefore to be relevant mainly to the obligation under Clause 2(b) to prosecute all voyages with the utmost despatch and under Clause 13(a) to comply with the charterers' orders and directions. Where the Hague or Hague-Visby Rules, or the Hamburg Rules, are applicable by virtue of Clause 27(c)(ii), the liberty to deviate for saving life or property will be governed respectively by Article IV, rule 4, or Article 5(6), of the relevant Rules: see paragraph 28.2, above. See also Clause 25 which relates to salvage.

37.141 The effect of Clause 27(c)(i) is that the owners do not have the benefit of the Clause 27(a) exceptions, nor the exceptions in the Hague or Hague-Visby Rules, in the case of loss or damage to the berths, works or equipment referred to in this sub-clause. This sub-clause was introduced into the Shelltime 4 form to meet any claim that the owners would be exempted from liability for any such damage by the exception in Clause 27(a) that the owners shall not "be liable for any loss or damage. . . from any act, neglect or default of the master, pilots, mariners or other servants of Owners in the navigation or management of the vessel. . .": see *Australian Oil Refining* v. *Miller* [1968] 1 Lloyd's Rep. 448; *The Satya Kailash* [1984] 1 Lloyd's Rep. 588 (C.A.); and paragraph 34.24, above. Accordingly the owners will be liable for loss or damage caused to the charterers in the circumstances covered by this sub-clause which results from the owners' breach of any of the terms of the charter or from negligence for which the owners are responsible.

37.142 In regard to claims "arising out of any loss of or damage to or in connection with cargo", the effect of Clause 27(c)(ii) is to apply to that claim, whether brought by the charterers or any other person, whichever of the Hague, Hague-Visby or Hamburg Rules should have been incorporated in the relevant bills of lading, as to which see under Clause 38, below. If no bill of lading was issued, Clause 27(c)(ii) subjects any such claim to the Hague-Visby Rules "unless the Hamburg Rules compulsorily apply in which case to the Hamburg Rules", which it is thought must mean applying by legislation to the shipment in question although no bill of lading was issued and not applying by legislation to the time charter. See also paragraph 34.31 on the limited nature of the application of the Hague-Visby Rules to the time charter, under Clause 27(c)(ii).

37.143 The effect of applying the Hague or Hague-Visby Rules to cargo claims, even when brought by the charterers, is not only to reduce the absolute obligations of seaworthiness at the beginning of the charter in Clauses 1(a) to (h) and 2(a)(i) to (iv) to obligations to exercise due diligence to make the ship seaworthy at that time, but also to impose an obligation of due diligence in regard to seaworthiness before and at the beginning of the relevant voyage under the charter: see the discussion at paragraphs 34.13 *et seq.*, above, and *Adamastos Shipping* v. *Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd's Rep. 73. It is to be noted, however, that in *The Saxon Star* there was no restriction of the Hague Rules to particular claims as in Clause 27(c)(ii). The effect of applying the Hamburg Rules will also be, it is suggested, to supplant those absolute obligations, as the owners will be able to avoid liability by proving under Article 5(1) of the Rules that they, their servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

37.144 Generally, in relation to the Hague and Hague-Visby Rules, see chapter 34, above.

"act of war"

37.145 The Exceptions clause (Clause 28) of the Shelltime 3 form, which in this respect is in similar terms to Shelltime 4, was considered in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508 in the context of the obligation on charterers under Clause 3 of Shelltime 3 (now Clause 4 of Shelltime 4) to exercise due diligence to ensure that the ship is employed only between good and safe ports. One of the arguments advanced by the charterers in that case (the facts of which are set out at paragraph 37.44, above) was that even if, *prima facie*, they were in breach of their obligations under Clause 3, they could nevertheless rely upon the exceptions in Clause 28 and in particular upon the provision that ". . . neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter expressly provided, be responsible for any loss or damage or delay or failure in performance hereunder arising or resulting from. . . act of war. . .".

37.146 In rejecting this contention, Gatehouse, J., adopting the argument of counsel for the owners, said, at page 516: "Does clause 28 provide the Charterers with a defence in the event that they are *prima facie* in breach of clause 3 where the port is unsafe by reason of the risk of an act of war? (a) the Charterers had an obligation under clause 3 to exercise due diligence to ensure that the vessel was not employed at or between ports which were unsafe by reason of war; (b) clause 28 is a general exceptions clause not primarily directed to war risks. As a matter of construction it protects the Charterers only when their failure in performance (and any loss or damage resulting therefrom) has been brought about by one of the excepted perils. In particular, (i) it does not protect them from liability arising from their own negligence: *The Emmanuel C* [1983] 1 Lloyd's Rep. 310 *per* Bingham, J., at pp. 312, 313 and 314, approved in *The Satya Kailash* [1984] 1 Lloyd's Rep. 588, 597 (C.A.); (ii) it is not intended to relieve them from their obligation to exercise due

diligence under clause 3 in relation to ports which are unsafe due to hostilities; (c) if in breach of clause 3 the Charterers failed to exercise due diligence to ensure that the vessel was employed between safe ports with the result that she became exposed to the risks of acts of war their failure in performance was caused by their own negligence rather than by any act of war and clause 28 does not protect them."

37.147 Clause 28 – Injurious Cargoes

28. No acids, explosives or cargoes injurious to the vessel shall be shipped and without prejudice to the foregoing any damage to the vessel caused by the shipment of any such cargo, and the time taken to repair such damage, shall be for Charterers' account. No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments.

37.148 For discussion of dangerous cargo generally, see chapter 9.

37.149 The relationship between this clause and Clause 27 might give rise to some uncertainty. Clause 27(c)(ii) provides that Clause 27(a) (the general exceptions clause) shall not apply to or affect any liability of the owners or the vessel or any other relevant person in respect of "any claim. . . arising out of any loss of or damage to or in connection with cargo". The sub-clause then goes on to provide that "All such claims" shall be subject to the Hague-Visby, Hague or Hamburg Rules, as the case may be. Thus, it would seem that where the claim is against the owners in respect of loss of or damage to cargo, or otherwise in connection with cargo, a defence asserting dangerous cargo stands or falls on Article IV, rule 6 of the Hague or Hague-Visby Rules or Article 13 of the Hamburg Rules, as the case may be. Where, however, the owners claim against the charterers for damage caused to the ship by dangerous cargo, Clause 28 applies. It should then be noted that Line 556 of Clause 28 refers only to "cargoes injurious to the vessel" and says nothing about cargoes that might be dangerous only to other cargo. To imply that such cargo is prohibited might be regarded as inconsistent, but the point has not been decided.

37.150 Lines 558 and 559 of Clause 28 prohibit the undertaking of any voyage or the loading of any cargo "that would expose the vessel to capture or seizure by rulers or governments". Terms such as "capture" or "seizure", in the context of a time charter, will be given a broad commercial interpretation. In *Tonnevold* v. *Finn Friis* [1916] 2 K.B. 551, a time charter that was still current at the outbreak of the 1914–1918 war, provided that "no voyage be undertaken and no documents, goods or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or Governments". In 1915 the owners refused to proceed on certain voyages owing to the risk of attack from enemy submarines. Scrutton, J., in upholding the award of an arbitrator that the owners were justified in their refusal by the clause in the charter, said, at page 552 of the report, that the arbitrator had taken the right commercial view and that it was ". . . clear that [the parties'] intention was that the shipowner should not be bound to undertake any voyage which would expose him to the risk of having his vessel taken out of his possession 'by rulers or Governments', and that when they used the words 'seizure' and 'capture' they were indicating acts of rulers or Governments which would deprive the owner of his vessel."

37.151 Clause 29 – Grade of Bunkers

29. Charterers shall supply fuel oil with a maximum viscosity of centistokes at 50 degrees centigrade and/or marine diesel oil for main propulsion and fuel oil with a maximum viscosity of ____ centistokes at 50 degrees centigrade and/or diesel oil for the auxiliaries. If Owners require the vessel to be supplied with more expensive bunkers they shall be liable for the extra cost thereof.

Charterers warrant that all bunkers provided by them in accordance herewith shall be of a quality complying with ISO Standard 8217 for Marine Residual Fuels and Marine Distillate Fuels as applicable.

37.152 For general comments on the quality of bunkers supplied, see paragraphs 12.7 to 12.11, above. Lines 565 to 567 identify a specific specification with which the charterers' bunkers must comply.

37.153 Clause 30 – Disbursements

30. Should the master require advances for ordinary disbursements at any port, Charterers or their agents shall make such advances to him, in consideration of which Owners shall pay a commission of two and a half per cent, and all such advances and commission shall be deducted from hire.

37.154 Clause 31 – Laying-up

31. Charterers shall have the option, after consultation with Owners, of requiring Owners to lay up the vessel at a safe place nominated by Charterers, in which case the hire provided for under this charter shall be adjusted to reflect any net increases in expenditure reasonably incurred or any net saving which should reasonably be made by Owners as a result of such lay up. Charterers may exercise the said option any number of times during the charter period.

37.155 The nature of the charterers' obligation to nominate a safe place to lay-up the ship if they exercise their option under this clause may be a matter of debate. Lines 128 to 131 of Clause 4(c) of the charter provide that notwithstanding anything contained in that clause or any other clause of the charter, "Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid". It is suggested, however, that the obligation in Clause 31 to nominate a safe place for lay-up may not be limited to the exercise of due diligence. Not only does Clause 31 not refer to any such limitation but the limited due diligence obligation in Clause 4 is expressly referable to the employment of the ship, whereas Clause 31 deals with circumstances in which the ship is *not* to be employed. It may be that the considerations which persuaded the House of Lords in *The Evia (No. 2)* [1982] 2 Lloyd's Rep. 307 to construe a safe port obligation as requiring, initially, only that the port should be prospectively safe at the time of nomination, may apply also to the obligation in Clause 31. As with a traditional safe port warranty, however, that does not mean the charterers can insist that the ship proceed to, or continue to lay up at, a place, safe when nominated, that has become unsafe. (In relation to these points, see paragraphs 10.50 *et seq.*, above, for a discussion of *The Evia (No. 2)* and paragraphs 10.94 to 10.96.)

37.156 Clause 32 – Requisition

32. Should the vessel be requisitioned by any government, de facto or de jure, during the period of this charter, the vessel shall be off-hire during the period of such requisition, and any hire paid by such governments in respect of such requisition period shall be for Owners' account. Any such requisition period shall count as part of the charter period.

37.157 The meaning of requisition may be defined by statute or regulation. Thus, Section 17(1) of the Compensation (Defence) Act 1939 defined requisition to mean "in relation to any property, take possession of the property or require the property to be placed at the disposal of the requisitioning authority". Where there has been no relevant statutory definition, the courts have been reluctant

to delineate the scope of the term themselves, although distinctions have been drawn between requisition and mere directions to a ship not involving the ship being put at the disposal of the government. In *Bombay & Persia Steam Navigation* v. *Shipping Controller* (1921) 7 Ll.L.Rep. 226, Lord Sterndale, M.R., said, at page 227, in considering an order given to a ship in war time by the Shipping Controller: ". . . what [the Shipping Controller] did in fact was to order this ship, instead of going direct to her contemplated port, to go to Port Said in order that he or some other authority might have the power of taking possession of her or her cargo if that was thought necessary to do so. It was not thought necessary, and what happened was simply that she, under direction, deviated on her voyage. I declined in *The Sarpen* case [1916] P. 306 to define a requisition in the broad sense, and I intend to continue to decline but, at any rate, it does contemplate employment of some sort by the Government for Government purposes. Here they merely directed her to go to a place to which otherwise she would not have gone. . . That, in my opinion, is not a requisition. . . ."

37.158 See also *Sutherland* v. *Compagnie Napolitaine D'Eclairage* (1920) 36 T.L.R. 724 (direction to a ship to load a cargo for the British Government held to constitute a requisition), *France Fenwick* v. *The Crown* (1926) 26 Ll.L.Rep. 52 and *Nicolaou* v. *Minister of War Transport* (1944) 77 Ll.L.Rep. 495.

37.159 The question whether an administration on whose behalf orders or directions are given is to be regarded as a government was considered in *Luigi Monta* v. *Cechofracht* [1956] 2 Lloyd's Rep. 97 (the facts of which are set out at paragraph 5.40, above) in the context of the war risks clause in the Gencon Charter. It is suggested that the principles laid down in that case would apply also to the words "any government, de facto or de jure" in Clause 32.

37.160 Although express provision is made in this clause for what is to happen if the ship is requisitioned, the requisition of the ship may, despite the clause, result in the frustration of the charter: see generally on frustration chapter 26 and for authorities on the effects of requisition, paragraphs 26.35 to 26.36, 26.43 to 26.44, and 26.51 to 26.53 above. In some such cases it may be relevant to have regard to the observation of Diplock, J., in *Port Line* v. *Ben Line Steamers* [1958] 1 Lloyd's Rep. 290, that a requisition of a ship under the Crown's prerogative power is a temporary taking of possession only, because the power is limited to taking possession for such period as is necessary for the purposes of defence of the Realm.

37.161 Clause 33 – Outbreak of War

33. If war or hostilities break out between any two or more of the following countries: U.S.A., the countries or republics having been part of the former U.S.S.R. (except that declaration of war or hostilities solely between any two or more of the countries or republics having been part of the former USSR shall be exempted), P.R.C., U.K., Netherlands, then both Owners and Charterers shall have the right to cancel this charter.

37.162 The option to cancel under a clause such as this must be exercised within a reasonable time: see *Kawasaki* v. *Belships* (1939) 63 Ll.L.Rep. 175 and *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212 and paragraph 24.20. In *Kawasaki* v. *Bantham Steamship*, the facts of which are set out below, the term "war" in a similar clause was interpreted as meaning war as the term would be understood by commercial people. But reading Clause 33 in conjunction with Clause 34, it might be argued that "war" in Clause 33 is intended to have more of a technical meaning than a popular or commercial meaning, because Clause 33 does not define "war", whereas Clause 34 speaks of "war (de facto or de jure)".

A time charter of the *Nailsea Meadow* between Japanese charterers and British owners provided that: "Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan." The question arose whether war had broken out between China and Japan by 18 September 1937 when the

owners purported to cancel the charter. An umpire found upon a consideration of all the evidence that at the relevant date war had broken out between Japan and China, but it was argued on behalf of the charterers that the court had to refer to the British Government for guidance on whether a war had broken out between two foreign countries or alternatively that "war" had to be interpreted technically in accordance with the principles of international law. Rejecting both these contentions, Goddard, J., and the Court of Appeal, while acknowledging that the court might have to seek guidance from the executive government if the question was whether the U.K. was at war, held that in the circumstances 'war' in the charterparty clause under consideration was to be construed as the term 'would be understood commercially'.

Kawasaki v. *Bantham Steamship* (1938) 61 Ll.L.Rep. 131 and (1939) 63 Ll.L.Rep. 155 (C.A.)

37.163 In the context of war risk insurance clauses in insurance policies and time charterparties, the term "hostilities" has been held to mean hostile acts committed by belligerents and pre-supposes an existing state of war: see *Spinney's* v. *Royal Insurance* [1980] 1 Lloyd's Rep. 406, *per* Mustill, J., at page 437 and the cases there cited. In *Britain Steamship* v. *The King* [1921] 1 A.C. 99, in which the U.K. Government under a T.99 time charter contracted to insure the ship against "all consequences of hostilities or warlike operations whether before or after declaration of war", Lord Wrenbury observed in the House of Lords, at page 133, that: ". . . the word 'hostilities' does not mean 'the existence of a state of war' but means 'acts of hostility' or (to use the noun substantive which follows) 'operations of hostility'. The sentence may be read 'all consequences of operations of hostility (of war) or operations warlike (similar to operations of war) whether before or after declaration of war'. To attribute to the word the longer meaning – namely, 'all consequences of the existence of a state of war' – would give the expression a scope far beyond anything which one can conceive as intended."

37.164 Clause 33 may therefore be intended to mean that the right of cancellation will arise if war, *de jure*, is declared between any of the named countries or if one of the named countries commits any hostile act against another named country when there exists a *de facto* state of war between them.

37.165 Clause 34 – Additional War Expenses

34. If the vessel is ordered to trade in areas where there is war (de facto or de jure) or threat of war, Charterers shall reimburse Owners for any additional insurance premia, crew bonuses and other expenses which are reasonably incurred by Owners as a consequence of such orders, provided that Charterers are given notice of such expenses as soon as practicable and in any event before such expenses are incurred, and provided further that Owners obtain from their insurers a waiver of any subrogated rights against Charterers in respect of any claims by Owners under their war risk insurance arising out of compliance with such orders.
Any payments by Charterers under this clause will only be made against proven documentation. Any discount or rebate refunded to Owners, for whatever reason, in respect of additional war risk premium shall be passed on to Charterers.

37.166 This clause covers orders to trade not only in areas where there is war, but also where there is threat of war. It also requires the charterers to pay any additional insurance premia, crew bonuses and other expenses incurred as a consequence of the orders. The wide definition of "war" in this clause, which includes not only war in its technical or legal sense, but also war "de facto" suggests that "threat of war" should also be interpreted widely and not confined to circumstances in which a formal threat of war has been made by one country against another. It may be sufficient to show that owners and charterers generally would have regarded the area to which the ship is ordered as one where there was a threat of war.

37.167 A question can arise in relation to a war risks clause whether it should be regarded as a 'complete code', relieving the charterers of any obligation as to safety in regard to the risks covered by it: see *The Evia (No. 2)* [1982] 2 Lloyd's Rep. 307 and paragraphs 10.50 and 5.33,

above. Clause 34 provides in Lines 589 to 591 that the obligation to reimburse the owners for additional insurance premia, crew bonuses and other expenses is subject to the proviso that the owners obtain from their insurers a waiver of any subrogation rights. It is suggested, therefore, that the charterers' obligations as to safety are not, as such, cut down, although a waiver of subrogation rights may reduce their liability for breach. If the charterers reimburse premium against a waiver of subrogation, then no subrogated claim can be made, but the owners would still be entitled in principle to recover uninsured losses (for example, a deductible or loss in excess of an insured limit), or losses not resulting from the risks in respect of which the charterers have paid the premium. If, however, there is no waiver of subrogation, the charterers will not have to reimburse premium and their liability should be entirely unaffected.

37.168 It should also be noted that the obligation on the charterers to pay additional insurance premia, crew bonuses and other expenses under Clause 34, although in some respects wider than the earlier provisions in the Shelltime 3 form, may in some circumstances be narrower than an obligation to pay excess war risks insurance. Standard war risk insurance includes risks other than those resulting from "war. . . or threat of war". In particular, although the term "war" has been held to include "civil war" (*Pesquerias y Secaderos de Bacalao de España* v. *Beer* (1949) 82 Ll.L.Rep. 500 (H.L.)), violent internal conflicts or disorders falling short of civil war do not fall within the term "war": see *Spinney's* v. *Royal Insurance* [1980] 1 Lloyd's Rep. 406, *per* Mustill, J., at page 427, and the cases there cited. Yet most such conflicts or disorders would fall within the cover given by a standard marine war risks policy. For commentary on the risks covered under standard marine war risks insurance policies see *Marine War Risks* (3rd edn). For other cases on War Risk insurance and additional War Risk premium, see paragraphs 5.33 *et seq.*, above.

37.169 Clause 35 – War Risks

35. (a) The master shall not be required or bound to sign Bills of Lading for any place which in his or Owners' reasonable opinion is dangerous or impossible for the vessel to enter or reach owing to any blockade, war, hostilities, warlike operations, civil war, civil commotions or revolutions.

(b) If in the reasonable opinion of the master or Owners it becomes, for any of the reasons set out in Clause 35(a) or by the operation of international law, dangerous, impossible or prohibited for the vessel to reach or enter, or to load or discharge cargo at, any place to which the vessel has been ordered pursuant to this charter (a "place of peril"), then Charterers or their agents shall be immediately notified in writing or by radio messages, and Charterers shall thereupon have the right to order the cargo, or such part of it as may be affected, to be loaded or discharged, as the case may be, at any other place within the trading limits of this charter (provided such other place is not itself a place of peril). If any place of discharge is or becomes a place of peril, and no orders have been received from Charterers or their agents within 48 hours after dispatch of such messages, then Owners shall be at liberty to discharge the cargo or such part of it as may be affected at any place which they or the master may in their or his discretion select within the trading limits of this charter and such discharge shall be deemed to be due fulfilment of Owners' obligations under this charter so far as cargo so discharged is concerned.

(c) The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any other wise whatsoever given by the government of the state under whose flag the vessel sails or any other government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or local authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or

recommendations anything is done or is not done, such shall not be deemed a deviation. 622
If by reason of or in compliance with any such direction or recommendation the vessel does 623
not proceed to any place of discharge to which she has been ordered pursuant to this charter, 624
the vessel may proceed to any place which the master or Owners in his or their discretion 625
select and there discharge the cargo or such part of it as may be affected. Such discharge shall 626
be deemed to be due fulfilment of Owners' obligations under this charter so far as cargo so 627
discharged is concerned. 628
Charterers shall procure that all Bills of Lading issued under this charter shall contain the 629
Chamber of Shipping War Risks Clause 1952. 630

37.170 This clause is based upon the Chamber of Shipping War Risks Clause, 1952, and charterers are required in Lines 629 and 630 of Clause 35 to incorporate the Chamber of Shipping clause in all bills of lading. Despite the definition of war in the previous clause, Clause 34, as "de facto or de jure", it is suggested that "war" in this Clause 35, although undefined, should, because of the origin of the clause, be construed similarly to include not only war in a technical sense, but war as the term would be understood commercially: see *Kawasaki* v. *Bantham Steamship* (1939) 63 Ll.L.Rep. 155, and paragraph 37.162, above. For an analysis of the other terms which appear in Clause 35(a), namely, blockade, hostilities, warlike operations, civil war, civil commotions and revolutions, see *Voyage Charters*, paragraphs 26.3 to 26.26.

"dangerous" in the opinion of master or owners

37.171 It was held in *The Kanchenjunga*, below, that under a provision in the Essovoy War Risks clause, somewhat similar to Clause 35(b) of Shelltime 4, the master of a vessel was entitled to refuse to load cargo at a port bona fide considered by him to be dangerous, even though the owners had waived their right to refuse the charterers' order to proceed to that port, which was known by the owners to be unsafe at the time of the order.

The *Kanchenjunga* was chartered on the Essovoy form for consecutive voyages with loading port options that included Kharg Island. The charter contained a safe port warranty. The ship was ordered by the charterers to load at Kharg Island and on the instructions of the owners the ship proceeded there, gave notice of readiness and anchored off the port awaiting a berth. While the ship was waiting at anchorage, there was an air raid on Kharg in which bombs were dropped. The master thereupon proceeded away from Kharg Island to a safe position and refused to return. Arbitrators found that Kharg Island was, at all times from before the charterers' order was given, an unsafe port and that what occurred when the air raid took place was no more than the manifestation of the existing prospective danger. Arbitrators further found that at all times the owners knew all the material facts about the dangers.

It was held by Hobhouse, J., the Court of Appeal and the House of Lords, that in the particular circumstances of the case, the owners, by their unequivocal acceptance of the charterers' order with full knowledge of the facts, waived their right to refuse the order to proceed to Kharg Island. The question then arose whether the owners were in breach in sailing away from Kharg following the air raid.

Clause 20(vi) of the charter provided:

> "(a) If any port of loading or of discharge named in this charterparty or to which the vessel may properly be ordered pursuant to the terms of the bills of lading be blockaded or
> (b) If owing to any war, hostilities, warlike operations. . . entry into any such port of loading or discharge or the loading or discharge of cargo at any such port be considered by the master or owners in his or their discretion dangerous or. . . prohibited. . . the charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provisions of the charterparty (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in the master's or owner's discretion dangerous or prohibited. . .)."

It was held by the House of Lords, affirming the Court of Appeal and Hobhouse, J., that Clause 20(vi)(b)

protected the owners from any claim for damages. Hobhouse, J., said, at page 518 of the first instance report: "Owners submit that under the clause the master (and owners) can refuse to load at a port which he bona fide considers to be dangerous. . . That the master did have at all material times the requisite bona fide belief was not disputed. But charterers disputed that this clause gave the master the right to refuse to load the cargo at Kharg Island. In my judgment the master clearly has that right by necessary implication from the wording of the clause. The clause expressly refers to the discretion which the master has in a situation of danger. The master must clearly have the right to act in accordance with his assessment and it would deprive the clause of its effect in relation to dangerous situations, as opposed to situations of impossibility, if one was to construe it any differently. Likewise he must have the right not to breach a prohibition. Therefore I hold on the facts found by the arbitrators that the master did have the right to refuse to load the cargo at Kharg Island. This gave rise to an option to charterers to nominate another loading port and they chose not to exercise that option. Instead, in circumstances where the master was still entitled bona fide to refuse to load at Kharg Island, charterers terminated the charter-party and cannot complain of any breach on the part of owners."

The Kanchenjunga [1987] 2 Lloyd's Rep. 509, [1989] 1 Lloyd's Rep. 354 (C.A.), and [1990] 1 Lloyd's Rep. 391 (H.L.).

37.172 Another war risks clause similar to Clause 35(b) of Shelltime 4, Clause 40(2) of the Beepeetime 2 form, was considered in *The Product Star*, below, where it was held on the facts that the dangers in proceeding to a port at which the ship had been ordered to load were no greater than the known dangers prevailing at the time the charterparty was entered into and consequently that the owners were not entitled to rely on the war risks clause to justify a refusal to comply with the order.

The *Product Star* was chartered on the Beepeetime 2 form in April 1987 for a period of six months, with charterers' option for a further six months. The owners were aware at the time the charter was entered into that the main pattern of the charterers' trade was to load at ports in the United Arab Emirates, including Ruwais, with occasional voyages involving other Arab Gulf areas. Under an additional war risks insurance clause, the charterers were to pay the existing extra basic war risks insurance premium for this pattern of trading and any extra war risks premium over and above the basic war risks premium payable at the date of the charter. Clause 40(2) of the charter provided:

> If (A) any port of loading or of discharge named in this Charter or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or
> (B) owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port of loading or of discharge or the loading or discharge of cargo at any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach any such port of loading or of discharge
> then Charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other port of loading or of discharge. . . '

Prior to the commencement of the charter, there had been a number of attacks on vessels by both Iraqi and Iranian forces in other parts of the Arabian Gulf, but there had been no attacks on ships trading only to the United Arab Emirates. Between April and the end of August 1987, the *Product Star* carried out four voyages from Ruwais to Bangladesh, during which period Iraqi and Iranian attacks on shipping continued. But the nature and extent of the risks involved for ships trading to the United Arab Emirates did not increase. Nevertheless, at the beginning of September, the owners, relying on Clause 40 of the charter, refused an order to proceed again to Ruwais to load on the ground that both they and the master considered entry to the port to be dangerous.

It was held by the Court of Appeal, affirming the judgment of Judge Diamond, Q.C., that: (1) the discretion under Clause 40 had to be exercised honestly and in good faith, and not arbitrarily, capriciously or unreasonably; (2) for the purposes of construing "dangerous" in Clause 40, the common intention that the vessel should trade to United Arab Emirates ports was relevant; the owners had by the terms of the charter accepted that the conditions prevailing at the time it was entered into were not "dangerous" for the purposes of Clause 40 and they were entitled to rely on that clause only if they could show that they reasonably regarded the risks as having increased; and (3) in fact the risks had not increased, the owners' good faith in refusing to proceed was questionable and in any event their refusal was arbitrary and unjustified.

The Product Star (No. 2) [1991] 2 Lloyd's Rep. 468 and [1993] 1 Lloyd's Rep. 397 (C.A.).

(See also on this case Davenport [1993] LMCLQ 150 and paragraph 5.32 above.)

War risks and safety of ports

37.173 The War Risks clause of the Shelltime 3 form (Clause 36), which is similar but not identical to Clause 35 of Shelltime 4, was analysed in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, the facts of which are set out at paragraph 37.44, above, in the context of the other war clauses in Shelltime 3 (Clauses 32 to 35), the safe port undertaking (Clause 3) and the exceptions clause (Clause 28). Gatehouse, J., held that these clauses were not formulated in such a way as to constitute a comprehensive code dealing with the parties' rights in the event that any aspect of performance became affected by war, so as to override the obligations under Clause 3. Adopting the argument of counsel for the owners, he set out, at page 516, his reasons for this conclusion in the following terms: "[(a)] (i) clause 28 ('Exceptions') is a general exceptions clause not primarily directed to the hazards of war, which is not directly linked in any way with clause 35 ('War Insurance') or clause 36 ('War risks'); (ii) clause 32 ('Requisition') is dealing with a specific situation under which the vessel may be taken out of the Owners' control (and therefore out of the charter service) by the Government for purposes which may be (but need not be) connected with the prosecution of war, but does not deal with the direct impact of hostilities on the vessel; (iii). . . 33 ('Outbreak of war'). . . is limited in its application to war between certain countries and merely gives a right to cancel the charter; (iv) clauses 34 ('Additional war expenses'), 35 ('War insurance') and 36 ('War risks') do deal with certain aspects of the impact of hostilities generally on the vessel's trading, but not in such a way as to suggest that they were intended to be exhaustive of the owners' rights or to override clause 3."

37.174 The judge continued: "(b) Further, under the present charter: (i) the Owners have no *unqualified* right to refuse to enter a war zone; clause 36 only allows them to refuse to comply with orders if the vessel is ordered to a port which is blockaded (36(2)(A)) or dangerous by reason of war; (ii) under clauses 5 ['Owners. . . to pay for all insurance on the vessel'] and 35, the basic cost of war risk insurance is borne by the Owners; the Charterers only have to bear any increase over the rate ruling at the date of the charter and in respect of an agreed value for hull and machinery; (iii) clause 36 makes no provision for war risk insurance against loss of hire or other risks (e.g. injury to crew) which remain the Owners' responsibility; (iv) clause 36 does not make any provision for time lost through damage to the vessel or injury to her crew as a result of hostilities; (v) the terms of the present charter are comparable in these material respects to those of the charter considered in *The Concordia Fjord* [1984] 1 Lloyd's Rep. 385, *per* Bingham J., at p.387. . . and are in the same respects materially different from those of the Baltime form considered in *The Evia* [1983] 1 A.C. 736, *per* Lord Roskill at p.766 . . .." (See paragraph 10.50, above.)

37.175 Much of the above reasoning is applicable to Shelltime 4 also, but it is important to note that the Additional War Expenses clause of Shelltime 4 (Clause 34) is in some respects wider in scope than the Additional War Expenses and War Insurance clauses of Shelltime 3 (Clauses 34 and 35) in that it requires the charterers to pay for "any additional insurance premia, crew bonuses and other expenses" incurred by the owners as a consequence of orders to trade in areas where there is war or threat of war, subject to the proviso that the owners obtain from their insurers a waiver of any subrogation rights against charterers. The scope of such a waiver may raise difficult questions, but presumably it would not extend beyond insured losses resulting from the risks in respect of which the charterers pay additional premium.

37.176 Clause 36 – Both to Blame Collision Clause

36. If the liability for any collision in which the vessel is involved while performing this charter fails to be determined in accordance with the laws of the United States of America, the following provision shall apply: 631 632 633

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the cargo carried hereunder will indemnify the carrier against all loss, or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of the said cargo and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

"The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

Charterers shall procure that all Bills of Lading issued under this charter shall contain a provision in the foregoing terms to be applicable where the liability for any collision in which the vessel is involved fails to be determined in accordance with the laws of the United States of America.

37.177 For comments on this clause, which is designed to deal with the situation in U.S. law under which the carrier, although protected by the Hague Rules against direct suit by cargo on the carrying ship, may become liable to that cargo indirectly, see paragraphs 34.44 and 34A.22 to 34A.28, above, and paragraphs 38.92 to 38.93, below.

37.178 This clause requires that the charterers shall procure that all bills of lading issued under the charter shall contain the Both-to-Blame Collision clause. If the charterers fail to do so and the owners incur liabilities from which they would have been protected had the clause been included, the owners will be entitled to damages equal to an indemnity.

37.179 Clause 37 – New Jason Clause

37. General average contributions shall be payable according to York/Antwerp Rules, 1994, as amended from time to time, and shall be adjusted in London in accordance with English law and practice but should adjustment be made in accordance with the law and practice of the United States of America, the following position shall apply:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible by statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo."

"If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the carrier before delivery."

Charterers shall procure that all Bills of Lading issued under this charter shall contain a provision in the foregoing terms, to be applicable where adjustment of general average is made in accordance with the laws and practice of the United States of America.

37.180 This clause provides for general average to be paid in accordance with the York-Antwerp Rules 1994 and for the adjustment to be drawn up in London in accordance with English law and practice. The clause also makes allowance for the possibility that the adjustment may be made in accordance with the law and practice of the United States.

37.181 The New Jason clause is designed to circumvent the decision of the United States Supreme Court in *The Irrawaddy*, 171 U.S. 187 (1897), that the exemption from liability for negligence in the navigation and management of the ship, which is contained in Section 3 of the U.S. Harter Act, did not have the further effect of enabling an owner to recover general average

contribution where such negligence caused the casualty. For a comment on the New Jason clause, see paragraphs 38.90 to 38.91, below.

37.182 This clause again requires that the charterers shall procure that all bills of lading issued under the charter shall contain the New Jason clause. If the charterers fail to do so and the owners incur a liability from which they would have been protected had the clause been included, the owners will be entitled to damages equal to an indemnity.

37.183 Clause 38 – Clause Paramount

38. Charterers shall procure that all Bills of Lading issued pursuant to this charter shall contain the following:
"(1) Subject to sub-clause (2) or (3) hereof, this Bill of Lading shall be governed by, and have effect subject to, the rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25th August 1924 (hereafter the "Hague Rules") as amended by the Protocol signed at Brussels on 23rd February 1968 (hereafter the "Hague-Visby Rules"). Nothing contained herein shall be deemed to be either a surrender by the carrier of any of his rights or immunities or any increase of any of his responsibilities or liabilities under the Hague-Visby Rules."
"(2) If there is governing legislation which applies the Hague Rules compulsorily to this Bill of Lading, to the exclusion of the Hague-Visby Rules, then this Bill of Lading shall have effect subject to the Hague Rules. Nothing therein contained shall be deemed to be either a surrender by the carrier of any of his rights or immunities or any increase of any of his responsibilities or liabilities under the Hague Rules."
"(3) If there is governing legislation which applied the United Nations Convention on the Carriage of Goods by Sea 1978 (hereafter the "Hamburg Rules") compulsorily to this Bill of Lading, to the exclusion of the Hague-Visby Rules, then this Bill of Lading shall have effect subject to the Hamburg Rules. Nothing therein contained shall be deemed to be either a surrender by the carrier of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the Hamburg Rules."
"(4) If any term of this Bill of Lading is repugnant to the Hague-Visby Rules, or Hague Rules, or Hamburg Rules, as applicable, such term shall be void to that extent but no further."
"(5) Nothing in this Bill of Lading shall be construed as in any way restricting, excluding or waiving the right of any relevant party or person to limit his liability under any available legislation and/or law."

37.184 This clause does not have the effect, directly, of incorporating the Hague, Hague-Visby or Hamburg Rules into the charter itself, but requires that the charterers shall procure that all bills of lading issued pursuant to the charter shall contain the Clause Paramount set out in Clause 38, under which the Hague-Visby Rules will apply to such bills of lading unless, in any given case, the Hague or Hamburg Rules "applies. . . compulsorily" under "governing legislation". In this context, it is suggested that "governing legislation" must refer to legislation under the law governing the bill of lading.

37.185 Due to Clause 27(c)(ii), however, the indirect effect of Clause 38, where a bill of lading has been issued, is to apply the Hague-Visby, Hague or Hamburg Rules, as the Clause Paramount might dictate, even as between the owners and the charterers, in respect of claims arising out of loss of or damage to or in connection with the cargo: see paragraphs 37.142 and 37.143, above. For comments on the Rules, see chapter 34, above.

37.186 If the charterers fail to incorporate the required Clause Paramount into bills of lading issued under the charter, they will be in breach, with the consequences already referred to under Clauses 36 and 37.

37.187 Clause 39 – Insurance/ITOPF

39. Owners warrant that the vessel is now, and will, throughout the duration of the charter:
(a) be owned or demise chartered by a member of the International Tanker Owners Pollution Federation Limited;
(b) be properly entered in ——— P & I Club, being a member of the International Group of P and I Clubs;
(c) have in place insurance cover for oil pollution for the maximum on offer through the International Group of P&I Clubs but always a minimum of United States Dollars 1,000,000,000 (one thousand million);
(d) have in full force and effect Hull and Machinery insurance placed through reputable brokers on Institute Time Clauses or equivalent for the value of United States Dollars ——— as from time to time may be amended with Charterers' approval, which shall not be unreasonably withheld.
Owners will provide, within a reasonable time following a request from Charterers to do so, documented evidence of compliance with the warranties given in this Clause 39.

37.188 Clause 40 – Export Restrictions

40. The master shall not be required or bound to sign Bills of Lading for the carriage of cargo to any place to which export of such cargo is prohibited under the laws, rules or regulations of the country in which the cargo was produced and/or shipped.
Charterers shall procure that all Bills of Lading issued under this charter shall contain the following clause:
"If any laws rules or regulations applied by the government of the country in which the cargo was produced and/or shipped, or any relevant agency thereof, impose a prohibition on export of the cargo to the place of discharge designated in or ordered under this Bill of Lading, carriers shall be entitled to require cargo owners forthwith to nominate an alternative discharge place for the discharge of the cargo, or such part of it as may be affected, which alternative place shall not be subject to the prohibition, and carriers shall be entitled to accept orders from cargo owners to proceed to and discharge at such alternative place. If cargo owners fail to nominate an alternative place within 72 hours after they or their agents have received from carriers notice of such prohibition, carriers shall be at liberty to discharge the cargo or such part of it as may be affected by the prohibition at any safe place on which they or the master may in their or his absolute discretion decide and which is not subject to the prohibition, and such discharge shall constitute due performance of the contract contained in this Bill of Lading so far as the cargo so discharged is concerned".
The foregoing provision shall apply mutatis mutandis to this charter, the references to a Bill of Lading being deemed to be references to this charter.

37.189 This clause not only requires that the Export Restrictions clause is to be incorporated by the charterers in all bills of lading, but also stipulates in Lines 722 and 723 that the clause is to apply to the charter itself.

37.190 Clause 41 – Business Principles

41. Owners will co-operate with Charterers to ensure that the "Business Principles", as amended from time to time, of the Royal Dutch/Shell Group of Companies, which are posted on the Shell Worldwide Web (www.Shell.com), are complied with.

37.191 Clause 42 – Drugs and Alcohol

42. (a) Owners warrant that they have in force an active policy covering the vessel which meets or exceeds the standards set out in the "Guidelines for the Control of Drugs and Alcohol On Board Ship" as published by the Oil Companies International Marine Forum (OCIMF) dated January 1990 (or any subsequent modification, version, or variation of these guidelines) and

that this policy will remain in force throughout the charter period, and Owners will exercise due diligence to ensure the policy is complied with.

(b) Owners warrant that the current policy concerning drugs and alcohol on board is acceptable to ExxonMobil and will remain so throughout the charter period.

37.192 Clause 43 – Oil Major Acceptability

43. If, at any time during the charter period, the vessel becomes unacceptable to any Oil Major, Charterers shall have the right to terminate the charter.

37.193 This important provision was not in the original Shelltime 4. It gives the charterers the right to terminate the charter if the ship "becomes unacceptable to any Oil Major" at any time during the charter period. Parties often make express provision that the ship is to be, or is to be rendered, acceptable to oil majors, at delivery or within some specified period: see, for example, *The Savina Caylyn* [2011] 1 Lloyd's Rep. 550, in which Simon, J., dealt with disputes arising under a clause referring to the SIRE system of tanker inspection and vetting established by the Oil Companies International Maritime Forum (OCIMF), the operation of which system was further explained in *The Rowan* [2011] 2 Lloyd's Rep. 331 (commented upon by Robert Gay at [2011] LMCLQ page 465) and [2012] 1 Lloyd's Rep. 564 (C.A.). However, there is no such obligation elsewhere in the Shelltime 4 form and the charterers also have the significant benefit of Clauses 3(d) and (e) should the ship fail inspections; see paragraphs 37.33 to 37.35, above. It is suggested, therefore, that no promise of acceptability to oil majors, whether at delivery or at any other time, is to be read into Clause 43. Rather, as "becomes unacceptable" suggests, Clause 43 will operate only where something occurs that causes the ship to become unacceptable when previously she had been acceptable.

37.194 Clause 43 contains no definition of who is an oil major. Bespoke provisions as to oil major acceptability often do provide such a definition. Where such a provision is included in the charter, it is suggested that "Oil Majors" in Clause 43 will take its content from that definition. Otherwise, which companies or groups are to be regarded as oil majors at any given time would need to be determined by evidence, including expert evidence. On the basis of such expert evidence, the arbitrator in *The Savina Caylyn* [2011] 1 Lloyd's Rep. 550 held, under a 2007 time charter on an amended Shelltime 4 form, that there were then six "oil majors", namely BP, Shell, ExxonMobil, Chevtex, Total Fina Elf and ConocoPhillips. He, and Simon, J., on appeal, rejected an argument that particular mention of the first five in one part of the parties' bespoke wording limited the term "oil major" as used in later parts of the wording so as to exclude ConocoPhillips.

37.195 Clause 44 – Pollution and Emergency Response

44. Owners are to advise Charterers of organisational details and names of Owners personnel together with their relevant telephone/facsimile/e-mail/telex numbers, including the names and contact details of Qualified Individuals for OPA 90 response, who may be contacted on a 24 hour basis in the event of oil spills or emergencies.

37.196 Clause 45 – ISPS Code/US MSTA 2002

45. (a) (i) From the date of coming into force of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) and the US Maritime Transportation Security Act 2002 (MTSA) in relation to the Vessel and thereafter during the currency of this charter, Owners shall procure that both the Vessel and "the Company" (as defined by the ISPS Code) and the "owner" (as defined by the MTSA) shall comply with the requirements of the ISPS Code relating to

the Vessel and "the Company" and the requirements of MTSA relating to the vessel and the "owner". Upon request Owners shall provide documentary evidence of compliance with this Clause 45(a)(i).

(ii) Except as otherwise provided in this charter, loss, damage, expense or delay, caused by failure on the part of Owners or "the Company"/"owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for Owners' account.

(b) (i) Charterers shall provide Owners/Master with their full style contact details and shall ensure that the contact details of all sub-charterers are likewise provided to Owners/Master. Furthermore, Charterers shall ensure that all sub-charter parties they either into during the period of this charter contain the following provision: "The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners".

(ii) Except as otherwise provided in this charter, loss, damage, expense or delay, caused by failure on the part of Charterers to comply with this sub-Clause 45(b) shall be for Charterers' account.

(c) Notwithstanding anything else contained in this charter costs or expenses related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for Charterers' account, unless such costs or expenses result solely from Owners' negligence in which case such costs or expenses shall be for Owners' account. All measures required by Owners to comply with the security plan required by the ISPS Code/MTSA shall be for Owners' account.

(d) Notwithstanding any other provision of this charter, the vessel shall not be off-hire where there is a loss of time caused by Charterers' failure to comply with the ISPS Code/MTSA (when in force).

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

37.197 This Clause is now current, as the ISPS Code, SOLAS amendments and U.S. Act of 2002 referred to have all been fully in force since 1 July 2004.

37.198 Clause 46 – Law and Litigation

46. (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.

(b) All disputes arising out of this charter shall be referred to Arbitration in London in accordance with the Arbitration Act 1996 (or any re-enactment or modification thereof for the time being in force) subject to the following appointment procedure:

(i) The parties shall jointly apoint a sole arbitrator not later than 28 days after service of a request in writing by either party to do so.

(ii) If the parties are unable or unwilling to agree the appointment of a sole arbitrator in accordance with (i) then each party shall appoint one arbitrator, in any event not later than 14 days after receipt of a further request in writing by either party to do so. The two arbitrators so appointed shall appoint a third arbitrator before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

(iii) If a party fails to appoint an arbitrator within the time specified in (ii) (the "Party in Default"), the party who has duly appointed his arbitrator shall give notice in writing to the Party in Default that he proposes to appoint his arbitrator to act as sole arbitrator.

(iv) If the Party in Default does not within 7 days of the notice given pursuant to (iii) make The required appointment and notify the other party that he has done so the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

(v) Any Award of the arbitrator(s) shall be final and binding and not subject to appeal.

(vi) For the purposes of this clause 46(b) any requests or notices in writing shall be sent by fax, e-mail or telex and shall be deemed received on the day of transmission.

(c) It shall be a condition precedent to the right of any party to a stay of any legal proceedings in which maritime property has been, or may be, arrested in connection with a dispute under this charter, that that party furnishes to the other party security to which that other party would have been entitled in such legal proceedings in the absence of a stay.

37.199 This clause provides expressly for the charter to be governed by English law: Clause 46(a). Its predecessor, Clause 41 of the original Shelltime 4 form, provided that disputes were to be decided by the English courts, unless either party elected for the dispute to be determined by arbitration in London. The leading English case on interpreting the scope of arbitration clauses is a case under Clause 41, *Fiona Trust* v. *Privalov* [2008] 1 Lloyd's Rep. 254, in which the House of Lords held that this clause covered a dispute as to whether the charter could be rescinded for bribery. Where arbitration was chosen, Clause 41(c)(ii) provided consent in advance to any appeal to the English High Court against the resulting arbitration award, so long as the appeal was on a question of law arising out of the award. That provision was effective to displace the normal requirement under the Arbitration Act 1996 to obtain the leave of the court to bring such an appeal: see *The Trade Nomad* [1998] 1 Lloyd's Rep. 57.

37.200 Now, however, Clause 46 provides only for arbitration, that is to say reference to arbitration of disputes arising out of a Shelltime 4 charter is now mandatory and not only an option that the parties might choose not to exercise. The intention is for arbitration before a sole arbitrator – see Clause 46(b)(i) – but if the parties do not agree who should be the sole arbitrator, then they are each to appoint an arbitrator and the two arbitrators so appointed are then to appoint a third arbitrator "before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration".

37.201 For comments on applicable time limits, see paragraphs 34.26 *et seq.*, above and on arbitration generally, chapter 29, above.

37.202 Clause 47– Confidentiality

47. All terms and conditions of this charter arrangement shall be kept private and confidential

37.203 Clause 48 – Construction

48. The side headings have been included in this charter for convenience of reference and shall in no way affect the construction hereof.

37.204 This clause makes clear that the clause headings are not to be referred to in construing the charter, by contrast to the rules for construing statutes (see *D.P.P.* v. *Schildkamp* [1971] A.C. 1, at page 10, *per* Lord Reid, and *Dixon* v. *B.B.C.* [1979] 1 Q.B. 546, *per* Shaw, L.J., at page 552).

CHAPTER 38

U.S. Law Commentary on Tanker Time Charters based on ExxonMobil Time 2005 Form

IT IS THIS [insert day] DAY of [insert month and year] MUTUALLY AGREED between [*Insert full-style name of the owner, or chartered owner*], a company organized under the laws of [*insert Owne's domicile*] and having its head office at [*insert address of Owner's head office*], as owner (**"Owner"**) of the M.T. [*Insert the name of the vessel using all italics*], as more fully described and warranted herein (**"Vessel"**), and [*Insert the full-style name of the Charterer*], a company organized under the laws of [*insert Charterer's domicile*] and having its head office at [*insert address of Charterer's head office*], as charterer (**"Charterer"**), that Owner lets and Charterer hires the use and services of the Vessel for the carriage of [*Insert cargo description*], in bulk, and such other lawful merchandise as may be suitable for a vessel of her description, for the term and on the terms and conditions hereinafter set forth in this time charter party (**"Charter"**).

38A.1 The type of petroleum or other liquid products to be carried is customarily described by a general categorization, to which viscosity and other characteristics are sometimes added. Thus, the description may be "crude and/or dirty petroleum products" or "clean petroleum products." The nature of the cargoes carried is, of course, highly important to the owner in so far as it relates to the condition of the vessel's tanks, pumping capacity and safety gear. The loading of cargo not within the described category would be a breach and would expose the charterer to a claim for damages. See *The Witfuel*, SMA 1381 (Arb. at N.Y. 1979), where the loading of a distillate clean petroleum product was held to be a breach of the charter which restricted the charterer to crude and/or dirty petroleum products. On the other hand, the owner would be in breach if the chartered vessel was incapable of carrying the specified cargo safely (see paragraph 9A.4).

38A.2 Clause 1—Term

1 Term

a Firm Period

The term of the Charter shall be for a period of about *[Insert the term of firm period]* (**"Firm Period"**) plus any extensions thereof as provided in Clause 1b and Clause 1c. The Firm Period shall commence at the time when the Vessel is placed at Charterer's disposal as provided in Clause 5. The word "about," as used in Clause 1a, shall mean up to forty-five (45) days more or less, at Charterer's option, and shall apply to the term of the Charter consisting of the Firm Period plus any optional periods or extensions as provided in Clause 1b and/or Clause 1c. The term of the Charter, as stipulated in Clause 1a, shall hereinafter be referred to as (**"Charter Term"**).

38A.3 The ExxonMobil form fixes at 45 days the amount of "underlap" or "overlap" permitted, i.e. redelivery may be made not more than 45 days before or after expiration of the flat period. In New York this would probably be considered a strict requirement, following the decisions in *The*

Romandie, SMA 1092 (Arb. at N.Y. 1977), *The Scaldia*, SMA 905 (Arb. at N.Y. 1975) and *The Elizabeth Entz*, SMA 588 (Arb. at N.Y. 1971). In England, however, the principle of *The Dione* [1975] 1 Lloyd's Rep. 115 might entitle the charterer to redeliver beyond the 45-day leeway under circumstances beyond the charterer's control.

b Optional Period(s)
Charterer shall have the option of extending the term of the Charter for additional period(s) ("Optional Period(s)") by written notice to Owner as follows:
[*Insert the description of the optional period(s), if any. For example*:
"There are no Optional Periods under the Charter.", or

(1) First Optional Period
One (1) year, to be declared not less than three (3) months prior to the expiration of the Firm Period.

(2) Second Optional Period
One (1) year, to be declared not less than three (3) months prior to the expiration of the first Optional Period.]

c Off-Hire Extensions
The term of the Charter may also be extended by Charterer for periods of all, or any part, of the time the Vessel is off-hire during the Firm Period and/or Optional Period(s) ("Off-Hire Extension(s)") by giving written notice to Owner at least thirty (30) days before the expiration of the Firm Period or the Optional Period, as the case may be. If Charterer so elects, and gives a further written notice to Owner at least fifteen (15) days before the expiration of any such Off-Hire Extension, all or any part of the time the Vessel is off-hire following the previous notice shall be added to the term of the Charter. The term "off-hire", as used in Clause 1c and elsewhere in the Charter, shall include any period(s) as specified in Clause 11, as well as any other period(s) for which cesser or suspension of hire is otherwise provided for in the Charter, or which are stipulated in the Charter to be for Vessel's or Owner's time and/or account.

38A.4 This option grants the charterer the option of "tacking" all or any part of the aggregate "off-hire" time to the charter time. In the absence of such a provision, there would be no right to "tack" off-hire periods.

38A.5 Clause 2—Vessel Particulars

2 Vessel Particulars
Owner warrants that, as of the date and time of Vessel delivery hereunder and during the Charter Term, the Vessel and its equipment will have the particulars, capabilities, and capacities as shown in Schedule A hereto. Should there be any conflict between the particulars, capabilities, and capacities shown in Schedule A and any other provision within a Clause of the Charter, the particulars, capabilities, and capacities as specified in the Clause of the Charter shall prevail to the extent of the conflict.

38A.6 The Schedule commonly provides a detailed description of the vessel's particulars, capabilities and capacities and would no doubt be construed as "intermediate obligations" under English law, and as "warranties" under U.S. law. Thus, failure of the vessel to comply with the description in some particulars would represent a breach of charter, but would not justify termination of the charter unless the consequences were sufficiently serious (see paragraphs 3.31 *et seq*. and 3A.1 *et seq*.).

38A.7 Several points should be noted with respect to the particulars described. The capacity of each of the pumping systems (cargo, stripping, and segregated ballast) is the "design" capacity. In the case of older vessels, actual capacity may be substantially less. Yet under Clause 4 of the ExxonMobil form (below, paragraph 38.23) the owner warrants that the "description, particulars, and capabilities of the Vessel shall be maintained by Owner throughout the Charter Term, so far as is possible by the exercise of due diligence." Pumping capacity is further modified by Clause 8(c) (below, paragraph 38.43), under which the owner warrants that the vessel is capable of discharging a given quantity of product per hour at specified temperatures.

38A.8 Where the time charter is for the carriage of a variety of petroleum products that do not all require heating, the ship's heating warranty cannot be construed as an undertaking to heat indiscriminately all cargoes to the warranted temperature continuously and uniformly: *The London Confidence*, SMA 1257 (Arb. at N.Y. 1978).

38A.9 Clause 3—Hire

3 Hire

a Payment of Hire

Charterer shall pay hire for the use of the Vessel in United States dollars per day, or pro rata for part of a day. Payments shall be made monthly. Owner shall send invoices for hire to Charterer by the first (1st) day of the calendar month for which hire is due and Charterer shall pay hire due by the tenth (10th) day of the calendar month or five (5) working days after receipt of Owner's invoice, whichever is later. Payments shall be made to:

[*Insert the full-style payment instructions*]

Payments shall be made by electronic funds transfer, without discount or adjustment except as specified in Clause 3 or elsewhere in the Charter, commencing with the date and hour (UTC) the Vessel is placed at Charterer's disposal as specified in Clause 5 and continuing to the date and hour (UTC) the Vessel is redelivered to Owner at the expiration or any termination of the Charter, except as may otherwise be provided in the Charter. Any hire paid in advance and not earned shall be returned to Charterer at once by Owner and/or by any party to whom Owner may have permissively assigned the hire hereunder. Owner, in any event, shall be jointly and separately responsible, along with any such assignee, for such return of hire. In no event will initial payment of hire be made until the Vessel is placed at Charterer's disposal as provided in the Charter. Charterer shall not be responsible for any delay or error by Owner's bank in crediting Owner's account with hire, provided Charterer has made proper payment of hire within the time permitted under Clause 3, including, without limitation, the grace period specified in Clause 3f.

(1) Hire Rate for Firm Period

[*Insert the appropriate rate(s) of hire.*]

(2) Hire Rate for Optional Period(s)

[*Insert "There are no Optional Periods under the Charter," or the appropriate hire rate(s) for the optional period(s), if any. For example:*

(a) First Optional Period

[*Insert hire rate.*]

(b) Second Optional Period

[*Insert hire rate.*]

(3) Hire Rate for Off-Hire Extensions

The daily rate of hire for any extended period due to off-hire in accordance with Clause 1c shall be the rate that was in effect at the time of the off-hire.

38A.10 Unlike older charter forms, hire under this clause is payable by "electronic funds transfer" rather than "cash" or "check," a reflection of modern commercial practices.

38A.11 Clause 3(b)—Deductions from Hire

b Deductions
Charterer shall be entitled to deduct from hire payments any:
1) disbursements for Owner's account, including commissions thereon;
2) lay-up savings calculated in accordance with Clause 17;
3) previous overpayments of hire, including the value of past off-hire;
4) amounts representing expenses incurred by Charterer relating to off-hire periods ("Related Off-Hire Expense");
5) amounts representing the value of off-hire periods and Related Off-Hire Expense anticipated to occur during the month or other period for which a payment of hire to be is made, it being understood and agreed that Charterer shall not be required to make a monthly advance or other payment of hire if Vessel is, on the due date for payment, off-hire;
6) any sums due pursuant to Clause 3e;
7) claims pursuant to Clause 9, and;
8) other sums to which Charterer is entitled under the Charter.
Charterer shall have the right of deduction under subparagraphs 1) through 8) above, even where right of deduction is disputed, provided Charterer's claim of deduction is made in good faith. Any required adjustment for hire deduction shall be made after all facts are established. Any difference between the amount(s) withheld and the amount(s) due shall be refunded or credited, as the case may be, in hire installment(s) due after any adjustment is determined.

38A.12 The ExxonMobil form approaches the troublesome issue of deductions from hire by giving the charterer fairly extensive liberty to deduct. Thus, the charterer may deduct an overpayment of hire resulting from the ship going off-hire, even if the off-hire is disputed.

38A.13 The same is true for off-hire and other allowances to the charterer for performance deficiencies measured by Clause 9. The above language permits a deduction for "claims pursuant to Clause 9." This suggests that, so long as there is a bona fide "claim," a deduction may be made even though the "claim" ultimately may be reduced or eliminated. Thus, the charterer need not fear a withdrawal for non-payment of hire in the case of disputed deductions made in good faith. In *The Cigale*, SMA 3229 (Arb at N.Y. 1995), the panel denied the owners' claim for a balance of hire and a declaration that it was entitled to withdraw the ship for non-payment of hire. The panel noted that the charterer's deductions appear to have been proper or estimates, which could have been substantiated but for the owners' failure to produce logs and other ship records. The panel drew an adverse inference against the owner because of its failure to produce documents.

38A.14 Finally, there is a catch-all provision allowing deductions for "other sums to which charterer is entitled under this charter." Since this is restricted to amounts to which the charterer is "entitled," as opposed to mere "claims," the charterer probably makes disputed deductions (other than for off-hire and Clause 9 claims) at his peril. If the charterer ultimately fails to substantiate its right to the sums involved, the deduction would constitute at least partial non-payment of hire and could therefore justify a withdrawal (see paragraph 16A.4).

38A.15 Clause 3(c)—Final Voyage

c Final Voyage
(1) Use of the Vessel

Notwithstanding Clause 1a, should the Vessel be on a final ballast/laden voyage or on a ship-to-ship transfer (**"Final Voyage"**) at the expiry of the Charter Term as calculated in accordance with Clauses 1a, 1b and 1c, Charterer shall have the continued use of the Vessel under the same Charter terms and rate of hire then prevailing under the Charter for such length of time as is necessary to complete the voyage or ship-to-ship transfer, as the case may be, and to thereafter effect redelivery of the Vessel to Owner at the place of redelivery under the Charter. Any such period of continued use shall be deemed to be part of the Charter Term.

(2) Hire payment

Should a payment of hire become due, when the Vessel is on the Final Voyage, said payment shall be made for the time estimated by Charterer to be necessary to complete the Final Voyage and effect redelivery of the Vessel to Owner in accordance with the Charter, less all deductions provided for in Clause 3b, which deductions shall be estimated by Charterer if the actual amounts cannot then be reasonably ascertained, and also less the amount estimated by Charterer to become payable by Owner for fuel on redelivery as provided in Clause 19. Upon Vessel redelivery, any difference between the estimated and actual amounts shall be refunded to or paid by Charterer, as the case may require.

38A.16 This paragraph simply provides for the deduction of estimated disbursements, fuel on redelivery, etc., from the final month's hire, a practice widely followed under all forms of time charter, whether or not expressly authorized.

38A.17 Clause 3(d)—Loss of Vessel

d Loss of Vessel

Should the Vessel be lost, or be missing and presumed lost, hire shall cease at the time of the loss, or if such time is unknown, at the time when the Vessel was last heard from. If the Vessel should become a Constructive Total Loss ("CTL"), hire shall cease at the time of the casualty resulting in such loss. In either case, any hire paid in advance and not earned shall be returned to Charterer and, in addition, Owner shall reimburse Charterer for the value of the estimated bunkers on board the Vessel at the time the Vessel went off-hire. If the Vessel should be missing when a payment of hire would otherwise be due, such payment shall be postponed until the safety of the Vessel is ascertained. If the Vessel should become a CTL, Charterer shall have the option to cancel the Charter on written notice to Owner. The Vessel shall be deemed a CTL under the Charter when the cost of recovering and repairing the Vessel is reasonably estimated to exceed either the Vessel's then current insured value or the fair market value of the Vessel when repaired, without in the latter case taking into consideration any value of the Charter.

38A.18 As a general rule, a ship becomes a "constructive total loss" if the cost of recovery and repairs exceed her value. See discussion in chapter 26 on Frustration at paragraph 26A.43.

38A.19 The clause provides that payment of hire is to be deferred if the ship is off-hire when a payment of hire would otherwise be due. This avoids the sometimes difficult task of the charterer forecasting how much off-hire may properly be deducted if the ship is, for example, under repair on the due date. By postponing payment until the off-hire has ceased, the charterer need pay in advance only for such part of a hire period for which he knows he will have the use of the ship.

38A.20 Clause 3(e) and (f)—Reduction in Hire and Default

e Reduction in Hire
Should the Vessel, for any reason during the Charter Term, fail to fulfill the particulars, capabilities, capacities, and/or conditions stipulated in Clause 2, Clause 4, or elsewhere in the Charter, Charterer shall be entitled, without prejudice to any claim Charterer may otherwise have under the Charter, to a reduction in the hire to compensate Charterer for such failure; and, where the failure affects the time taken by the Vessel to perform any services under the Charter or the availability of the Vessel for such services, hire shall be reduced by an amount equal to the value of the time so lost, using the rate of hire applicable at that time.

f Default
In default of punctual and regular payment of hire as specified in the Charter, Owner will notify Charterer at:
[*Insert full-style of Charterer's payment contact*]
(or such other address as Charterer may, subsequent to the date of the Charter, advise Owner in writing) whereupon Charterer shall make payment of the amount due within ten (10) working days of receipt of said notification from Owner, failing which Owner shall have the right, on written notice to Charterer given prior to any receipt of late payment by or on behalf of Owner, to withdraw the Vessel from the service of Charterer without prejudice to any claim Owner may otherwise have against Charterer under the Charter.

38A.21 This is a modification of the traditional "withdrawal" clause permitting termination for any delay in payment. By requiring notice of default and allowing a grace period, the provision averts the well-known hardships resulting from a withdrawal in a high market. A valid withdrawal by the owner is without prejudice to any existing claims it may have under the charter as well as its right to seek damages caused by the charterer's default.

38A.22 Other hire clauses

g Extra Expenses and Advances
The hire rate(s) set forth in Clauses 3a(1) and 3a(2) cover in full any and all expenses for extra victualling by the Master, communications charges, and all overtime worked by the Vessel's officers and crew at Charterer's request. Charterer shall be entitled to a two and one-half percent (2.5%) commission on any sums advanced or disbursements made for Owner's account. Charterer shall make no cash advances to the Master. However, Owner shall have the option of making advances to Charterer, or its designated agent, for disbursement (provided such advances are deemed adequate and reasonable by Charterer) and, in such event, no commission shall be paid to Charterer.

h Hourly Rate of Hire
The hourly rate of hire (**"Hourly Rate of Hire"**) for any period under the Charter shall be one twenty-fourth (1/24th) of the then-prevailing daily rate of hire.

i Taxes
All taxes, and dues in the nature of a tax, on Owner's income (howsoever described) shall be for Owner's account. All taxes and dues on the Vessel and/or cargo and/or on freights, arising out of cargoes carried or ports at which the Vessel calls in accordance with Charterer's orders under the Charter, shall be for Charterer's account if and to the extent that they are imposed because of Charterer's orders or in connection with the Vessel's service to Charterer under the Charter.

If Charterer is obliged to deduct withholding tax from any payment due Owner, because of any action by or responsibility of Owner (whether in relation to Owner's business generally or to the Vessel), Charterer shall pay only the net amount due Owner after such deduction. However, where a tax or dues is for Charterer's account but such tax or dues takes the form of a mandatory withholding of part of a payment due to Owner from Charterer, then such payment shall be increased such that the net amount received by Owner after the mandatory withholding shall be amount contractually due from Charterer to Owner.

Notwithstanding any other provision of the Charter, Charterer shall not be liable for any taxes or dues:

1) if they are imposed at ports and/or places where the Vessel calls solely for Owner's purposes, or to the extent that they are imposed with reference to periods when the Vessel has deviated from Charterer's ordered voyage or is off-hire, and/or

2) if they would not have been imposed but for some action or fact that is the responsibility of Owner not related exclusively to the service of the Vessel under the Charter, and/or

3) to the extent that they are subject to increase due to some action, fact or reason that is the responsibility of Owner and is not related exclusively to the service of the Vessel under the Charter.

38A.23 Clause 4—Owner's Warranties

4 Owner's Warranties

a Vessel Condition

Owner warrants that, at the time the Vessel is placed at Charterer's disposal, the Vessel shall be tight, staunch, and strong; in thoroughly efficient order and condition, and in every way fit, manned, equipped and supplied for the service contemplated; with holds, cargo tanks, pipelines and valves clear, clean and tight; and its machinery, pumps, boilers, inert gas system, crude oil washing system, navigational equipment, heating coils, and all other equipment fully functional and in good working order and condition, and in every way seaworthy and fit to carry cargoes required under the Charter. Such description, particulars, and capabilities of the Vessel shall be maintained by Owner throughout the Charter Term, so far as is possible by the exercise of due diligence. In the event of a conflict between Clause 4a and Clause 2, Clause 2 shall prevail to the extent of the conflict.

b Vessel Management and Operation

Owner warrants that the Vessel will be managed and operated during the Charter Term by the company or companies named in Schedule A. Owner shall not change the management and/or operation of the Vessel during the Charter Term without the prior written consent of Charterer. If Owner transfers the operation and/or management of the Vessel to another entity without Charterer's prior written consent, in addition to its other rights Charterer may (in its absolute discretion and upon written notice to Owner) terminate the Charter.

c Evaporator

Owner warrants that, during the Charter Term, the Vessel shall be equipped with a fresh water evaporator, which shall be maintained in good operating condition. Owner warrants that this evaporator is capable of making sufficient fresh water to supply the Vessel's needs.

d Stability and Structural Integrity

Owner warrants that, during the Charter Term, the Vessel shall be suitable to

carry cargoes in any size ranging from no cargo to a full cargo (up to the appropriate Classification Society load line), with relative density ranging from 0.6 to 1.2, without incurring operational restrictions resulting from potential stability or structural problems.

e Cargo Heating

If the Vessel is described in Schedule A as being fitted with cargo heating coils or heat exchangers, Owner warrants that, during the Charter Term, the Vessel shall be capable of maintaining the temperature of the cargo loaded and/or increasing such temperature by 4.0°C per day during the voyage up to a maximum of 57° C (in either case as instructed by Charterer) and maintaining same throughout the voyage and during the entire discharge. Should the Vessel fail to heat cargo in accordance with Charterer's instructions, Charterer shall have the option to:
1) delay discharge of the cargo; and/or
2) delay berthing of the Vessel; and/or
3) discontinue discharge and remove the Vessel from the discharge berth or place until cargo is heated in accordance with Charterer's instructions.
Any time lost due to the Vessel's failure to maintain the temperature of the cargo, or to heat the cargo, in accordance with Charterer's instructions shall be off-hire time and for Owner's account; including, without limitation, any delay in moving the Vessel from and then back to a berth or place of discharging and any intermediate waiting in a vessel queue. In addition, any expense incurred by reason of such delay or otherwise shall be for Owner's account.

f Cargo Manifolds

Owner warrants that, during the Charter Term, the Vessel shall be equipped with pressure gauges fitted outboard of the valve at each discharge manifold connection. Such gauges shall be maintained in proper working condition and each gauge shall have a valid test certificate. The Vessel shall be equipped with a sufficient number of cargo manifold reducing pieces, of steel or comparable material (excluding aluminum and gray cast iron) and that meet the most recent Oil Companies International Marine Forum (**"OCIMF"**) standards, to make available appropriate flanges for cargo hoses or arms at all manifold connections on one side of the Vessel as follows:
Vessels less than 16 kDWT shall be equipped to present flanges of 4", 6" and 8" (ASA) and
Vessels from 16 to 60 kDWT shall be equipped to present flanges of 8", 10" and 12" (ASA) and
Vessels over 60 kDWT shall be equipped to present flanges of 10", 12" 14", 16", and 20" (ASA).

g Communications

Owner warrants that, during the Charter Term, the Vessel shall be equipped with VHF radiotelephone, satellite communications earth station, facsimile machine, radio teletypewriter, electronic mail capability, and such other radio telecommunications equipment as may be required by international, flag state, and port state regulations. The Vessel shall also be fitted with a computer capable of sending and receiving electronic mail (including attachments) as well as maintaining and transmitting Charterer's logs via electronic mail to Charterer.

h Crew Complement

Owner warrants that, during the Charter Term, the Vessel shall have a full and efficient complement of Master, officers and crew, with adequate training and experience in operating all of the Vessel's equipment, and that the Master and all officers shall possess valid and current certificates and/or documents issued or approved by the country of the Vessel's registry. Owner shall provide and maintain navigation and bridge organization manual(s) and procedures that

conform to the latest International Chamber of Shipping and International Maritime Organization standards. The deck officer complement shall be not less than the Master and three (3) deck officers, except when the Vessel is engaged in discharging cargo to lighters when four (4) deck officers shall be provided. Conversational English language proficiency is required for the Master and any officer in charge of cargo or bunker oil handling, and is warranted under the Charter.

i Drug and Alcohol Policy

Owner warrants that, during the Charter Term, it shall have a policy (**"Policy"**) on drug and alcohol abuse applicable to the Vessel that meets or exceeds the standards in the latest edition of OCIMF Guidelines for the Control of Drugs and Alcohol Onboard Ship. Under the Policy, alcohol impairment shall be defined as a blood alcohol content of 40 mg/100 ml or greater, the appropriate seafarers to be tested shall be all the Vessel's officers, and the drug/alcohol testing and screening shall include unannounced testing in addition to routine medical examinations. An objective of the Policy should be that the frequency of the unannounced testing be adequate to act as an effective abuse deterrent, and that all officers be tested at least once a year through a combined program of unannounced testing and routine medical examinations. Owner further warrants that the Policy will remain in effect during the Charter Term and that Owner shall exercise due diligence to ensure that the Policy is complied with. It is understood that an actual impairment, or any test finding of impairment, shall not in and of itself mean Owner has failed to exercise due diligence. Persons who test positive, refuse to test, or are unfit for duty (impaired because of drug or alcohol use) shall be removed from the Vessel during the remaining Charter Term and hall not be reassigned to service of Charterer or any of Charterer's associated or affiliated companies.

j Compliance

Owner warrants that the Vessel shall, at all times during the Charter Term, be in full compliance with all applicable international conventions, all applicable laws, regulations, and/or other requirements of the country of the Vessel's registry and of the countries of the port(s) and/or place(s) to which the Vessel may be ordered hereunder, and all applicable regulations and/or requirements of any terminals or facilities in such port(s) or place(s) where the Vessel may load or discharge. Owner further warrants that the Vessel shall have on board, during the Charter Term, all certificates, records, or other documents required by the aforesaid conventions, laws, regulations, or requirements, including any required for transiting of the Suez or Panama Canal, by day or night, if such transit is possible. Without limitation, the conventions, laws, regulations, and requirements referred to in Clause 4j mean conventions, laws, regulations, and requirements concerning ship size, ship design, safety, operation of ship's equipment (including inert gas and crude oil washing systems, if the Vessel is so equipped), navigation, pollution, and other like matters. At the time of delivery and during the entire Charter Term, the Vessel shall have on board an International Tonnage Certificate, or equivalent, and shall meet applicable guidelines published by the OCIMF. In addition, Owner warrants that, if required by Charterer or the Vessel's trade, the Vessel will hold a valid International Transport Workers' Federation (**"ITF"**) certificate or an equivalent document acceptable to Charterer throughout the Charter Term. The Vessel shall be off-hire during any time lost as a consequence of ITF action and Owner shall reimburse Charterer for any Related Off-Hire Expense.

k Charterer's Representatives

Owner warrants that, during the Charter Term, Charterer shall have the right to have its representatives visit the Vessel to observe operations as often and at

such intervals as Charterer elects. Such visits shall include, but not be limited to, access to pump room(s), engine room(s), cargo control room(s), navigation bridge, and deck areas. Owner shall allow Charterer's representatives to survey and take samples of all the Vessel's bunker tanks and cofferdams at loading, discharge and/or bunkering ports. Charterer's representatives shall also have the right to attend on board the Vessel to ascertain the circumstances of any incident involving cargo carried hereunder. Neither the exercise nor non-exercise by Charterer of any such right shall in any way absolve or reduce the obligations of Master and/or Owner under the Charter.

l Quality Assurance

(1) The Vessel

If at any time during the Charter Term one or more of the below circumstances occur:

- Owner is in breach of its obligations under Clause 2 and/or any of Clauses 4a through 4k and Owner fails, to Charterer's reasonable satisfaction, to cure such breach within thirty (30) consecutive days after Charterer sends written notice to Owner specifying the breach(s) and demanding correction, and/or
- the Vessel is responsible for an incident that results in damage to the Vessel, its equipment, or other property in excess of US$ 100,000, or that results in a discharge of oil of 10,000 U.S. gallons or more, and/or
- the Vessel is off-hire for a total of two hundred forty (240) cumulative unplanned hours during any one (1) year period during the Charter Term,

upon each occurrence of any of the above circumstances, Charterer shall have the option on written notice to Owner to terminate the Charter with immediate effect if the Vessel is free of cargo or at a date and time as stated in Charterer's notice, such termination being without prejudice to any other rights and remedies Charterer may have under the circumstances. Owner warrants that Owner and the Vessel's Master will comply with all orders and/or instructions given by Charterer with respect to the reporting to Charterer of any incidents affecting the Vessel and/or cargo. In all cases, Owner shall ensure that Charterer is promptly advised of all accidents to and/or pollution incidents involving the Vessel, and of any Vessel system failure.

(2) The Operator

Charterer's designated vetting affiliate has rated the Vessel Operator named in item 2.2 of Schedule A as being eligible for time charters as indicated in item 2.2.9 of Schedule A. Such rating is based in part upon an assessment of the Vessel Operator's OCIMF Tanker Management and Self Assessment report (**"TMSA"**) provided by the Vessel Operator. Owner warrants that, as of the date of the Charter and throughout the Charter Term, the TMSA does and will continue to accurately reflect the status of the Vessel Operator's safety and quality-management systems. Owner further warrants that during the Charter Term the Vessel Operator will maintain or improve the safety and TMSA as of the date of the Charter and set forth in Schedule D. Owner shall authorize or procure permission for Charterer's representatives to audit the status of the Vessel Operator's safety and quality-management systems with respect to the levels of achievement for each Element stated in the TMSA at any time during the Charter Term; provided, however, that reasonable notice of any such audit has been given to Owner and the date(s) of such audit agreed with the Vessel Operator. If Charterer's representatives find that the Vessel Operator has failed to maintain the safety and quality-management achievement levels identified in the TMSA as required by this Clause, and corrective action acceptable to Charterer (which acceptance shall not be unreasonably withheld) is not taken within three (3) months after notice of

such failure is given by Charterer to Owner, Charterer may, at its option and upon written notice to Owner, require Owner to promptly change the Vessel Operator to another operator of Owner's choice that is then eligible for time charters as specified in item 2.2.9 of Schedule A. If Owner does not promptly change the Vessel Operator in accordance with this Clause 4l(2), such failure shall be deemed a fundamental breach of the Charter and in such event Charterer shall have the option to terminate the Charter upon written notice to Owner and redeliver the Vessel to Owner when the Vessel is free of cargo, without prejudice to any other rights and remedies Charterer may have.

Clause 4 shall be without prejudice to Clause 13.

38A.24 Clause 5(a)—Place of Delivery

5 Delivery

a Place of Delivery

The use and services of the Vessel shall be placed at the disposal of Charterer [*Insert specific place of delivery, and any conditions on delivery; e.g. "all-fast alongside the berth"*] (**"Place of Delivery"**). Charter hire shall commence when the Vessel is at the Place of Delivery and in all respects ready to load and otherwise fully perform the Charter and ready for sea, and written notice thereof has been given by the Master to Charterer or its Agents at the Place of Delivery

38A.25 The requirement that the ship be "ready for sea" on delivery, in addition to being ready to load, should avoid the result of those cases which hold that hire runs if a ship can load, even if some repairs are necessary before the ship can sail (see paragraphs 8A.1 *et seq*.). The clause also reflects the fact that delivery is often done when the ship is at sea. After delivery, the temporary failure of equipment needed only for sea would probably not cause off-hire during loading, since there would be no "time lost."

38A.26 Clause 5(b)—Laydays

b Laydays

Hire shall not commence before [*Insert the first day of the delivery range*], except with Charterer's written pre-consent, and the Vessel shall be placed at Charterer's disposal, in accordance with the provisions of Clause 5a, no later than [*Insert the last day of the delivery range*] (**"Canceling Date"**), in default of which Charterer shall have the option to cancel the Charter. Charterer's option to cancel the Charter is declarable not later than seventy-two (72) hours after expiration of the Canceling Date, local time at the Place of Delivery. Cancellation by Charterer, or acceptance of the use of the Vessel's services, shall be without prejudice to any claims for damages Charterer may have for late tender of the Vessel's services or other breach of Owner's obligations under the Charter. Owner shall give Charterer written notices of the Vessel's estimated time of arrival at the Place of Delivery [*Insert notification requirements* (*e.g.; 180, 90, 60, 30, 20, 10, 5, 2, and 1*)] days prior to Owner's anticipated time of delivery. If, prior to the Canceling Date, it appears to Charterer that the Vessel will not be ready for delivery under the Charter by the Canceling Date, Charterer shall have the option on written notice to Owner:

1) to cancel the Charter, or
2) to require Owner to promptly give in writing to Charterer a new canceling date, with continuing right in Charterer to cancel the Charter, at any time prior to the original Canceling Date, either before or after receipt of any new canceling date that Owner may provide in accordance with Charterer's requirement.

448 If Charterer accepts a new canceling date in writing, the Vessel shall use utmost
449 dispatch to meet such date and the terms of Clause 5b shall otherwise apply to
450 this new date as if it was the original Canceling Date

38A.27 The first sentence of this provision is quite similar to other standard "laydays/cancelling" clauses, such as Clause 14 of the New York Produce form. The third sentence is *not* found in most such clauses, but it probably does no more than avoid a finding of waiver of any claim on account of mere acceptance or cancellation. Ordinarily, the owner would not be liable for late delivery unless occasioned by his default in proceeding to the delivery port with the utmost despatch (e.g., by making an unwarranted intermediate voyage) or unless he had misrepresented the position or expected readiness of the vessel at the time of fixing (see paragraphs 24A.1*et seq*.).

38A.28 Clause 5(c) and (d)

451 **c Fuel at Delivery**
452 Charterer shall accept and pay for all fuel in the Vessel's bunker tanks at the time
453 the Vessel is placed at Charterer's disposal. Payment for such fuel shall be in
454 accordance with the last documented net price paid by Owner, excluding any
455 delivery charges.

456 **d Space Available to Charterer**
457 The whole reach and burthen of the Vessel (but not more than she can
458 reasonably stow and safely carry) shall be at the Charterer's disposal, reserving
459 proper and sufficient space for the Vessel's officers, crew, Master's cabin, tackle,
460 apparel, furniture, fuel, provisions, and stores.

38A.29 Clause 6—Trading Limits

461 **6 Trading Limits**
462 **a Trading Range**
463 The Vessel may be employed in any part of the world trading between and at
464 ports, places, berths, docks, anchorages, and submarine pipelines in such lawful
465 trades as Charterer or its agents may direct, subject to the limits of the current
466 British Institute Warranties and any subsequent amendments thereto, but may be
467 sent to ports and places on the St. Lawrence River and tributaries between May
468 15 and November 15 and through the Straits of Magellan and around Cape Horn
469 and the Cape of Good Hope at any time of the year without payment of any extra
470 premium. Notwithstanding the foregoing restrictions, the Vessel may be sent to
471 Baltic Sea ports not north of Stockholm, and to Helsingfors and Abo, Finland,
472 and other ports and places as set forth in the British Institute Warranties and
473 Clauses, provided, however, that Charterer shall reimburse Owner for any
474 additional documented premium properly assessed by the Vessel's underwriters
475 and paid by Owner for breach of such trade warranties. In the event that the
476 Vessel shall, for any reason, be unable to be employed in trade to any port or
477 place not excluded by Clause 6a, all time lost shall be for Owner's account and
478 Charterer shall have the option to terminate the Charter upon written notice to
479 Owner and redeliver the Vessel to Owner when the Vessel is free of cargo,
480 without prejudice to any other rights and remedies Charterer may have.

38A.30 It has become an almost universal practice to limit a vessel's trading under a time charter to "Institute Warranty limits," which are the trading limits set by the Institute of London Underwriters, for sailing beyond which extra hull insurance premiums are charged. The above provision permits the charterer to order the vessel to certain specified areas which may be outside warranty limits without payment of any extra premiums required under the vessel's hull insurance.

The charterer can order the vessel outside other specified Institute Warranty limits only by paying the additional premiums which may be charged by underwriters.

38A.31 Clause 6(b)—Berthing and Lightering

b Berths and Lightering

The Vessel shall be loaded, discharged, or lightened at any suitable port, place, berth, dock, anchorage, submarine pipeline, or alongside other vessels or lighters, whether in port or not and while at anchorage or underway, as Charterer may direct. Notwithstanding anything contained in Clause 6 or any other provisions of the Charter, Charterer shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage, submarine pipeline, vessel, or lighter, and shall not be liable for any loss, damage, injury, or delay resulting from conditions of, or at, ports, places, berths, docks, anchorages, submarine pipelines, vessels, or lighters not caused by Charterer's fault or neglect when directing the Vessel to such ports or places or which could have been avoided by the exercise of reasonable care on the part of the Master or Owner.

When the Vessel is employed as a lightering vessel, in order to assist the Vessel, Master, and Owner in the lightering operation, whether at anchorage or underway, Charterer may, at its option, provide and pay for lightering advisor(s) and lightering gang to be employed under the exclusive direction, supervision, and control of the Vessel's Master, who shall continue to be fully responsible for the operation, management, and navigation of the Vessel during the entire lightering operation. In the event it is necessary for Owner to incur additional hull insurance premium directly related to the employment of the Vessel as a lightering vessel, Charterer agrees that such provable and necessary additional premium shall be for Charterer's account.

Lightering and ship-to-ship transfer operations shall be performed in accordance with, and meet or exceed, the standards in the latest OCIMF guidelines for ship-to-ship transfers.

38A.32 This is a modification of the usual "safe port" and "safe berth" warranties. The ExxonMobil form expressly disclaims a warranty of safety and, instead, limits the charterers' liability to loss caused by his "fault or neglect." Additionally, the provision makes it explicit that the owner must bear the loss if it could have been avoided by reasonable care on his part or that of the master. See, for example, *The Athenoula*, SMA 1410 (Arb. at N.Y. 1980), in which the panel pointed out that Clause 16 of the Mobiltime form did not warrant the safety of a berth but rather obligated the charterer to exercise due diligence in ensuring that the ship be employed between safe berths. The provision leaves open the possibility of a "divided damages" result if the fault of both the charterer and the owner contributed to a casualty. Thus, the trend in admiralty to allocate damages on a proportionate fault theory is not negated, although the basis of the charterers' responsibility has been changed from strict liability to actual fault. But see *The Halekulani*, SMA 1633 (Arb. at N.Y. 1981).

38A.33 The problem of safety in loading is particularly acute for tanker owners today, since many of the "ports" and "berths" to which their ships may be ordered consist of nothing more than mooring buoys, with little or no protection from weather and seas heretofore associated with the notion of a "harbor." Moreover, much of the crude originates in areas where there is need for concern over the "political" safety of the port. Under the ExxonMobil form these additional risks appear to have been shifted to the owner.

38A.34 Clause 6—Remaining clauses

c Vessel Speed Orders

Charterer may issue orders directly to the Master to slow down or speed up the

Vessel, consistent with the safe operation of the Vessel and its machinery, on ballast and/or laden passages. A copy of any such orders shall also be sent to Owner.

d Controlled Passages

The following passages shall not be navigated by the Vessel while performing under the Charter without Charterer's prior written agreement:

1) The Strait of Messina
2) The Strait of Bonifacio
3) Between the Scilly Islands and Land's End
4) The Minches, if the Vessel is over 10,000 Gross Tons
5) If bound to port(s) on the East Coast of the U.K., north of the River Thames, the in-shore traffic zones in the English Channel
6) The Old Bahama Channel

When transiting the Florida Straits, from Key Biscayne south to the Dry Tortugas, the Vessel shall maintain a distance of not less than ten (10) miles off the outer navigational aids marking the reefs off the Florida Keys. When transiting the Windward Passage or the Yucatan Channel, the Vessel shall give the coast of Cuba a wide berth. It is understood and agreed that the daily rate of hire includes all compensation for the restrictions in Clause 6d.

e Ship Inspection Report (SIRE) Program

Owner shall ensure that during the Charter Term there is on file with OCIMF a complete and correct SIRE Vessel Particulars Questionnaire. Further, Owner shall make its best efforts to ensure that, throughout the Charter Term, there shall be on file with OCIMF a SIRE report submitted within the past six (6) months by a major international oil company that is a member of OCIMF and not an associated or affiliated company of Charterer. Any cost of complying with this Clause 6e, and any time lost by reason of Owner's failure to so comply, shall be for Owner's account.

38A.35 Clause 7—Dry Cargoes

7 Dry Cargoes

Charterer shall have the option of shipping any lawful dry cargo in bulk, for which the Vessel and her tanks are suitable, and any lawful merchandise in cases and/or cans and/or other packages in the Vessel's forehold, between decks, and/or other suitable space available, subject, however, to the Master's approval as to kind and character, amount and stowage. All charges for dunnage, loading, stowing, and discharging so incurred shall be paid by Charterer.

38A.36 Clause 8—Speed and Performance Warranties

8 Speed, Fuel and Pumping Warranties

Owner warrants that, during the Charter Term, the Vessel shall fully meet the speed, fuel, and pumping warranties stipulated in Clause 8.

a Speed Performance Warranty

Owner warrants that the Vessel is capable of maintaining, and shall maintain, on all sea passages from sea buoy to sea buoy, a guaranteed average speed of not less than [*Insert the proper warranty speed*] knots in a laden condition and not less than [*Insert the proper warranty speed*] knots in a ballast condition (**"Warranty Speed"**). Speed warranty performance to be excluded for periods of wind conditions exceeding force six (6) on the Beaufort Scale persisting for more than twelve (12) consecutive hours. The Master shall promptly advise Charterer in writing whenever the Vessel encounters wind conditions exceeding Beaufort

Force Six (6), and again when the wind conditions moderate to Beaufort Force Six (6) or less.

b Fuel Consumption Warranty

(1) Propulsion and Auxiliary Fuel

Owner warrants a maximum daily fuel consumption on all sea passages from sea buoy to sea buoy of high viscosity fuel oil meeting the latest quality standards of ISO 8217 RMG 380 if reasonably available, or RMH 380 if RMG 380 is not reasonably available (**"HFO"**) and marine diesel fuel meeting the latest quality standards of ISO 8217 DMB or better (**"DMB"**) for all purposes excluding heating and tank cleaning (**"Warranty Consumption"**) as listed below. Fuel consumption warranty performance to be excluded for periods of wind conditions exceeding force six (6) on the Beaufort Scale persisting for more than twelve (12) consecutive hours.

[Insert the appropriate speed and consumption figures in the following table and paragraphs]

Speed (knots)	HFO Laden (MT)	HFO Ballast (MT)	DMB (MT)
10.0	–	–	–
10.5	–	–	–
11.0	–	–	–
11.5	–	–	–
12.0	–	–	–
12.5	–	–	–
13.0	–	–	–
13.5	–	–	–
14.0	–	–	–
14.5	–	–	–
15.0	–	–	–
15.5	–	–	–
16.0	–	–	–
16.5	–	–	–
17.0	–	–	–

38A.37 Here we have one of the salient differences between a typical tanker time charter form and the New York Produce and Baltime forms. Under the usual dry cargo charters speed performance is measured under "good" or "ordinary" weather conditions. Tanker time charters such as the STB form utilize the "guaranteed" or "all weather" speed concept, under which such external factors as wind, seas, currents and fog are all ignored. This approach has the virtue of simplicity, and if a ship is engaged over a long period of time in standard trades, these factors should average out fairly well. However, the provision has not been applied literally in a number of New York arbitrations. Thus, in *The Golar Kansai*, SMA 1263 (Arb. at N.Y. 1978), the speed warranty and hire adjustment provisions of the Mobiltime form were held geared to "moderate (Beaufort 1–5)" weather. See also *The Athenoula*, SMA 1410 (Arb. at N.Y. 1980) and *The Efplia*, SMA 1359 (Arb. at N.Y. 1979), where speed performance under the Mobiltime and Texacotime forms was measured under "moderate" weather also.

38A.38 The ExxonMobil form seems to acknowledge this issue by providing that "Speed warranty performance to be excluded for periods of wind conditions exceeding force six (6) on the Beaufort Scale persisting for more than twelve (12) consecutive hours."

38A.39 In *The Ionic*, SMA 2519 (Arb. at N.Y. 1988), a dispute arose under a Texacotime

charter concerning responsibility for reduced speed in various circumstances. The panel majority ruled that it is not proper to exclude from the performance calculation time lost as a result of restricted visibility caused by weather conditions unless speed was reduced to comply with the International Collision regulations. The panel was unanimous in ruling that periods of reduced engine speed are to be excluded from performance calculations where the ship has to transit restricted sea lanes and engine speed was reduced to comply with either international or local laws. The panel noted, however, that it was a prerequisite to the owners' rights under the performance clause that it demonstrate the ability of the ship to meet and maintain its guaranteed speed and consumption under all weather conditions. As stated by the panel: "Specifically, the vessel must have been capable of meeting the performance requirements throughout the period of the charter on a seabuoy-to-seabuoy basis."

38A.40 An unresolved issue is the extent to which the performance guarantees of speed and consumption apply to periods of deliberately slow steaming. One possible solution to the problem of claims for excess consumption is to stipulate in advance a "curve" or scale of consumption at various speeds.

38A.41 Still another issue may be generated by the use of VLCC's virtually as storage facilities by keeping them at loading or discharge ports for weeks or months. If this results in bottom fouling there may be a dispute as to whether any loss of speed is the owner's sole responsibility.

38A.42 In *The Stolt Capricorn*, SMA 2359 (Arb. at N.Y. 1987), the owners' failure to show that the ship's cargo pumps were in good working condition and complied with the provisions of Clause 8 led to its being found liable for the charterers' damages. The arbitrators stated that, had the owner shown that the ship complied with the provisions of Clause 8, it would have been absolved from any performance claims. One of the issues raised in the case related to back pressure from the shore. The panel ruled that "the Master had a duty to the court and/or protest any delays which might have been caused from shoreside to the performance of his vessel." In the absence of such protest or records, the panel concluded that the owner could not show that prevailing shore conditions were such that they had adversely affected the discharge.

38A.43 Clause 8—Remaining clauses

(2) Heating and Tank Cleaning Fuel

For each day heat is applied to the cargo or slop tanks, Owner warrants that the fuel consumption will not exceed [*Insert the appropriate quantity*] metric tons of HFO per day for maintaining heat, or [*Insert the appropriate quantity*] metric tons per day for increasing heat, of all tanks and pro rata for part of the tanks. For tank cleaning, other than crude oil washing, Owner warrants that the fuel consumption will not exceed [*Insert the appropriate quantity*] metric tons of HFO for washing all tanks, and pro rata for washing part of the tanks, which also includes shifting ballast and other tank cleaning functions.

(3) Fuel Consumption in Port

Owner warrants that the maximum fuel consumption in port shall be as follows:

Idle (at anchor or on berth):	[*Insert the appropriate quantity*] MT of HFO per day (with boiler secured).
	[*Insert the appropriate quantity*] MT of HFO per day (on standby with boiler on).
Loading:	The Idle consumption warranted above for standby with boiler on plus an additional [*Insert the appropriate quantity*] MT of HFO for loading a full cargo, or pro rata for part cargo.

Discharging:	The Idle consumption warranted above for standby with boiler on plus an additional [*Insert the appropriate quantity*] MT of HFO for discharging a full cargo, or pro rata for part cargo.

c Pumping Performance Warranty

Owner warrants that the Vessel will discharge cargo at the following minimum rates:

Light petroleum (viscosity less than 69 cSt at 50° C) [*Insert the appropriate quantity*] m^3/hr.;

Medium petroleum (viscosity of 69 to 690 cSt at 50° C) [*Insert the appropriate quantity*] m^3/hr.;

Heavy petroleum (viscosity above 690 cSt at 50° C) [*Insert the appropriate quantity*] m^3/hr.;

or that the Vessel will maintain throughout the entire period of discharge, including crude oil washing and stripping, an average pressure of 100 pounds per square inch gauge (PSIG) at the ship's manifold should the foregoing minimum rates not be met. Charterer shall have the option to Crude Oil Wash all or part of the Vessel's cargo tanks. In the event the Vessel uses crude oil cargo to wash cargo tanks during discharge, the Vessel shall be allowed an additional eight (8) hours for crude washing of all tanks or pro rata for crude washing part of the tanks.

38A.44 Clause 9—Performance Reviews

9 Performance Reviews

a Performance Review Frequency and Compensation

The speed, fuel consumption, and pumping performance guaranteed by Owner under Clause 8 will be reviewed by Charterer at the end of approximately six (6) months, counting from the time of delivery of the Vessel to Charterer in accordance with the Charter, and thereafter at approximately six (6) month intervals. The Vessel's performance will be reviewed on a voyage-by-voyage basis in accordance with Clause 9b. If it is found that the Vessel has failed to maintain the speed, fuel consumption, or pumping performance warranted during the preceding performance review period (or at any time during the Charter Term), Charterer shall be retroactively compensated in respect of such failings as follows:

(1) Speed Warranty Compensation

Payment to Charterer of the Hourly Rate of Hire for each hour, or pro rata for each part of an hour, that the Vessel steams in excess of the time the Vessel would have taken at the Warranty Speed under Clause 8a. Owner will receive no credit or compensation if Vessel performance with respect to speed is greater than the Warranty Speed.

(2) Fuel Performance Warranty Compensation

Payment to Charterer for each metric ton, or pro rata for part of a ton, in excess of the guaranteed daily consumption under Clause 8b for all purposes at sea for main engine and/or auxiliaries and/or heating and/or tank cleaning and while at anchor, loading, or discharging, including any excess not borne by Owner in accordance with Clause 11 of the Charter, at the average actual price paid for the particular grade of fuel oil purchased by Charterer for the total period under review. Charterer shall provide supporting price vouchers or invoices for such purchased fuel oil as soon as possible after completion of the review for the specified performance period. Subject to Clause 9b(2), Owner will receive no credit or compensation if the vessel's fuel consumption is less than the Warranty Consumption.

(3) Pumping Performance Warranty Compensation
Charterer is to be compensated at the Hourly Rate of Hire for each hour, or pro rata for each part of an hour, that the Vessel takes in excess of the pumping time allowed per the rates warranted in Clause 8c. Owner will receive no credit or compensation if the Vessel is able to discharge at a rate greater than warranted in Clause 8c. If the terminal or place of discharging does not allow or permit the Vessel to meet the warranty specified in Clause 8c, the Master shall forthwith issue a Letter of Protest (which shall, if possible, be acknowledged) to such terminal or place and shall immediately advise Charterer in writing by electronic mail, telex, or facsimile. If the Master fails to issue the Letter of Protest, Owner shall be deemed to waive any rights to contest that time was lost as a result of the Vessel's failure to comply with the pumping warranties in Clause 8c. Any delay to Vessel's discharge caused by shore conditions identified in Master's Letter of Protest shall be taken into account in the assessment of pumping and loading performance.

(4) Performance Review Basis
The basis for determining the Vessel's performance in Clauses 9a(1) through 9a(3) shall be the statistical data supplied by the Master in the Sea Logs, Port Logs, and Pump Logs provided by Charterer.

(5) Performance Claims Review
Charterer shall provide Owner with an opportunity to review any claim submitted by Charterer under Clause 9a and Owner shall complete such review and provide Charterer with the results thereof within fifteen (15) days from the date such claim was sent by electronic mail or facsimile from Charterer to Owner. Charterer may deduct from hire any amount to which it claims it is entitled under Clause 9a after the expiration of twenty-five (25) days from the date of Charterer's sending of a claim relating thereto to Owner. Such deduction shall be without prejudice to Owner defending such claim.

(6) Claim for Final Period
In the event of Charterer having a claim in respect of Vessel's performance during the final performance review period, the amount of such claim shall be withheld from hire in accordance with Charterer's estimate made not earlier than three (3) months before the end of the Charter Term and any necessary adjustment after the termination of the Charter shall be made by Owner to Charterer or Charterer to Owner, as the case may require.

b Performance Review Calculations
(1) Speed Warranty Calculations
Speed performance will be determined by taking the shortest safe distance for the sea passage from the BP Shipping Marine Distance Tables (**"BP Distance"**), less the distance reported in the Vessel's Sea Log for steaming from the sea buoy to the loading/discharge berth or place inbound and from the loading/discharge berth or place to the sea buoy outbound, divided by the Warranty Speed to determine charter party hours at sea. Total actual hours at sea, as reported in the Vessel's Sea Log, will be compared to the charter party hours at sea to determine lost or saved hours. Each laden and ballast sea passage shall be calculated independently and the results of different sea passages shall not be averaged over time. For the avoidance of doubt, Vessel over-performance with respect to speed on any voyage(s) shall not be deemed to offset Vessel under-performance on any other voyage(s).

(a) Speed Warranty Adjustments
All stops at sea and any sea passage covered by an off-hire calculation will be excluded from speed warranty calculations.
In the event the Vessel is ordered by Charterer to deviate during a sea passage, such actual deviation miles and actual hours shall be recorded in the Vessel's Sea Log. For the purpose of Clause 9b, deviation shall mean a change in course caused by a change in destination ordered by Charterer after the Vessel has commenced its voyage to the initial port or place ordered by Charterer. The actual deviation miles reported in the Vessel's Sea Log will be added to the BP Distance for the sea passage performed up to the point of deviation to determine the charter party hours for the passage.

In the event Charterer orders the Vessel to proceed at speed(s) greater than the Warranty Speed on any sea passage, and the Vessel is able to achieve speed(s) greater than the Warranty Speed, such sea passage will be excluded from speed and fuel warranty calculations. In such cases, if the Vessel is unable to achieve speed(s) greater than the Warranty Speed, then the speed and fuel warranty calculations for that sea passage shall be based on the Warranty Speed.

In the event Charterer orders the Vessel to proceed at speed(s) equal to or less than the Warranty Speed on any sea passage, such sea passage will not be excluded from speed and fuel warranty calculations which shall be based on Charterer's ordered speed.

In the event Charterer orders the Vessel to adjust speed on any sea passage to arrive at a port or place at a specified time, such sea passage shall be excluded from speed and fuel warranty calculations,

Actual hours at sea recorded in the Vessel's Sea Log and corresponding BP Distance(s) for passage in the following restricted waters will be excluded from speed warranty calculations:

English Channel — Between NW/SE line through Bassurelle Light and NW/SE line through Noord Hinder Light Vessel.

Malacca/Singapore Straits, Eastbound through Passage — Between NE/SW line through 03–00 N, 100–40 E and Latitude 01–35 N.

Malacca/Singapore Straits, Westbound through Passage — Between Horsbourgh Lighthouse and the Brothers Lighthouse.

Malacca/Singapore Straits, Eastbound to Singapore Only — Between NE/SW line through 03–00 N, 100–40 E and 1 mile SW of Sultan Shoal Light.
Malacca/Singapore Straits, From Singapore to Westbound Only — Between 1 mile SW of Sultan Shoal Light and the Brothers Lighthouse.

(b) Speed Warranty Calculation Method
Each sea passage not excluded from the speed performance review process as detailed above will be calculated as follows:

(i) The BP Distance for the sea passage, minus the sum of the distance reported in the Vessel's Sea Log for steaming from the sea buoy to the loading/discharge berth or place inbound and from the

loading/discharge berth or place to the sea buoy outbound and the distance reported for passages in restricted waters, divided by the Warranty Speed equals charter party hours.
(ii) Total actual hours at sea, minus the sum of time stopped at sea and time reported for passage of restricted waters, minus charter party hours as determined in (i) above equals hours saved or lost.
(iii) Hours lost, times the Hourly Rate of Hire, equals the amount due Charterer.

(2) Fuel Warranty Calculations
For each grade of fuel the following calculation is performed for each sea passage. Each laden and ballast sea passage shall be calculated independently. Within each performance review period, fuel saved on any voyage (including in-port consumption determined in accordance with Clause 9b(4)) shall be credited against any excess consumption on other voyages performed during the same performance review period. However, any net savings of fuel during one performance review period shall not be credited against excess consumption in any other performance review period and Owner shall receive no credit or compensation for any net fuel savings during a performance review period.

(a) Average Speed
The BP Distance for the sea passage minus the sum of the distance reported in the Vessel's Sea Log for steaming from the sea buoy to the loading/discharge berth or place inbound and from the loading/discharge berth or place to the sea buoy outbound divided by the actual hours at sea minus stops at sea reported in the Vessel's sea log equals the average speed for fuel consumption purposes. The distance steamed in restricted waters is not excluded from the BP Distance included in this calculation.

(b) Days at Sea
Total actual hours at sea, minus the sum of stops at sea, divided by 24 equals the total days at sea.

(c) Warranted Consumption
Average speed as calculated in Clause 9b(2)(a) and rounded to the nearest tenth (1/10) of a knot is compared to the fuel consumption table of guaranteed consumption and the appropriate value(s), tons per day, is chosen. The appropriate value is chosen as follows:
(i) If the average speed equals a value in the table, the corresponding fuel value is selected.
(ii) If the average speed falls between any two values in the table, the appropriate value is determined by linear interpolation using the next lowest and the next highest values in the table.
(iii) If the average speed falls below the lowest or above the highest value in the table, the appropriate value is determined by linear extrapolation using the lowest two values in the table when the speed is below the lowest value, or using the highest two values in the table when the speed is above the highest value in the table.
Example of linear extrapolation:
Actual speed above the highest value in the table; e.g., 14.3 knots.

Speed	MT/Day
14.3 (Actual)	?
14.0	38.0
13.5	35.0

[(14.3k–14k) x (38MT – 35MT) / (14k – 13.5k)] + 38MT = 39.8MT

Actual speed below the lowest value in the table; e.g., 11.8 knots.

Speed	MT/Day
12.5	31.0
12.0	29.0
11.8	(Actual) ?

29MT – [(12k-11.8k) x (31MT - 29MT) / (12.5k – 12k)] = 28.2MT

(d) Allowed Consumption

The total days at sea from Clause 9b(2)(b) times the appropriate value, in tons per day, from the fuel table as detailed in Clause 9b(2)(c) equals Charter Party Allowed Consumption.

(e) Amount Due Charterer

Charter Party Allowed Consumption minus actual consumption as reported in the Vessel's Sea Log equals tons saved or excess tons consumed.

Excess tons consumed, times the appropriate price as determined in accordance with Clause 9a(2) equals amount due Charter.

(3) Pumping Warranty Calculations

For each discharge, the following calculations will be performed to determine any time lost during pumping, and any compensation due to Charterer.

(a) Warranty Pumping Time

The gross volume discharged, divided by the appropriate warranted pumping rate from Clause 8c, equals the Warranty Pumping Time.

(b) Crude Oil Washing ("COW") Allowance

The number of tanks crude oil washed, divided by the total number of cargo tanks, times the total time allowed for crude oil washing all tanks from Clause 8c equals the COW Allowance.

(c) Charter Party Pumping Hours

The sum of the Warranty Pumping Time, plus the COW Allowance, equals the Charter Party Pumping Hours.

(d) Actual Pumping Hours

The actual hours spent discharging cargo, including COW and stripping, equal the Actual Pumping Hours.

(e) Hours Lost

If the Actual Pumping Hours exceeds the Charter Party Pumping Hours, the difference equals Hours Lost.

(f) Compensation Due Charterer

Hours Lost, times the Hourly Rate of Hire, equals the amount of Compensation Due Charterer.

(g) Waiver of Compensation Due Charterer

If the minimum discharge pressure specified in Clause 8c is maintained throughout the discharge, including COW and stripping, there shall be no Compensation Due Charterer for that discharge.

(4) In-Port Fuel Warranty Calculations

For each grade of fuel the following calculation is performed for each port

call. Each port call shall be calculated independently and the results of different port calls shall be included in the voyage calculations in accordance with Clause 9b(2).

(a) Warranty In-Port Time
The gross elapsed time from sea buoy inbound to sea buoy outbound less the time elapsed during passage inbound, passage outbound, and shifting between berths is the Warranty In-Port Time.

(b) Idle Consumption Allowance
The Warranty In-Port Time from Clause 9b(4)(a) times the appropriate value, in tons per day, from the idle allowance as detailed in Clause 8b(3) equals the Idle Consumption Allowance.

(c) Loading Allowance
The metric tons of cargo loading at the port, divided by the total metric tons loaded on the voyage, multiplied by the Loading warranty in Clause 8b(3) equals the Loading Allowance.

(d) Discharging Allowance
The metric tons of cargo discharged at the port, divided by the total metric tons discharged on the voyage, multiplied by the Discharging warranty in Clause 8b(3) equals Discharging Allowance.

(e) Allowed Consumption
(i) Port Calls without Loading or Discharge
If no cargo is loaded or discharged during a port call, the Allowed Consumption is the Idle Consumption Allowance.
(ii) Loading Port Calls
If cargo is loaded during a port call, the Allowed Consumption is the Idle Consumption Allowance plus the Loading Allowance.
(iii) Discharging Port Calls
If the cargo is discharged during a port call, the Allowed Consumption is the Idle Consumption Allowance plus the Discharging Allowance.
(iv) Loading and Discharging Port Calls
If cargo is discharged and loaded during a port call, the Allowed Consumption is the Idle Consumption Allowance plus the Discharging Allowance plus the Loading Allowance.

(f) Amount Due Charterer
Allowed Consumption minus actual consumption as reported in the Vessel's Sea Log equals tons saved or excess tons consumed.
Excess tons consumed, multiplied by the appropriate price as determined in accordance with Clause 9a(2) equals amount due Charter.

38A.45 This clause is one of the more sophisticated attempts to provide a method for adjusting hire in the event of underperformance. It should be noted that in the case of speed and consumption, the owner is not entitled to extra compensation if performance of the ship *exceeds* the guaranteed rates. Compare *The Golar Kansai*, SMA 1263 (Arb. at N.Y. 1978); *The Northern Star*, SMA 1494 (Arb. at N.Y. 1980). In *The Golar Kansai*, however, a case involving the Mobiltime form, the owner was held not entitled to credit for underconsumption of fuel which resulted from the ship's failure to maintain her minimum speed.

38A.46 *The Northern Star* decision illustrates the difficulty of applying the hire adjustment clause in certain circumstances. The ship demonstrated superior speed performance and lower fuel

consumption capability during the first two years of the charter, and the issue arose in subsequent years during periods of "slow steaming" ordered by the charterer. In an interim ruling, the panel decided that:

> . . . any periods of slow steaming or lay up should be evaluated for hire purposes on the basis of actual daily hire rate established during the last preceding quarter year in which the vessel performed at speeds unimpeded by Charterer's orders. Daily allowances to Owner for proven underconsumption of fuel and diesel oils at full speed should also be due to Owner, during slow steaming and/or lay up periods on the same basis as was allowed during the last preceding quarter in which the vessel performed at speeds unimpeded by Charterer's orders.
>
> In so holding, the panel pointed out that the hire adjustment clause compensated either the owner or charterer for proven speed capability and consumption characteristics of the ship, and to construe it otherwise would be to allow the clause to work only in favor of one party. Thus, once the ship had established a speed capacity in excess of that warranted, then the charterer could simply order the ship not to steam at greater than the warranted speed and effectively prevent the owner from earning any additional hire. See also *The Columbia Liberty*, SMA 2220 (Arb. at N.Y. 1986).

38A.47 Finally, it might be noted that hire adjustment under such a clause does not involve ordinary contract law concepts of damages and mitigation. Therefore, a refusal by the charterer to accept a substitute ship in mitigation of damages for speed deficiency, in the absence of a substitution provision, is a proper exercise of his rights and does not affect the adjustment of hire: *The Golar Kansai*, above.

38A.48 Clause 10—Liens

10 Liens

Owner shall have a lien on all cargoes for all amounts due Owner under the Charter, and Charterer shall have a lien on the Vessel for all monies paid in advance and not earned, all disbursements and advances for Owner's account, all amounts due to Charterer under Clause 9 and other provisions of the Charter, including, without limitation, the value of fuel in the Vessel's bunker tanks supplied or paid for by Charterer, and for any damages sustained by Charterer as a result of the breach of the Charter by Owner

38A.49 This language is similar to Clause 18 of the New York Produce form. Ordinarily, the lien will not extend to cargo owned by third parties: see paragraphs 30.64 *et seq*.) Unlike Clause 18 of the New York Produce form, however, there is no express grant of a lien on "subfreights" so that the owners' position regarding security is uncertain if the cargo has been sold to a third party. Of course, if the bill of lading incorporated the terms of the time charter by reference, the consignee could well be said to have purchased cargo subject to a lien. However, this is not a common practice in the tanker trade.

38A.50 The charterer's lien on the ship is express and quite broad. Under U.S. law, this would be clearly enforceable and subject the ship to *in rem* proceedings in the United States District Court.

38A.51 Clause 11—Off-hire

11 Off-Hire

a General Provisions

(i) In the event of loss of time from repairs; breakdown of machinery (whether partial or otherwise) including, without limitation, tank coatings; interference by authorities; collision, stranding, fire, or other accident or damage to the Vessel or cargo (not caused by the fault of Charterer) preventing, or which would prevent, the full and efficient working of the Vessel for more than three (3) consecutive hours, or

(ii) In the event of loss of time (whether or not continuing for any length of time) from deficiency of men or stores; breach of orders or neglect of duty by the Master, officers or crew; or from the consequences of illness or injury to, or strikes by, or refusal, inability or unwillingness to sail or otherwise do work on the part of the Master, officers or crew; or from labor-related picketing or boycott due to the Vessel or crew union affiliation or lack thereof, at places of loading, discharge, bunkering, or elsewhere by persons or organizations other than the Master, officers or crew of the Vessel; or from deviation (which expression includes, without limitation, putting back or putting into any port or place other than that to which the Vessel was bound under orders from Charterer) for the purpose of obtaining medical advice or treatment, or landing any injured, ill or other person, or the body of a deceased person on board (other than any person who may be carried at Charterer's request); while saving or attempting to save life or property or going to the aid of a ship in distress (whether voluntary or not), or

(iii) In the event of loss of time (taking into account, where appropriate, the three-hour franchise in sub-paragraph (i) above) from failure of the Vessel for any reason to fulfill the requirements of Clause 2 and/or Clause 4; then,

payment of hire shall cease for all time lost until the Vessel is again in an efficient state to resume her service and has regained a point of progress equivalent to that when the hire ceased hereunder, including, without limitation, return to the berth, queue position, or place occupied by the Vessel when the Vessel went off-hire. The cost of fuel consumed while the Vessel is off-hire hereunder, as well as all port charges, pilotage, and other expenses incurred during such period or consequent to the putting-in to any port or place other than that to which the Vessel is bound, shall be borne by Owner; but should the Vessel be driven into port or to anchorage by stress of weather or on account of accident to her cargo, such loss of time shall be for Charterer's account. If, upon the voyage, the speed of the Vessel is reduced or her fuel consumption is increased by breakdown, casualty, or inefficiency of Master, officers, or crew, so as to cause a delay of more than eight hours in arriving at the Vessel's next port or an excess consumption of more than one day's fuel, hire for the time lost and cost of extra fuel consumed, if any, shall be borne by Owner. Any delay by ice or time spent in quarantine shall be for Charterer's account, except delay in quarantine resulting from the Master, officers, or crew having communications with the shore at an infected port where Charterer has given the Master adequate written notice of infection, which shall be for Owner's account, as shall also be any loss of time through detention by authorities as a result of charges of smuggling or of other infraction of law by the Master, officers, or crew.

b Cumulative Off-Hire

If the periods of time lost, for which hire does not cease to be payable under the provisions of Clause 11a because each such period or delay is not of more than three (3) consecutive hours duration, exceed in the aggregate twenty-four (24) hours in any charter party year (and pro rata for part of a year), hire shall not be payable for all time lost during such twenty-four (24) hour franchise period as well as the excess beyond such period and any hire overpaid by Charterer shall be repaid by Owner. The term "charter party year" means consecutive periods of one year, with the first commencing on the date of delivery under the Charter.

c Detention of the Vessel

In the event of loss of time by detention of the Vessel by authorities at any place in consequence of legal proceeding against the Vessel, Owner, Vessel operator, Master and/or crew, or by reason of any strike or boycott against the Vessel, payment of charter hire shall cease for all time so lost. The cost of fuel consumed as well as all additional port charges, pilotage, and other expenses incurred during the time so lost shall be borne by Owner. If any such loss of time

shall exceed thirty (30) consecutive days, Charterer shall have the option to cancel the Charter by written notice given to Owner while the Vessel remains so detained, without prejudice to any other right Charterer may have in the premises.

d Owner's Due Diligence

The provisions of the Charter providing for Vessel off-hire and Related Off-Hire Expense, including, without limitation, Clause 3 and Clause 11, shall be fully operative regardless of any due diligence Owner may have exercised.

e Trading While Off-Hire

Owner may not, under any circumstances, trade the Vessel for its own account during any period of off-hire.

f Reservation

Nothing in Clause 11 shall affect any other provisions of the Charter stipulating loss of time for Vessel's or Owner's account or otherwise providing for suspension or cessation of hire or other rights and remedies for loss or diminution of Vessel services under the Charter.

38A.52 There are several important differences between the ExxonMobil off-hire provisions and those of dry cargo forms, such as the New York Produce form. Thus, under the ExxonMobil form the ship will go off-hire for delays caused by "interference by authorities." This is not the case under the New York Produce off-hire clause, although it does cover time lost due to "restraint of Princes."

38A.53 In order for off-hire to accrue under the first part of the clause (i.e., for breakdowns of machinery, collision, etc.) the delay must be for at least three hours. Once the three-hour minimum is met, however, the ship will be off-hire for the entire period of the delay, including the three-hour "franchise" period. Furthermore, paragraph (b) requires the addition of all periods of delay under three hours, and if they aggregate more than 24 hours in a year (or pro rata for part of a year) the ship will be off-hire for the excess.

38A.54 The clause also provides that the ship is off-hire for any deviation to land sick or injured "persons," except those carried at the charterers' request. This would usually mean deviating to land disabled crewmen. Again, this is a category of off-hire not within Clause 15 of the New York Produce form. Moreover, for the second group of delays subject to off-hire (i.e., deficiency of men, deviation, etc.) there is no minimum "franchise" period.

38A.55 The off-hire is measured not by the period of the ship's incapacity, but rather by the time the use of the ship has been effectively lost to the charterer, i.e. from the commencement of the breakdown or deviation until the ship is again in a position equivalent to that she was in when the breakdown occurred or the deviation began. This contrasts with the line of cases interpreting Clause 15 of the New York Produce form, treating the ship as off-hire only for the period of actual incapacity: see paragraphs 25A.1*et seq*.

38A.56 All the off-hire provisions must be read in conjunction with Clause 8. Thus, even if there is no off-hire because the applicable minimums have not been met, the loss of time will of course "count" in so far as computation of the ship's average speed is concerned. By the same token, actual off-hire periods are excluded from the calculations of speed and consumption under Clause 8.

38A.57 The final sentence of paragraph (a) allocates off-hire for quarantine delays. Under the corresponding New York Produce form, there is no specific mention of quarantine, and numerous disputes have arisen as to whether the circumstances of the quarantine gave rise to a "deficiency of men" or "restraint of Princes" for which the ship was off-hire.

38A.58 Paragraph (c) settles in the charterers' favor the issue of whether the ship is off-hire if she is arrested or attached (although it is silent with respect to the situation where the ship is arrested or attached in connection with claims for which the charterer bears ultimate responsibility). It also grants the charterer the option to cancel if the arrest continues for 30 consecutive days. Thus, an owner who lacks the resources to post the required security risks losing a valuable charter if the ship is subjected to prolonged legal restraint: see discussion at paragraphs 25A.36 *et seq*.

38A.59 Clause 12—Dry-docking and Repairs

12 Dry-docking and Repairs

a General Provisions

Owner, at its expense, shall dry-dock the Vessel, clean and paint the Vessel's bottom, and make all overhaul and other necessary repairs at reasonable intervals. Such overhaul or repair intervals shall not be less than thirty (30) months and such dry-docking intervals shall not be less than sixty (60) months unless the Vessel's flag state or classification society requires shorter intervals. For the purpose of dry-docking or repair, Charterer shall allow the Vessel to proceed to an appropriate port. Owner shall be solely responsible for such dry-docking and repairs, and also for gas-freeing the Vessel upon each occasion. All towing, pilotage, fuel, and other expenses incurred while proceeding to and from and while in and waiting for dry dock or repair shall also be for Owner's account. Fuel used during such dry-docking or repair periods, as provided in Clause 12 or Clause 15, or used in proceeding to or from the port of dry-docking or repair, will be charged to Owner by Charterer at the price charged to Charterer by its bunker supplier at such port if bunkers are obtained there, or at the next replenishment port.

b Adjustment of Hire

In case of dry-docking or repair pursuant to Clause 12 at a port where the Vessel is to load, discharge or bunker under Charterer's orders, hire shall be suspended from the time the Vessel receives free pratique on arrival, if in ballast, or upon completion of discharge of cargo, if loaded, until the Vessel is again in all respects ready for service. In case of dry-docking or repair at a port other than where the Vessel loads, discharges or bunkers under Charterer's orders, the following time and bunkers shall be deducted from hire: The total time and bunkers, including dry-dock or repair port call, for the actual voyage from the last port of call under Charterer's orders to the next port of call under Charterer's orders, less the theoretical voyage time and bunkers for the direct voyage from said last port of call to said next port of call. The theoretical voyage will be calculated on the basis of the sea buoy to sea buoy distance at the warranted speed and consumption stipulated in Clauses 8a and 8b.

c Accumulation of Off-Hire Time

The period during which hire is suspended, including time in and waiting for dry dock and repairs, until the Vessel again comes on-hire under the terms of Clause 12b shall count as off-hire time under the terms of the Charter.

d Dry-docking Area

When dry-docking or repair is required, the Vessel may only be dry-docked or repaired within the Vessel's then-current trading pattern or area unless Charterer pre-agrees otherwise in writing. Owner may not, under any circumstances, trade the Vessel for its own account on the voyage to or from the dry dock or repair location.

e Notices

Except in case of emergency, Owner shall give Charterer no less than three

months written notice of its intention to dry-dock or repair the Vessel, which notice shall include Owner's estimate of the time required to complete the planned dry-docking or repair. Owner shall also promptly give Charterer written notice if Owner's original estimate of the duration of the dry-docking or repair period changes by more than three days. In any case, Owner shall give no less than ten days written notice of the date for completion of any planned dry-dock or repair, failing which any time thereby lost to Charterer shall be off-hire time.

38A.60 Clause 12 is a fairly straightforward provision requiring the ship "dry-docking intervals shall not be less than sixty (60) months unless the Vessel's flag state or classification society requires shorter intervals." As indicated in the comment under Clause 8, however, disputes may arise if the charterer's use of the ship requires exceptional bottom cleaning to avoid loss of speed.

38A.61 Paragraph (b) represents an effort to make off-hire for drydocking concomitant with the charterers' loss of trading time. It may not always be apparent just what "theoretical voyage" should be deducted from the time spent in deviating to the drydock, since the location of the drydock may cause a change in orders. However, in practice the owner and the charterer usually co-operate in arranging a drydocking so as to minimize the charterers' loss of use of the ship and the period of off-hire.

38A.62 Clause 13—Owner Provides

13 Owner Provides

a Owner's Responsibility

Owner shall provide and pay for all provisions, deck and engine room stores, galley and cabin stores, P&I, hull, and other insurance on the Vessel (except as provided for in Clause 6a and Clause 21d), wages of the Master, officers, and crew, all certificates and other requirements necessary to enable the Vessel to be employed throughout the trading limits herein provided, consular fees pertaining to the Master, officers, and crew, all fresh water used by the Vessel, and all other expenses connected with the operation, maintenance, and navigation of the Vessel, and customs or import duties arising in connection with any of the foregoing.

b Wages, Provisions and Stores

Any amounts expended for wages, provisions, and stores (insofar as such amounts are in respect of a period when the Vessel is on-hire) shall not be deemed a general average expenditure.

c Lubricants

When, during the Charter Term, Owner plans to purchase lubricants for the Vessel, Owner shall purchase such lubricants from one of Charterer's associated or affiliated companies whenever they are available at competitive prices. In the event lower prices are quoted to Owner by any supplier at the relevant port(s), Owner shall give one of Charterer's associated or affiliated companies the opportunity to meet such quotation

38A.63 This section is similar to Clause 1 of the New York Produce form. It should be noted, however, that under the above wording the owner undertakes to provide all "certificates" necessary to employ the ship within the permissible trading limits. This would no doubt include the "certificates of financial responsibility" required under United States oil pollution regulations and similar documents which may now or hereafter be required in other jurisdictions.

38A.64 Clause 14—Officers' Duties

14 Officers' Duties

a Master's Duties

The Master, although appointed by and in the employ of Owner and subject to Owner's direction and control, shall observe the orders of Charterer in connection with Charterer's agencies, arrangements, and employment of the Vessel's services hereunder. The Master shall prosecute all voyages with the utmost dispatch and render all reasonable assistance with the Vessel's crew and equipment, including, without limitation, hoisting, connecting and disconnecting hoses at ports or sea-berths when requested or when such assistance is the normal practice. If a conflict arises between loading or discharge terminal orders and Charterer's orders, Master shall stop cargo operations and promptly request instructions from Charterer by the fastest available means. Nothing in Clause 14, or elsewhere in the Charter, shall be construed as creating a demise of the Vessel to Charterer, nor as vesting Charterer with any control over, or responsibility for, the management, operation, and/or navigation of the Vessel.

b Logs

The Master and the engineers shall timely keep and sign full and correct logs of the voyages, which are to be patent to Charterer and its agents, and true log abstracts or such other paper or electronic forms as Charterer may require are to be sent, as instructed, directly to Charterer from each port of call.

c Conduct

If Charterer shall have reason to be dissatisfied with the conduct of the Master, officers or crew, Owner shall, on receiving particulars of the complaint, investigate it and, if reasonably required, make a change in the appointments.

38A.65 These provisions are quite similar to the comparable ones of the New York Produce form. See discussion at paragraphs 19A.1 *et seq*.

38A.66 In *The Zacharia T*, SMA 2224 (Arb. at N.Y. 1986), the vessel was chartered to carry a cargo of crude oil from Esmeraldas, Ecuador to Corpus Christi, Texas. The charter provided that the vessel was to load a full cargo of crude oil, "consistent with safe transit draft for the Panama Canal of 39' 6" tropical fresh water." The safe draft instruction was later amended by charterer to a maximum transit draft of 38' 11" TFW. The vessel loaded at a single-point mooring buoy and because prevailing swell conditions made it virtually impossible to obtain an accurate draft reading, the master requested that the loading master advise him when 51,000 long tons had been pumped aboard. When loading was finished, it was established by surveyors that the quantity loaded was 53,435 long tons. Because the excess tonnage put the ship at a draft which would have prevented her from transiting the Panama Canal, the master registered a protest. It was not feasible to off-load any of the cargo at Esmeraldas and, instead, the vessel lightered at Balboa and reloaded the excess cargo after the ship and the lightering vessel had passed through the Panama Canal. A dispute arose between the owner and charterer as to liability for the lightering expenses and off-hire. The panel held that the owner was liable because it was the master's responsibility to ensure that the vessel was not overloaded. According to the panel:

> [I]t always remains the Master's duty to see to it that the vessel is loaded and trimmed in such a manner as to safely prosecute the intended voyage. If the intended passage involves transit through a draft limiting channel or canal, as here, it is incumbent on the Master to take this into account and load the vessel in such a manner as to accomplish the voyage without delay or extra expense.

38A.67 Clause 15—Fuel, Port Charges, etc

15 Fuel, Port Charges, Etc.

a Fuel, Port Charges, Dues and Fees

Charterer shall provide and pay for all fuel. Owner, at each fueling, shall arrange for and retain properly sealed and identified samples of each grade of fuel received and shall hold same subject to Charterer's written instructions. Charterer shall also pay for all port charges (including the cost of obtaining a certificate of arrangements for oil recovery boats or devices at Japanese ports), light dues, dock dues, canal dues, pilotage, consular fees (except those pertaining to Master, officers and crew), tugs necessary for assisting the Vessel in, about, and out of port for the purpose of carrying out the Charter, and Charterer's agencies and commissions incurred for Charterer's account. Owner shall, however, reimburse Charterer for any fuel used or any expenses incurred in making a general average sacrifice or expenditure, and for any fuel consumed during, or related to, dry-docking, repair of the Vessel, or other periods of off-hire and said reimbursement(s) shall in no event be deemed a General Average expenditure. Charterer shall nominate and appoint Vessel's agents at all port(s) and place(s). Such agents shall be paid for by Charterer; however, when such agents are providing assistance or services to the Vessel, Master, crew or Owner, Owner shall instruct such agents who shall represent solely the Owner and Vessel.

38A.68 This provision is consistent with the usual allocation of fuel costs to the charterer. It may be noted that fuel consumed as part of a general average sacrifice is for the owners' account, which is logical since the ship and cargo will then share this cost in accordance with established rules governing apportionment of general average expenses.

38A.69 Clause 15(b)—Tugs and Pilots

b Tugs and Pilots

In engaging pilotage and tug assistance, Charterer is authorized by Owner to engage them on behalf of Owner on the usual terms and conditions for such services then prevailing at the ports or places where such services are engaged, including provisions there prevailing, if any, making pilots, tug captains, or other personnel of any tug the borrowed servants of Owner.

38A.70 Paragraph (b) of Clause 15 is obviously aimed at towage and pilotage conditions such as the so-called "U.K. Towing Conditions." These are standard contract terms that make the shipowner responsible not only for damage caused by errors on the part of the ship, but also for errors on the part of the tug. Such contracts are void in the United States as against public policy. However, they are valid in England and elsewhere. By this clause the charterer is authorized to bind the owner to these terms, if they are customary or required at the particular port or terminal where the services are needed.

38A.71 Clause 15(c)—Charterer's Responsibility

c Charterer's Responsibility

Neither Charterer, nor its agents, nor any associated or affiliated company of Charterer, nor any of their agents, directors, officers, or employees shall be under any responsibility for any loss, damage, or liability arising from any negligence, incompetence, or incapacity of any pilot, tug captain, or other personnel of any tug, or arising from the terms of the contract of employment thereof, or for any unseaworthiness or insufficiency of any tug or tugs, the

services of which are arranged by Charterer on behalf of Owner, and Owner agrees to indemnify and hold Charterer, its agents, its associated and affiliated companies, and their agents, directors, officers and employees harmless from and against any and all such consequences.

38A.72 Paragraph (c) expresses what is in all probability the general rule in any event, i.e., the charterer engages the tug or pilot on behalf of the owner and assumes no responsibility for the safe navigation of the ship. However, this provision should be read in conjunction with the limited "safe port" and "safe berth" obligations of Clause 6. These would seem to preclude the charterer from directing the ship to a port or berth which he knows or should know lacks adequate towage facilities. See *The Agia Erini II*, SMA 1602 (Arb. at N.Y. 1981).

In *Scholl* v. *Chuang Hui Marine Co. Ltd*., 646 F.Supp. 137, 1987 AMC 1162 (D.Conn. 1986), the charter contained a clause similar to ExxonMobil Clause 15(c). The charterer and owner were sued by a petroleum inspector who claimed that he was injured when he slipped on an oily substance on the deck of the tanker. The court granted summary judgment in favor of charterer and dismissed the petroleum inspector's claim, holding that the charterer had no duty to the inspector to maintain the deck in a safe condition.

38A.73 Clause 15(d)—Charterer's Tugs or Pilots

Charterer's Tugs or Pilots
Charterer shall have the option of using its own tugs or pilots, or tugs or pilots made available or employed by any associated or affiliated company, to render towage or pilotage services to the Vessel. In this event, the terms and conditions relating to such services prevailing in the port where such services are rendered and applied by independent tugboat owners or pilots shall be applicable, and Charterer, its associated or affiliated company and its pilots shall be entitled to all exemptions from, and limitations of, liability applicable to said independent tugboat owners or pilots and their published tariff terms and conditions.

38A.74 Clause 15(d) is an effort to have the charterers' affiliated towing companies treated as separate and independent entities for purposes of determining liability in the event of a casualty. It is conceivable that claims involving such tugs would be held subject to New York arbitration under the charter, in which case the owner could urge that the towing conditions could not be enforced. Since such conditions would presumably be valid where they were promulgated, some rather difficult conflict of laws issues would be raised.

38A.75 Clause 15(e)—Exceptions

e Exception
Any and all requirements of the Vessel, whatsoever, during or in connection with periods of off-hire and during loss of time for Owner's account, whether or not Vessel is off-hire, shall be provided and/or paid for by Owner, notwithstanding that such requirements would otherwise be provided for and/or paid for by Charterer under Clause 15.

38A.76 Clause 16—Additional Equipment

16 Additional Equipment
Charterer, subject to Owner's approval not to be unreasonably withheld, shall be at liberty to fit any additional pumps and/or gear for loading or discharging cargo or other purposes it may require beyond that which is on board at the commencement of the Charter, and to make the necessary connections with steam or water pipes or

other systems, such work to be done at its expense and time, and such pumps and/or gear so fitted to be considered its property, and Charterer shall be at liberty to remove same at its expense and time during or at the expiry of the Charter; the Vessel to be left in her original condition to Owner's satisfaction, ordinary wear and tear excepted. Owner shall, at its expense, provide appropriate maintenance for any equipment installed by Charterer.

38A.77 The addition of equipment such as pumps may complicate the evaluation of the vessel's performance under Clause 8. Moreover, notwithstanding the assertion that the equipment remains the charterers' property, it may be subject to maritime liens against the ship: see *Payne* v. *The Tropic Breeze*, 412 F.2d 707 (1st Cir. 1969).

38A.78 Clause 17—Lay-up

17 Lay-up

Charterer shall have the option of laying-up the Vessel for all or any portion of the Charter Term, in which case hire hereunder shall continue to be paid, but there shall be credited against such hire the whole amount which Owner shall save (or reasonably should save) during such period of lay-up through reduction in expenses, less any extra expenses to which Owner is put as a result of such lay-up. The place of such lay-up shall be subject to Owner's approval, not to be unreasonably withheld. Should Charterer, having exercised the option granted hereunder, desire the Vessel to again be put into service, Owner will, upon receipt of written notice from Charterer to such effect, immediately take steps to restore the Vessel to service as promptly as possible. The option granted to Charterer hereunder may be exercised one or more times during the currency of the Charter or any extension thereof.

38A.79 Lay-up is a frequently utilized privilege when the tanker market is depressed. The basic formula for apportioning savings and expenses is simple and fair, although it may prove quite complicated in practice. For example, calculating "savings" in insurance and maintenance may be difficult if the ship is part of a large fleet. Similarly, the effects of long term lay-ups on a ship's subsequent performance are difficult to gauge, and there no doubt will be disputes as to just what degree of "restoration" the charterer is responsible for.

38A.80 Clause 18—Requisition of Vessel

18 Requisition of Vessel

a Requisition of Title

In the event that title to the Vessel shall be requisitioned or seized by any government authority (or the Vessel shall be seized by any person, entity, or government under circumstances that are equivalent to requisition of title), the Charter shall terminate automatically as of the effective date of such requisition or seizure.

b Other Requisition

In the event that the Vessel should be requisitioned for use or seized by any government authority or by any person or entity on any basis not involving or not equivalent to requisition of title, it shall be off-hire hereunder during the period of such requisition, and any hire or any other compensation paid in respect of such requisition shall be for Owner's account; provided, however, that if such requisition continues for a period in excess of sixty (60) days, Charterer shall have the option to terminate the Charter upon written notice to Owner. Any periods of off-hire under Clause 18b shall be subject to Charterer's option for off-hire extension set forth in Clause 1c.

38A.81 Even without a provision such as this clause, requisition of title to a ship has traditionally been held to "frustrate" a charter.(see above, paragraph 26A.33).

38A.82 In so far as requisition of use is concerned, the application of the doctrine of frustration is less certain. Paragraph (b) is framed in terms of an option given to the charterer to terminate if the requisition lasts in excess of 60 days. There is no provision as to when the option must be exercised, so that the clause would probably be read as continuing the option for the duration of the requisition. No comparable option is given to the owner, although in the case of a sufficiently lengthy requisition he could presumably declare the charter "frustrated" under general legal principles (assuming, of course, that the charterer had elected not to exercise his option).

38A.83 It should be noted that all off-hire during a period of requisition of use may be added to the term of the charter at the charterer's option.

38A.84 Clause 19—Redelivery

19 Redelivery

a Redelivery Conditions

Unless the Charter shall previously have been terminated by loss of the Vessel or as otherwise provided in the Charter or by law, Charterer shall redeliver the Vessel to Owner, free of cargo, at the expiration of the Charter Term upon completion of discharge at a port or place, worldwide, in Charterer's option, and shall give written notice of the date and hour of such redelivery. In addition, Charterer shall give Owner written notice of the estimated date of such redelivery 30, 20, 10 and 5 days in advance of same. At Charterer's option, the Vessel may be redelivered to Owner with tanks in a clean or dirty condition and in no event shall Charterer be required to redeliver the Vessel gas-free.

b Fuel at Redelivery

Owner shall accept and pay for all fuel in the Vessel's bunker tanks when the Charter terminates. Payment for such fuel shall be in accordance with the last documented net price paid by Charterer, excluding any delivery charges.

c Early Redelivery

If the Charter is terminated prior to the expiration of the Charter Term in accordance with any provision of the Charter or by reason of law, Owner shall reimburse Charterer for the value of any hire paid but not earned, the value of fuel in the Vessel's bunker tanks at termination in accordance with Clause 19b, any other sums Charterer is entitled to under the Charter, as well as any damages Charterer may sustain if termination is due to Owner fault or breach of the Charter.

38A.85 It is customary to provide for redelivery within a range of ports rather than at a particular port, thereby giving the charterer flexibility during the final period of trading under the charter.

38A.86 Clause 20—Bills of Lading

20 Bills of Lading

a Signatures

Bills of Lading shall be signed by the Master as presented, the Master attending daily, if required, at the offices of Charterer or its agents. However, at Charterer's option, Charterer or its agents may sign Bills of Lading on behalf of the Master. All Bills of Lading shall be without prejudice to the Charter, and Charterer shall indemnify Owner against all consequences or liabilities which may arise from any inconsistency between the Charter and any Bills of Lading or

other documents signed by Charterer or its agents, or by the Master at their request, or which may arise from an irregularity in papers supplied by Charterer or its agents

b Carriage of Cargo

Notwithstanding anything in the Charter to the contrary, the carriage of cargo under the Charter and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in Clauses 20b(1) through 20b(6) and such terms shall be incorporated verbatim, or be deemed incorporated by reference, in any such Bill of Lading. In such Clauses and in any Act referred to therein, the word "Carrier" shall include Owner and any chartered owner of the Vessel.

(1) Clause Paramount

This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, except that if this Bill of Lading is issued at a place where any other act, ordinance, or legislation gives statutory effect to:

1) the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels, 15th August 1924 (**"Hague Rules"**), or
2) the Hague Rules as amended by the Protocol signed at Brussels on 23rd February 1968 (**"Hague/Visby Rules"**), or
3) the United Nations Convention on the Carriage of Goods by Sea 1978 (**"Hamburg Rules"**),

then this Bill of Lading shall have effect subject to the provisions of such act, ordinance, or legislation. The applicable act, ordinance, or legislation (**"Act"**) shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the Act. If any term of this Bill of Lading be repugnant to the Act to any extent, such term shall be void to that extent but no further.

(2) Jason Clause

In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the Carrier is not responsible, by statute, contract or otherwise, the cargo shippers, consignees, or owners of the cargo shall contribute with the Carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or its agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo shippers, consignees or owners of the cargo to the Carrier before delivery.

(3) General Average

General Average shall be adjusted, stated, and settled according to York-Antwerp Rules 2004 (**"Rules"**) and, as to matters not provided for by those Rules, according to the laws and usage at the port of New York; provided that, when there is an actual escape or release of oil or pollutant substances from the Vessel (irrespective of Vessel location), the cost of any measures,

continued or undertaken on that account, to prevent or minimize pollution or environmental damage shall not be allowable in General Average; and, Provided further, that any payment for pollution damage (as defined in Article I 6.(a) of the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage) shall also not be allowable in General Average. It is understood and agreed, however, that the cost of measures to prevent pollution or environmental damage, undertaken in respect of oil or pollutant substances which have not escaped or been released from the Vessel, shall be included in General Average to the extent permitted by the Rules. If a General Average statement is required, it shall be prepared at such port by an Adjuster from the port of New York appointed by the Carrier and approved by Charterer of the Vessel. Such Adjuster shall attend to the settlement and the collection of the General Average, subject to customary charges. General Average Agreements and/or security shall be furnished by Carrier, and/or Charterer, and/or Owner, and/or Consignee of the cargo, if requested. Any cash deposit being made as security to pay General Average and/or salvage shall be remitted to the Average Adjuster and shall be held by the Adjuster at the Adjuster's risk in a special account in a duly authorized and licensed bank at the place where the General Average statement is prepared.

(4) Both to Blame

If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot, or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder shall indemnify the Carrier against all loss or liability to the other or non-carrying ship or its owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or recovered by the other or non-carrying ship or its owners as part of their claim against the carrying ship or Carrier. The foregoing provisions shall also apply where the owners, operators, or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact. The provisions in this Clause 20b(4) shall only apply if Owner has exercised due diligence to make the Vessel seaworthy and properly manned, equipped, and supplied, with the burden of proof in this regard resting solely on Owner.

(5) Limitation of Liability

Any provision of the Charter to the contrary notwithstanding, the Carrier shall have the benefits of all limitations of, and exemptions from, liability accorded to the owner or chartered owner of vessels by any statute or rule of law for he time being in effect.

(6) Deviation Clause

Subject to Clause 11, the Vessel shall have liberty to sail with or without pilots, to tow or be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage.

c Bill of Lading Indemnity

If Charterer requests Owner to deliver cargo at a discharge port or place either:

1) Without prior presentation to the Vessel at the discharge port or place of one of the original Bills of Lading issued for the cargo, duly endorsed, and/or
2) At a discharge port or place other than that specifically named in said Bills of Lading,

Owner shall deliver the cargo in accordance with Charterer's request if Charterer first executes and delivers a written indemnity in connection with such delivery in favor of Owner, Vessel, any chartered owner(s) of Vessel, Master, Vessel operators, agents and underwriters and delivers such indemnity to Owner or Owner's designee. The subject indemnity shall meet the requirements of Clause 20d and shall be limited in value to two hundred percent (200%) of the CIF value of the cargo.

d Form of Indemnity

The indemnity referred to in Clause 20c shall be a short form indemnity document incorporating the terms and conditions set forth in Clause 20e. This document (which must be properly filled-in) shall be given to Owner by electronic mail, telex, letter, or facsimile as requested by Owner and be in the exact form quoted below, which document, when transmitted, shall be deemed to have been signed by person acting on behalf of Charterer:

QUOTE

Time Charter of M.T. [*Insert the vessel name*] dated [*Insert the date of the charter party*] between [*Insert the name of Owner*], as Owner ("Owner") and [*Insert the name of Charterer*], as Charterer ("Charterer").
Reference is made to the cargo ("Cargo") now laden aboard the above Vessel "Vessel"). Pursuant to Clause 20c of the above-captioned charter party ("Charter"), the undersigned requests that Owner(s) of the Vessel deliver the Cargo at _____ unto _____ without prior discharge site presentation to the Vessel of all original Bills of Lading issued for the Cargo appropriately endorsed for such delivery and/or at a discharge port or site other than one specifically named in said Bills of Lading.

In consideration of such delivery, the undersigned hereby gives an indemnity containing the terms set forth in Clause 20e of the Charter ("Indemnity Terms and Conditions"). The Indemnity Terms and Conditions are deemed incorporated in and made a part of this document. The term "Indemnifier" in the Indemnity Terms and Conditions shall be deemed to refer to the undersigned. The term "Cargo" and the phrase "Requested Delivery" in the Indemnity Terms and Conditions shall be deemed, respectively, to mean the Cargo and the delivery request set forth in the preceding paragraph of this document. The term "Ship" as used in the Indemnity Terms and Conditions shall be deemed to refer to the Vessel. The following information must be provided:

Name of Charterer: _____
Name of Person Acting on Behalf of Charterer: _____
Authority/Title of Above Person: _____
Date Indemnity Given: _____

UNQUOTE

e Indemnity Terms and Conditions

(1) Nature of Indemnity

Indemnifier shall indemnify and hold harmless the Owner of the Ship, any chartered Owner of the Ship, the Ship operator, the Ship Master, the Ship underwriters and the Ship agents (hereinafter jointly and individually called **"Indemnitees"**) in respect of any liability, loss, damage, costs (including, but not limited to attorney/client costs) and other expense of whatever nature which Indemnitees may sustain or incur by reason of the Requested Delivery.

(2) Funds for Defense
In the event of any legal action or proceedings being commenced against the Indemnitees in connection with the Requested Delivery, Indemnifier shall provide Indemnitees from time to time, on Indemnitees' demand, with sufficient funds to defend the same.

(3) Arrest or Detention
If the Ship or any other vessel or other property belonging to the Indemnitees should be arrested or detained or if the arrest or detention thereof should be threatened for any claim in connection with the Requested Delivery, the Indemnifier shall provide, upon demand of the Indemnitees, such bail or other security as may be required to prevent such arrest(s) or detention(s) or to secure the release of the Ship or such vessel or other property from arrest or detention, and shall indemnify the Indemnitees in respect of any loss, damage, costs (including but not limited to attorney/client costs), and other expense resulting from such arrest or detention or threatened arrest or detention, whether or not the same may be justified, and to pay to the Indemnities, on the Indemnitees' demand, the amount of such loss, damages, costs and/or expense.

(4) Termination of Indemnity
This Indemnity shall automatically become null and void, and Charterer's liability hereunder shall cease, upon presentation of all original Bills of Lading duly endorsed to reflect delivery of Cargo in accordance with the Requested Delivery, or upon the expiration of thirty-six (36) months after completion of discharge, whichever occurs first; provided that no legal proceedings arising from delivery of the Cargo in accordance with the Requested Delivery have been instituted against the Indemnitees and/or Vessel within such thirty-six (36) month period. Owner shall advise Charterer with reasonable dispatch in writing if any proceedings are instituted.

(5) Governing Law
The within Indemnity shall be governed and construed in accordance with the internal substantive laws of the State of New York, U.S.A. The Indemnitees may, but shall not be obligated to, bring any legal action or proceeding with respect to such Indemnity in the Courts of the State of New York, U.S.A. or in the U.S. Federal Court situated therein and the Indemnifier unconditionally and generally accepts in regard to such legal action or proceeding, for itself and its property, the jurisdiction and venue of the aforesaid courts.

f Arbitration of Bill of Lading Claims
Any claim for loss, damage and/or non delivery of cargo carried pursuant to the Charter, made by any associated or affiliated company of Charterer and asserted to arise under Bill(s) of Lading issued for such cargo, shall be subject to Clause 29 of the Charter, said associated or affiliated company having authorized Charterer to so agree on its behalf. If Clause 20f applies, the terms "Charterer" and "Charter" in Clause 29 shall be taken to mean, respectively, the aforementioned associated or affiliated company and Bill(s) of Lading.

38A.87 The ExxonMobil form follows the usual practice by providing that the master is to sign bills of lading "as presented," but that such bills are to be "without prejudice" to the charter. In essence, this means that the form and provisions of the bill should create no obligation on the part of the owner, as a "carrier," greater than the obligations created by the terms of the charter itself. Of course, paragraph (b) goes on to provide for the application of the Carriage of Goods by Sea Act

(COGSA) to all carriage under the charter, thus effectively making the owner liable to cargo to the same extent as he would be if COGSA governed *ex proprio vigore*. Hence, only in the event of the charterer issuing a bill of lading increasing the carrier's obligation to cargo would paragraph (a) come into play.

38A.88 Paragraph (b) provides for a far clearer incorporation of COGSA by reference than does the New York Produce form: see discussion at paragraphs 34A.1 *et seq*. Thus, in cases where the charterer is the shipper, COGSA nevertheless governs the parties' rights and immunities by agreement. This provision also requires the inclusion of a "Clause Paramount" in all bills of lading issued under the charter, together with the clauses enumerated as subparagraphs (2) through (6).

38A.89 The meaning of the statement that such clauses shall be "deemed" incorporated by reference in all bills of lading is not clear, since any third-party holder of a bill would not be bound to the terms of the charter unless they were incorporated in the bill by reference. As far as cargo owned by the charterer at all stages is concerned, the bill would be a mere receipt and document of title, and the charter itself would evidence the terms of the contract of carriage.

38A.90 The "New Jason Clause" is, of course, the traditional means of eliminating the carrier's fault as a bar to recovery in general average. In accordance with the decision of the United States Supreme Court in *The Jason*, 225 U.S. 32 (1912), carriers are permitted to eliminate fault as a bar to recovery in general average, but only to the extent that they may validly exonerate themselves by contract from liability for cargo loss or damage. Thus, in practice, cargo will be liable for its proportion of general average expenses occasioned by "errors in navigation," but not for general average expenses occasioned by the carrier's lack of "due diligence" to make the vessel seaworthy. See, e.g., *The Argo Merchant*, SMA 2101 (Arb. at N.Y. 1985), wherein the charterer was held liable to make a general average payment.

38A.91 Under the ExxonMobil form general average is to be adjusted, stated and settled according to the York-Antwerp Rules of 2004 and the laws and usage at the port of New York. By its terms, the charter expressly excludes from General Average the cost of any measures to prevent or minimize pollution damage where there has been an actual escape of oil or pollutant, and excludes any payment for pollution damage as defined in the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage. The charter does, however, allow a General Average claim for the cost of preventing oil pollution where the oil or pollutant has not escaped from the ship.

38A.92 The "Both-to-Blame Collision Clause" is designed to require cargo on the carrying ship to indemnify her owner against the consequences of cargo's right to recover in full from the non-carrying ship in a mutual fault collision case. Thus, if ship A collides with ship B, and both ships are at fault, cargo on A may recover its loss from B on a straight tort theory. (Cargo on A of course may not recover from A in the usual both-to-blame case, where A's fault is negligent navigation, since "errors in navigation" is a defense under COGSA.) However, cargo's recovery against B becomes part of B's damages, part of which are then recoverable from A in proportion to A's fault. The net result is that A will be indirectly liable for part of the cargo loss on A, even though A is under no direct liability for such loss. It is the avoidance of this indirect liability at which the clause is directed.

38A.93 The both-to-blame clause has long been held invalid under COGSA: see discussion at paragraphs 34A.22 *et seq*. However, in *American Union Transport Inc*. v. *United States*, 1976 AMC 1480 (N.D.Cal. 1976), the court upheld its validity in private carriage. The question remains whether the both-to-blame clause would be considered valid when used in conjunction with a "Clause Paramount," since the latter by its own terms would render invalid any clause inconsistent with COGSA, which would include the both-to-blame clause. The ExxonMobil incorporation of COGSA does not, however, expressly purport to make invalid all clauses inconsistent with COGSA, but only those clauses which reduce the *carrier's* rights or immunities. Hence, it is

arguable that the both-to-blame clause in the ExxonMobil form is valid for carriage of cargoes owned by the charterer.

38A.94 Under United States law, the right of limitation of liability is available only to owners and bareboat charterers, and not to time or voyage charterers: 46 U.S.C. § 30501, 30505. Even an owner or bareboat chartered owner may not be entitled to limitation in respect of a liability arising under a "personal" contract, such as a charterparty: *Pendleton Benner Line*, 246 U.S. 353 (1918). Thus, since no United States statute or rule of law gives the owner the right to limit his liability under the charter, paragraph (b)(v) would appear to be ineffectual in a case where the owner is the "carrier" and the charterer is the cargo owner; in such a case the owner would be liable to the charterer without the benefit of a right of limitation for any cargo loss or damage resulting from a cause not excepted under the terms of the charter.

38A.95 Where, however, the governing contract of carriage is evidenced by a bill of lading which has been negotiated to a holder in due course, the owner will be entitled to limit his liability to the holder for cargo loss or damage not caused with his "privity or knowledge." But if the bill of lading is issued by the charterer, the holder will be entitled to recover in full for cargo loss or damage resulting from a cause not excepted under COGSA, which would govern the bill of lading evidencing the contract of carriage between the charterer, as a "carrier," and the holder of the bill. If the cause of the loss is a failure to exercise due diligence to make the vessel seaworthy, or some other cause for which ultimate liability rests on the owner under the terms of the charter, the charterer will of course be entitled to indemnity, and since the right to indemnity arises out of a "personal" contract (the charter), the owner will not be entitled to limit his liability vis-à-vis the charterer. The end result will be that the owner will, indirectly, be liable in full for the loss or damage. Paragraph (b)(5) of Clause 20 therefore appears to have no effect other than to make it clear that nothing in the charter is to be construed as depriving the owner of any legal right he would otherwise have to limit his liability to third parties.

38A.96 As with the both-to-blame clause, there may be some inconsistency between COGSA's restrictions on deviation and a "liberties" clause such as 20(b)(6) of the ExxonMobil form, when the cargo is being carried for a third party under a bill of lading. However, when the carriage is performed for the charterer pursuant to the terms of the charter there would appear to be no reason why the provisions of the liberties clause should not be given full force.

38A.97 Clause 21—War Risks

21 War Risks

a Contraband

No contraband of war shall be shipped, but petroleum and/or it products shall not be deemed contraband of war for the purposes of Clause 21.

b War Zones

The Vessel shall not, however, be required, without the consent of Owner, which shall not be unreasonably withheld, to enter any port, place, or zone that is involved in a state of war, warlike operations or hostilities, civil strife, terrorism and other politically motivated activities, or piracy, whether there be a declaration of war or not, where it might reasonably be expected to be subject to capture, seizure or arrest, or to a hostile act by a belligerent power (the term "power" meaning any de jure or de facto authority or any other purported governmental organization maintaining naval, military or air forces or any terrorist group or organization).

c War Risks Insurance

For purposes of Clause 21, it shall be unreasonable for Owner to withhold

consent to any voyage, route, or port or place of loading or discharge if insurance against all risks defined in Clause 21b is then available commercially or under a government program in respect to such voyage, route, or port or place of loading or discharge. If such consent is given by Owner, Charterer shall pay any provable additional cost of insuring the Vessel against hull war risks over and above such costs in effect on the date of the Charter, as shown in Schedule B, in an amount equal to the insured value under its ordinary hull policy but not exceeding [*Insert the insured value under the Vessel's hull policy*] U.S. dollars. In addition, Owner may purchase war risk insurance on ancillary risks such as loss of hire, freight disbursements, total loss, etc., if it carries such insurance for ordinary marine hazards. Subject to the just-mentioned total insurance limitation of [*Insert the insured value under the Vessel's hull policy*] U.S. dollars, the provable additional costs of such ancillary insurance over and above the costs in effect on the date of the Charter shall be for Charterer's account. If such insurance is not obtainable commercially or through a government program, the Vessel shall not be required to enter or remain at any such port, place, or zone. Owner shall obtain from insurers a waiver of any subrogated rights against Charterer and its associated and affiliated companies and their agents, directors, officers and employees in respect of any claims under the war risks insurance arising out of Owner's compliance with Charterer's orders.

d Additional Costs

In the event of the existence of the conditions described in Clause 21b subsequent to the date of the Charter, or while Vessel is on hire under the Charter, Charterer shall, in respect of voyages to any such port, place or zone, assume any provable additional cost of wages and crew war bonus and insurance properly incurred in connection with Master, officers and crew as a consequence of such war, warlike operations or hostilities over and above such costs in effect on the date of the Charter.

e Hostile Areas

Owner shall have the option of adjusting the timing, speed, and routing of the inward and outward passage through areas of hostility depending on the prevailing pattern of hostilities. Owner shall keep Charterer advised of its plans to transit areas of hostilities including any changes while in transit. The voyage instruction procedures for the Vessel to transit a hostile area(s) shall be as follows:

Charterer issues voyage instructions directly to the Vessel, with a copy to Owner.

Charterer's voyage instructions should include:

1) specific ports to load/discharge and sequence of port calls
2) required load/discharge dates
3) cargo grades and quantities
4) bunkering details
5) cargo measurement and documentation requirements, etc.

Charterer's voyage instructions to include advice to the Master that the specific sailing instructions for the passage in and out and through the area of hostilities will be issued by Owner.

Owner, upon receipt of Charterer's voyage instructions, shall determine the level and nature of risk in the hostile area(s) and issue specific cautionary sailing instructions directly to the Vessel with copy to Charterer's office on an urgent basis.

Owner's specific cautionary sailing instructions shall include passage timing, recommended routing, speed in and out and through the area(s) of hostilities, and other specific cautionary instructions.

38A.98 Under the New York Produce and other time charter forms the owner usually has a right to refuse to proceed to a port where hostilities are under way which might threaten the ship or her

cargo. The owners' right in such cases derives not from an express "war risks" provision but rather from the charterers' obligation to nominate "safe ports." To be "safe," a port must be "politically" safe as well as safe for navigation, and a port where a substantial risk of capture or damage from war-like operations exists does not satisfy the obligation. However, as noted, Clause 6(b) of the ExxonMobil form disclaims any warranty of "safe port" and limits the charterer's obligation to the exercise of reasonable care. Clause 21 goes even further, and in effect obligates the owner to send the ship even to a war zone, provided war risk insurance is available.

38A.99 Paragraph (b) is broadly worded, covering as it does not only hostile acts of *de jure* and *de facto* governments, but also those of any "purported governmental organization maintaining naval, military, or air forces or any terrorist group or organization." On the other hand, acts of saboteurs and rioters not engaged by such an organization would not be covered.

38A.100 Under paragraph (c) the charterer is obligated to pay the additional cost of war risk hull insurance, if it is available, in which case the owner is required to permit the ship to undertake a voyage or enter loading or discharging ports where hostilities are in progress. The owner is also permitted to purchase war risk insurance against "ancillary risks," including loss of hire, freight, disbursements, and total loss. If he carries marine risk insurance against such risks, and while the paragraph does not expressly so state, the plain inference is that the additional cost of such war risk insurance, like the additional cost of war risk hull insurance resulting from the charterer ordering the ship to a zone where hostilities are in progress, will be for the charterer's account: see paragraphs 35A.16 *et seq*.

38A.101 Clause 22—Exceptions

22 Exceptions

a Loss, Damage, Delay

The Vessel, Master and Owner shall not, unless otherwise expressly provided in the Charter, be responsible for any loss or damage to cargo arising or resulting from: any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery.

Neither the Vessel, the Master or Owner, nor Charterer, shall, unless otherwise expressly provided in the Charter, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God; act of war; perils of the sea; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion.

38A.102 Under the first sentence of Clause 22(a) the owner and her master, *in personam*, and the ship, *in rem*, are exonerated from liability for cargo loss or damage resulting from certain specified causes, including errors in navigation or management, fire not caused by the owners' personal design or neglect, perils of the sea, and latent defects.

38A.103 The second sentence is a "mutual" exceptions clause shielding both the owner and the charterer against liability for "any loss or damage or delay or failure in performing" under the charter, resulting from a list of causes considerably broader than the list contained in the corresponding provision of the New York Produce form (Clause 16, second sentence). As interpreted by the American courts, a "mutual" exceptions clause excuses only the party whose

performance is affected by the occurrence of one of the excepted causes. Thus, if the owner is unable to follow the charterer's sailing instructions because of a tugboat strike, the owner will not be liable in damages. But as the strike does not affect the charterers' ability to pay hire, and as nothing in the off-hire clause (Clause 11) provides for off-hire for time lost on account of a tugboat strike, the charterer will not be relieved of the obligation to pay hire during the delay: see *Clyde Commercial S.S. Co*. v. *West India S.S. Co*., 169 Fed. 275 (2d Cir. 1909).

38A.104 Conversely, if a bank strike makes it impossible for the charterer to pay hire when due, the charterer will be excused so long as the strike continues to have that effect, but the owner will remain obligated to follow the charterer's orders with respect to sailing, loading, discharging, etc.

38A.105 Clause 22(b)—Number of Grades

b Number of Grades
The Owner warrants the Vessel is constructed and equipped to carry [*Insert number of grades of cargo*] within the Vessel's natural segregations. If for any reason the Vessel, upon arrival at a loading port or place, is unable to load the required number of grades, Charterer will do its utmost to provide a suitable cargo consistent with the Vessel's capabilities, with any delay being for Owner's account. However, if such cargo cannot be provided within a reasonable time the Vessel is to proceed to the nearest repair port in ballast and there make all necessary repairs, any time and expense being for Owner's account.

38A.106 The first sentence of paragraph (b) is a warranty that the ship is capable of carrying a specified number of grades of oil. The second sentence, however, is in effect a modification of the off-hire provisions of Clause 11; if the ship cannot, "for any reason," comply with the warranty, she will not necessarily go off-hire, since the charterer will then be obligated to "do its utmost" to provide a cargo which the vessel will be able to load. Only if this proves impossible will the owner be obligated to send the ship to the nearest repair port in ballast, and there effect the necessary repairs. In that case the time lost and the expenses will be for the owners' account.

38A.107 Clause 22(c)—Limitation of Exceptions

c Limitation of Exceptions
The exceptions stated in Clause 22a shall not affect Owner's undertakings with respect to the condition, particulars and capabilities of the Vessel, the provisions for payment and cessation of hire, the obligations of the Owner under Clause 20 in respect of the loading, handling, stowage, carriage, custody, care, and discharge of cargo in the Charter, and/or Charterer's option(s) to terminate the Charter in accordance with the Charter terms.

38A.108 Clause 23—Salvage

23 Salvage
All salvage moneys earned by the Vessel shall belong to Owner.

38A.109 Clause 24—ITOPF

24 ITOPF
Owner warrants that it is a member of the International Tanker Owners' Pollution Federation (**"ITOPF"**) and that Owner will retain such membership during the Charter Term.

38A.110 Clause 25—Clean Seas

25 Clean Seas

Owner agrees to participate in Charterer's program covering oil pollution avoidance (**"Program").** Such Program requires compliance with latest International Maritime Organization (**"IMO"**) and Port State regulations. The Program prohibits discharge overboard of all oil and all oily water, oily ballast or oil in any form unless in compliance with IMO and Port State local regulations or under extreme circumstances whereby the safety of the Vessel, cargo, or life at sea would be imperiled. Owner shall ensure that the Vessel's personnel comply with the following:

a Retention of Residues

Subsequent to the date of delivery, and in the course of the ballast passage before presenting for delivery hereunder, any oily residues remaining in the Vessel from its previous cargoes shall be retained on board and shall be handled according to Charterer's instructions.

b Tank Washings

During tank washing, the tank washings shall be collected into one cargo compartment and, after maximum separation of free water, such free water shall be discharged overboard to the extent permitted by applicable regulations. Thereafter, Charterer shall be notified promptly by electronic mail, facsimile, or telex of the estimated quantity of the segregated tank washings and the type and source of such washings. If Charterer requires that demulsifiers shall be used for the separation of oil and water, such demulsifiers shall be obtained by Owner and paid for by Charterer. When specifically requested by Charterer (e.g., for third-party re-lets), Owner shall ensure that the Master, on the Vessel's arrival at the loading port(s) or place(s) during the Charter does the following:

1) Arranges for the measurement of the segregated tank washings in conjunction with the cargo supplier(s).
2) Records the quantity of tank washings so measured in the Vessel's ullage record.
3) Issues a Slop Certificate.
4) Arranges that the Slop Certificate and/or Vessel's ullage record be duly signed by the cargo supplier(s) and promptly sent to Charterer.

c Disposition of Residues

The segregated tank washings and any other oily cargo residues on board (**"Residues"**) shall, at Charterer's option, be pumped ashore into slop facilities at the loading port(s) or place(s), commingled with the cargo to be loaded, or segregated from the cargo to be loaded. If Charterer requires the Master to discharge the Residues at facilities at loading port(s) or place(s), the cost of such facilities and the ultimate disposal of the Residues shall be for Charterer's sole account. If Charterer requires Residues to be kept separate from the cargo to be loaded, such Residues shall, at Charterer's option, be discharged at the discharging port(s) or place(s) in accordance with Charterer's instructions.

d Additional Pollution Prevention Measures

1) Owner will also arrange for the Vessel to adhere to Charterer's Program covering oil pollution avoidance during off-hire periods within the Charter Term, including the preparation of cargo tanks for dry-docking and repairs.
2) The Vessel will take all necessary precautions while loading and discharging cargo or bunkers, as well as ballast, to ensure that no oil will escape overboard.
3) Nothing in Charterer's instructions shall be construed as permission to pollute the sea by the discharge of oil or oily water, etc.
4) The Vessel shall have a safe and efficient means of transferring engine room

and pump room bilge liquids to designated holding tanks onboard, for disposal in accordance with international, flag state, and port state regulations.

5) Pump room stripping line overboard discharges shall be suitably blanked off before arriving in port. Such blanks are to be installed and retained in the lines throughout the entire period that the Vessel is in coastal waters.

38A.111 Clause 26—Cargo Management

26 Cargo Measurement

a Measurement and Sampling Requirements

All measurement and sampling procedures shall be performed in accordance with the latest published Manual of Petroleum Measurement Standards issued by the American Petroleum Institute or similar standards issued by the American Society of Testing and Materials.

b Loading Requirements

Prior to loading, the Master shall measure the on board quantities of oil, water and sediment residues that are segregated in all holding tanks and slop tanks and those that remain in cargo tanks and, if requested, shall advise supplier(s) and Charterer of such quantities. After loading, the Master shall determine the cargo quantities loaded, expressing these cargo quantities in barrels at standard temperature (60° F) and performing such calculations in accordance with Clause 26a. A written tank-by-tank ullage report containing all measurements of oil, water and sediment residues on board prior to loading and quantities of cargo loaded shall be prepared and promptly submitted by the Master to Charterer.

c Letter of Protest

If the Master's calculations of cargo loaded (oil, water and sediment residues on board excluded), after applying the Vessel's Experience Factor (**"VEF"**), show any deficiency from the Bill of Lading figures, the Master shall, if investigation and recalculation verify such deficiency, issue a Letter of Protest to supplier(s) (which should, if practicable, be acknowledged) and shall immediately advise Charterer of such deficiency by electronic mail, telex or radio and thereafter shall send a copy of the Letter of Protest to Charterer. The Vessel shall have on board sufficient historical information for the calculation of a VEF using the latest edition of the API MPMS. The Master shall calculate and apply the VEF, as so determined, during all loadings.

d Discharging Requirements

Prior to discharging, the Master shall measure the quantity of each grade of cargo on board, expressing these quantities in barrels at standard temperature (60°F), using the same calculation procedures specified in Clause 26a. Before and after discharging, the Master shall cooperate with shore staff to ascertain discharged quantities. The Vessel shall be obliged to discharge all liquid oil and, if ordered by Charterer, any residues of oil, water and sediment. The Vessel's just-mentioned obligation shall not in any way be qualified or limited by any purported "custom of the trade" that is based on a deemed in-transit loss and that, otherwise, could excuse the Vessel from failure to discharge all liquid cargo and residues.

e Inspection

Charterer may employ an inspector, at its expense, to verify the quantities and qualities of cargo and residues on board the Vessel at both loading and discharging port(s) and/or place(s). If the Vessel is equipped with an Inert Gas System, depressurization of tanks to permit ullage measurements shall be

allowed in accordance with the provisions of the most recent Inert Gas Systems of Oil Tankers publication issued by the IMO.

38A.112 Clause 27—Insurance Costs and Liability Levels

27 Insurance Costs and Liability Levels

a Insurance Required

Owner warrants that, throughout Vessel's service under the Charter, Owner shall have full and valid Protection and Indemnity Insurance (**"P&I Insurance"**) for the Vessel, as described in Clause 27b, with the P&I Insurance placed with a Protection and Indemnity Club (**"P&I Club**") that is a Member of the International Group of P&I Clubs (**"International Group"**). This P&I Insurance shall be at no cost to Charterer except as otherwise provided in Clause 27c and Clause 27e.

b Liability Coverage

The P&I Insurance must include coverage against liability for cargo loss/damage and against liability for pollution (**"Pollution Liability"**) in the maximum coverage amount(s) per incident for each of the foregoing categories of liability as made available by any P&I Club in the International Group at the commencement of each policy year or other applicable period of coverage during the Charter Term (but only US$ 1,000 million (one billion dollars) per incident cover for Pollution Liability is required if such cover is available from a P&I Club). All administrative expenses incurred by Owner in placing and/or changing P&I Insurance coverages in order to comply with Clause 27 shall be for Owner's sole account.

c Surcharge Costs

Charterer shall, except as otherwise provided in Clause 27, reimburse Owner for any documented net surcharges properly due and paid by Owner under the P&I Insurance for U.S. voyages directed under the Charter by Charterer; provided, however, that any reimbursement obligation of Charterer shall be conditioned upon Owner fully meeting the requirements of Clause 4j. Any request by Owner for reimbursement under Clause 27c shall be submitted to Charterer, along with appropriate supporting documentation, on a quarterly basis. The phrase "net surcharges" as used in Clause 27c shall mean the surcharges, as described above, paid by Owner after taking into consideration any and all discounts and/or rebates received or receivable by Owner, or to Owner's credit under the P&I Insurance (**"Net Surcharges"**).

d Increased Costs

US$ 1,000 million (one billion dollars) per incident coverage for Pollution Liability under P&I Insurance (**"Insurance Coverage"**) is currently available in accordance with Clause 27b. Notwithstanding anything to the contrary in the Charter, Charterer's maximum liability for Net Surcharges shall be limited in amount to the highest Net Surcharges cost (**"Maximum Surcharge Cost"**) under the Insurance Coverage paid by Owner in the Charter term during the last availability of such Insurance Coverage to Owner in accordance with Clause 27b. If the amount of the Net Surcharges increases above the Maximum Surcharge Cost, the amount of such increase (**"Increased Surcharge Cost**") shall be for Owner's sole account, subject, however, to Clause 27e. If Owner is required, under Clause 27b, to obtain coverage for Pollution Liability under P&I Insurance in excess of US$ 1,000 million (one billion dollars) per incident and the net cost to Owner of such coverage — aside from any surcharge cost — is greater than the net cost to Owner that was applicable under the Insurance Coverage in the Charter Term during the last availability of such Insurance Coverage to Owner in accordance with Clause 27b, this additional net cost (**"Additional Non-surcharge Cost"**) shall be borne solely by Owner, subject, however, to Clause 27e.

e Negotiation of Increased Costs

If Owner incurs Increased Surcharge Cost and/or Additional Non surcharge Cost (**"Cost(s)"**) and finds payment thereof burdensome, then Owner may call in writing for negotiations with Charterer with respect to Owner's payment of such Cost(s). In the event Owner so calls for negotiations and there is no agreement reached with respect to such Cost(s) in writing between Owner and Charterer within sixty (60) days after Owner calls for such negotiations, Owner may, upon written notice to Charterer, terminate the Charter effective when the Vessel is cargo free, without liability on either party except for sums, if any, owed by either party under the Charter as of the date of Vessel redelivery; provided, however, that if negotiations are so called for by Owner and agreement is not reached as aforesaid, Charterer shall have the option, at its sole discretion, to either pay the subject Cost(s) or provide a reasonable alternative thereto, in which case Owner shall have no right to terminate the Charter under Clause 27e. Any payment by Charterer, or provision of an alternative to payment with respect to specific Cost(s), shall not be deemed an agreement by Charterer to pay any other, or future, Increased Surcharge Cost and/or Additional Non surcharge Cost.

f Notice to Charterer

Owner shall give Charterer timely written notice of all pertinent details in connection with any renewal or new placement of P&I Insurance required by Clause 27, failing which any reimbursement obligation of Charterer under Clause 27 shall cease.

g Lapse of Coverage(s)

If required by Charterer, Owner shall, as soon as is reasonably possible, furnish to Charterer such evidence of the insurance(s) required under Clause 27 as Charterer may reasonably request. If there is a failure or lapse of such insurance(s) for any reason (**"Non Coverage"**) at any time during the Charter term, Charterer shall have the option on written notice to Owner to terminate the Charter when the Vessel is cargo-free, or to procure replacement insurance(s) with the same or different underwriters and/or P&I Club chosen by Charterer, with all cost to be borne by Owner, which cost may, at Charterer's option, be invoiced to Owner for payment or be deducted from hire or other sums due Owner under the Charter. The Vessel shall be off-hire from the time of the Non Coverage until full reinstatement of the insurance(s) or termination of the Charter by Charterer. A termination or failure to terminate the Charter in accordance with Clause 27g shall be without prejudice to any claims for damages that Charterer may have by reason of Owner's fault for Non Coverage.

h TOPIA / STOPIA 2006

Owner warrants that it is a Participating Owner and that the Vessel is entered in the Tanker Oil Pollution Indemnification Agreement 2006 (TOPIA 2006) and shall so remain during the Charter Term, provided always that: i) the Vessel meets the definition of a "ship" under the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) or any amendment thereto and ii) TOPIA 2006 is not terminated in accordance with cl. IX of that agreement. Additionally, if the Vessel has a gross tonnage of 29,548 or less, Owner warrants that it is a Participating Owner and that the Vessel is entered in the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA 2006) and shall so remain during the Charter Term, provided always that: i) the Vessel meets the definition of a "ship" under the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) or any amendment thereto and ii) STOPIA 2006 is not terminated in accordance with cl. IX of that agreement. As used in this Clause 27h, the term "Participating Owner" has the definition ascribed to it in TOPIA 2006 and/or STOPIA 2006, as the case may require.

38A.113 Clause 28—Parent Guaranty and Change of Ownership

28 Parent Guaranty and Change of Ownership

a Parent Guaranty

If required by Charterer, Owner shall cause its parent company (or companies) to execute and deliver to Charterer a written Guaranty in the form shown at Schedule C. Such executed written Guaranty shall be delivered to Charterer concurrent with Owner's signing of the Charter.

b Restrictions on Transfer

Owner's rights and obligations under the Charter are not transferable by sale or assignment without Charterer's written pre-consent. During the Charter Term, Owner shall not offer the Vessel for sale to a non-affiliated buyer without Charterer's pre-consent. In the event of the Vessel being sold, the Charter being assigned, or the Vessel being offered for sale to a non-affiliated company without such consent, then in addition to its other rights, including, without limitation the right to claim damages, Charterer may, at its absolute discretion, terminate the Charter.

38A.114 By this clause the ExxonMobil form sharply limits the owners' ability to profit from a high rate charter by selling the ship "with charter." Although it may be argued that the charterer would not be entitled to withhold consent to a sale to a reputable purchaser unreasonably, nevertheless the severe penalty of termination in the event of a transfer without its consent would make any prudent owner hesitate before attempting such a sale without first obtaining the charterer's express approval.

38A.115 Nothing in the clause would appear to prohibit the beneficial owner of a ship registered in the name of a corporation from disposing of his interest indirectly by a sale of his shares of corporate stock.

38A.116 Clause 29—Arbitration

29 Arbitration

Any and all differences and disputes of whatsoever nature arising out of the Charter shall be put to arbitration in the city of New York, pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by Owner, one by Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Until such time as the arbitrators finally close the hearing, either party shall have the right by written notice served on the arbitrators and on the other party to specify further disputes of differences under the Charter for hearing and determination. The arbitrators may grant any relief which they, or a majority of them, deem just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance. Awards, made pursuant to Clause 29 may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any court having jurisdiction in the premises.

38A.117 There are several important differences between the arbitration clause of the ExxonMobil form and that of the New York Produce form. Under the latter the arbitrators must be "commercial men," a term which in New York is understood to exclude practising lawyers. Under the ExxonMobil form, however, the parties may choose either lawyers or commercial men, and frequently the panel will be comprised of a mixture of lawyers and non-lawyers.

38A.118 The ExxonMobil arbitration clause gives the arbitrators wide powers, including the right to order specific performance. Absent express authorization, it is doubtful that such an award

would be valid and enforceable. United States courts have held that arbitrators may grant equitable relief, however, if the arbitration clause is sufficiently broad to give them express authority to do so.

38A.119 Finally, the ExxonMobil arbitration clause expressly authorizes the awarding of attorneys' fees, a point on which the New York Produce form is silent. See discussion at paragraphs 29A.86 *et seq*.

38A.120 Clause 30—Assignment and Sublet

30 Assignment and Sublet
Notwithstanding any other provisions of the Charter, Charterer may assign all of its rights and obligations under the Charter to any of Charterer's associated or affiliated companies. Charterer shall also have the right to sublet the vessel but, in the event of a sublet, Charterer shall always remain responsible for the fulfillment of the Charter in all its terms and conditions.

38A.121 These provisions expressly give the charterer the right to assign the charter and to "sublet" the ship, rights it would have under United States law, even without such express provisions, unless the charter clearly provided otherwise.

38A.122 Clause 31—Business Policy

31 Business Policy
Owner agrees to comply with all laws and lawful regulations applicable to any activities carried out in the name, or otherwise on behalf, of Charterer under the provisions of the Charter. Owner agrees that all financial statements, billings and reports rendered by Owner to Charterer, as provided for in the Charter, shall, in reasonable detail, accurately and fairly reflect the facts about all activities and transactions handled for the account of Charterer.

38A.123 Clause 32—Interpretation and Law

32 Interpretation and Law
The interpretation of the Charter and the rights and obligations of the parties hereto shall be governed by the Federal Maritime Law of the United States and, where applicable, by the Law of the State of New York. The headings of Clauses and paragraphs are for convenience of reference only and shall not affect the interpretation of the Charter. No modification, waiver or discharge of any term of the Charter shall be valid unless in writing and signed by the party to be charged therewith. No provision of the Charter shall be interpreted or construed against a party because that party or its legal representative drafted the provision. Notwithstanding anything in the Charter to the contrary, the Charter shall not be interpreted or applied so as to require Owner or Charterer to do, or to refrain from doing, anything which would constitute a violation of, or result in a loss of economic benefit under, United States anti-boycott or export control laws and regulations. When used in the Charter in relation to Charterer, the terms "associated or affiliated company" or "associated or affiliated companies" shall include Exxon Mobil Corporation, or any division of Exxon Mobil Corporation, or any company (other than Charterer) that is directly or indirectly owned, in whole or in part, by Exxon Mobil Corporation. The term "Clause," when used in the Charter, shall mean a clause of the Charter. The options granted to Charterer to cancel or otherwise terminate the Charter are both individual and cumulative. Charterer's exercise, or failure to exercise, any option to cancel or terminate the Charter shall not affect any other

option granted to Charterer to terminate or cancel the Charter; any such cancellation or termination being without prejudice to any other rights and remedies Charterer may have under the circumstances including, without limitation, the right to damages for any breach of the Charter.

38A.124 Charters, being maritime contracts, are not subject to State or local law, as such, but are governed by the "general maritime law" of the United States, which is a set of judicially fashioned rules with antecedents in English admiralty law and operating uniformly throughout the country (see paragraphs 1A.1 *et seq*.). To a large extent the substantive law of carriage of goods under ocean bills of lading has been modified by federal statutes (e.g., the Harter Act and COGSA) but carriage under charterparties remains relatively free of statutory regulation. Thus, in the main, by Clause 30 the parties merely accept the applicability of the general maritime law of the United States, rather than the law of any other country.

IN WITNESS WHEREOF, THE PARTIES HAVE CAUSED THIS CHARTER PARTY TO BE EXECUTED IN DUPLICATE THE DAY AND YEAR HEREIN FIRST ABOVE WRITTEN.

WITNESS ***FOR OWNER***

_____ BY: _____

NAME: _____

TITLE: _____

DATE SIGNED: _____

WITNESS ***FOR CHARTERER***

_____ BY: _____

NAME: _____

TITLE: _____

DATE SIGNED: _____

Glossary of English Legal Terms

Absolute obligations

G.1 Many contractual terms are what are called 'absolute' obligations. If a certain state of affairs does not exist or is not brought about, as the case may be, a party that has undertaken an absolute obligation in that regard is guilty of a breach of contract. It does not matter whether he was careless or worse in causing or allowing the promised state of affairs not to occur. A promise that the ship is in a certain class when the charter is concluded is an absolute obligation of this kind: *Routh* v. *MacMillan* (1863) 9 L.T. 541. Absolute obligations are often to be contrasted, especially in maritime contracts, with 'due diligence' obligations (see paragraph G.12, below).

Conditions

G.2 In modern legal parlance, a condition is a term of the contract that is of such importance that *any* breach of it will entitle the innocent party to treat the whole contract as discharged. Where a term is a condition, in the words of Lord Diplock in *Photo Production* v. *Securicor* [1980] 1 Lloyd's Rep. 545, at page 553, "the contracting parties have agreed. . . that *any* failure by one party to perform [that] . . . obligation. . ., irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all. . . obligation[s] of both parties remaining unperformed".

G.3 However, the word 'condition' can be used in other senses. In particular, it is often used in the linguistically natural sense of a condition precedent (see paragraph G.8, below), as in 'it is a condition of my making payment that I should have received an invoice from you'. Because that is such a natural use of the word, the modern technical legal usage referred to in paragraph G.2, above, although now very well established, is somewhat unsatisfactory.

G.4 The question whether a particular term is a condition in the sense referred to in paragraph G.2 above is a question of construction (see paragraph G.9 below) – sometimes a difficult one; see, for example, paragraph 16.130, above, and *The Astra* [2013] 2 Lloyd's Rep. 69. The courts seek to strike a balance between the sometimes conflicting principles that certainty under commercial contracts is desirable and that over-rigid rules can lead to injustice. Knowing in advance that any breach of a particular term of a contract will allow the innocent party to treat the contract as discharged, however serious the breach or its consequences, promotes certainty. On the other hand, entitling a party to escape from a disadvantageous contract because of a breach of contract that, as the facts have turned out, may appear somewhat technical or of minor consequence, can be seen as unjust. But then such an appeal to broader justice is open to the criticism that whether the breach was sufficiently serious to make termination of the contract just may not be known for some time, and even when the facts are clear a lengthy process of arbitration or litigation may be necessary to determine the rights of the innocent party. The balance that the courts now seek to strike was described by Lord Roskill in *Bunge* v. *Tradax* [1981] 2 Lloyd's Rep. 1 at page 14 in these terms: "In short, while recognising the modern approach and not being over ready to construe terms as

conditions unless the contract clearly requires the Court so to do, none the less the basic principles of construction for determining whether or not a particular term is a condition remain as before, always bearing in mind on the one hand the need for certainty and on the other the desirability of not, where legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy." The following, non-exhaustive, guidance can be distilled from the cases as to when terms are likely to be characterised as conditions:

(1) Where the obligation is specifically designated in the contract as a condition. But this is not conclusive, and the context of the whole contract may suggest that the word "condition" should not be read in its technical sense: see *Wickman* v. *Schuler* [1973] 2 Lloyd's Rep. 53.

(2) Where the obligation has been held to be a condition in another case. The "expected ready to load" provision in a voyage charter was held to be a condition, partly on this ground, in *The Mihalis Angelos* [1970] 2 Lloyd's Rep. 43 (C.A.). But in *The Diana Prosperity* [1976] 2 Lloyd's Rep. 621, at page 626, Lord Wilberforce suggested that some of the earlier cases on sale of goods might require reconsideration, and, although he did not refer to other types of contract, it is clear that the conclusiveness of earlier case law on this point cannot be taken entirely for granted.

(3) Where the supposed intentions of the parties, as indicated from the terms and general background of the contract, so indicate. In *Bunge* v. *Tradax*, above, Lord Wilberforce suggested that this is usually so in cases of "time clauses in mercantile contracts": and Lord Roskill said that the same is true "where a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term" (in that case, an f.o.b. buyer's statement of his ship's e.t.a. in the U.S. Gulf as a condition precedent to the seller's duty to nominate a loading port): see also *The Mavro Vetranic* [1985] 1 Lloyd's Rep. 580 (nomination of ship under contract of affreightment to be made '20 (twenty) days prior to ETA'), *Gill & Duffus* v. *Societe pour l'Exportation des Sucres* [1986] 1 Lloyd's Rep. 322 (C.A.) (port of shipment to be specified by a given date 'at latest') and *The Niizuru* [1996] 2 Lloyd's Rep. 66 (25-day notice under a laycan narrowing provision in a time charter). See also *The Seaflower (No. 2)* [2001] 1 Lloyd's Rep. 341 (C.A.), below. The fact that performance of other contracts depends on the performance of the contract under consideration (as in 'string' sales) is another indication.

G.5 Where the term 'broken' is one which can be broken in many ways leading to a great variety of potential consequences, it is unlikely to be interpreted as a condition. In the leading case, *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.), the stipulation as to seaworthiness in a time charter was on such grounds interpreted as an intermediate term (see paragraph G.18 below). *The Hongkong Fir* is referred to in more detail at paragraph 8.44, above; see also the explanation of that case by Donaldson, J., in *Toepfer* v. *Lenersan-Poortman* [1978] 2 Lloyd's Rep. 555, affirmed by the Court of Appeal at [1980] 1 Lloyd's Rep. 143.

G.6 Under the modern approach, the use of the word "guarantee" will probably not, without more, be taken to indicate that a particular promise is a condition, rather than an intermediate term. In *The Ymnos* [1982] 2 Lloyd's Rep. 574, where the ship was time-chartered for the charterers' container services, the charter contained a term: ". . . owners guarantee the loading of the containers. . . without any stability problem". In fact there were stability problems, but they were related to the closing stages of loading or the early stages of discharge and might be slight or serious in effect. They could be remedied by the use of shore cranes or, if these were not available, might result in a smaller or larger number of containers being shut out. It was held by Robert Goff, J., on

the authority of *The Hongkong Fir*, that since the term was one of which there might be breaches of varying degrees of seriousness, it was not properly to be classified as a condition. The use of the word "guarantee" meant no more, in the clause in question, than that any stability problem during loading of the contractual number of containers would result in a breach of contract by the owners. It did not require the provision to be construed as a condition rather than an intermediate term.

G.7 In *The Seaflower (No. 2)* [2001] 1 Lloyd's Rep. 341 (C.A.), the facts of which are set out at paragraph 37.16 above, an undertaking in a tanker time charter, which was expressed as a 'guarantee', that an oil major's approval would be obtained within a certain limited time, was construed as a condition, although it was made clear that the use of the word "guarantee" would not of itself have been sufficient to lead to such a conclusion. It was a necessary implication from the terms of the contract as a whole, underlined by the use of the word "guarantee", that it was the parties' intention to give a right of cancellation if the approval was not obtained within the stipulated period. More important than the use of the word "guarantee" was the fact that the charter gave a right of cancellation for failure to renew certain oil major approvals, which the Court of Appeal regarded as a very strong indication of the importance attached to oil major approvals by that charter.

Conditions precedent

G.8 As noted in paragraph G.3, above, the ordinary, non-technical use of the term "condition" may connote a condition precedent, a state of affairs required to exist before an obligation arises or has to be performed. A condition precedent may require one party to bring the relevant state of affairs into existence before he is entitled to take some further step in the performance of a contract, or before some further obligation is owed or can be performed by the other party. So, for example, it may be a condition precedent to the charterers' duty to accept delivery of the ship that the owners have served notice narrowing the dates within which delivery is to occur: see paragraph 7.12, above; or that the ship be in a certain state of fitness and readiness: see paragraphs 8.41 *et seq*., above. In such cases, the term that is a condition precedent is not necessarily a condition of the contract, in the sense referred to in paragraph G.2, above. Indeed, the party by whom the condition would be fulfilled, if at all, may not promise to do so at all or may only make a qualified promise, for example, to exercise due diligence to bring about its fulfilment. In other cases, a condition precedent may be a requirement that must be fulfilled before a whole contract comes into operation and, in such cases, it is very often a requirement that neither party undertakes will be fulfilled, although, as always, that is a question of construction (see paragraph G.9, below) in any particular case. For example, where a ship is chartered "subject to satisfactory survey", it may be a condition precedent to the charter coming into operation at all, yet typically neither party promises that the survey will be satisfactory: see paragraph 1.22, above.

Construction

G.9 The process of ascertaining the meaning and effect of a contract is referred to as 'construction'. The task of the court or arbitrator 'construing' the contract is to identify what reasonable parties in the position of the owners and charterers in question would have intended by the language they have used in the context in which they used it, taking into account all information reasonably available to them concerning the charter and the subject of the particular clause in question. The first edition of *Abbott on Shipping* (1802) said that the construction of charterparties, like that of other mercantile instruments, "should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade, to which the contract relates". A fuller exposition of the applicable principles can be found in Lord Hoffmann's

speech in *Investors Compensation Scheme* v. *West Bromwich Building Society* [1998] 1 W.L.R. 896, at pages 912 to 913 and, more recently, in the decisions of the House of Lords and Supreme Court (respectively) in *Chartbrook* v. *Persimmon Homes* [2009] 1 AC 1101 and *Rainy Sky* v. *Kookmin Bank* [2012] 1 Lloyd's Rep. 34.

Damages

G.10 The basic remedy for breach of contract in English law is an action for damages. The damages awarded will seek to put the victim of the breach of contract in the same position as he would have been in had the contract been performed, so far as monetary compensation can do that. If the victim of the breach does not establish that the contractual performance of which he has been deprived by the breach would have been profitable to him, damages may be awarded to compensate him for any loss or expense incurred in reliance upon his right to receive that contractual performance, unless the contract-breaker shows that the value of that performance would not have covered that loss or expense: this is an application of the basic compensatory principle, not a different type of damages, see *The Mamola Challenger* [2011] 1 Lloyd's Rep. 47.

G.11 For damages to be recoverable in respect of a particular loss or item of damage or expense: (a) the breach of contract must have been the effective cause of the loss, damage or expense, or one of several effective causes not including a breach of the contract by the claimant himself; and (b) the loss, damage or expense must not be too 'remote' a consequence of the breach. A consequence is too 'remote', and a claim for damages in respect of it will be said to fail for 'remoteness', where the consequence is different from anything for which the contract-breaker undertakes responsibility by the contract. In the absence of specific contract terms or common background knowledge indicating to the contrary (in either respect), a party, by entering into a contract, undertakes responsibility for consequences that the parties could reasonably have contemplated, when entering into the contract, would be likely to result from the breach in question, and not for consequences beyond such reasonable contemplation of the parties. (See paragraphs 4.59 and 4.60 above.)

Due diligence obligations

G.12 The party bound by an obligation of due diligence, or a 'due diligence obligation', unlike a party owing an 'absolute' obligation (see paragraph G.1, above), is required only to exercise, or to have exercised, reasonable diligence to ensure that the promised state of affairs is brought about or exists. That means that he must exercise that degree of care and skill that is to be expected from (as it may be) reasonable charterers or reasonable owners. The owners' obligation to maintain the ship under Clause 1 of the New York Produce form is an example of such an obligation: see paragraph 11.6, above. The best known due diligence obligation in maritime contracts is the obligation under Article III, rule 1 of the Hague or Hague-Visby Rules to ensure that a ship is seaworthy before she commences a contractual voyage: see paragraphs 8.26 *et seq*., above. Such obligations may be 'personal', meaning the requirement is only that the owners or charterers have themselves behaved with care. More often, they are 'non-delegable', like the duty under Article III, rule 1, meaning that due care must have been taken by whoever in fact carries out the relevant task, for example, an independent contractor engaged to carry out repairs.

Election

G.13 Election is a species of waiver or, perhaps, the only true waiver (see paragraph G.36). Where the contract allows a party to choose between two inconsistent alternative courses of action,

he may, by merely communicating a choice of one, lose the right to adopt the other. His election to act in one way rather than the other is binding and irrevocable, without more ado; in particular, without any action or reaction from the other party. So, for example, the right to rescind for misrepresentation, or terminate for breach, may be lost by election – in each case, usually referred to as 'affirmation'. So too may the owners' right not to comply with a particular voyage order because, for example, it orders loading at an unsafe port (see *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (H.L.), summarised at paragraph 10.64 above), or the owners' right to withdraw the ship for non-payment of hire (see *per* Lord Scarman in *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303 at page 314, quoted in paragraph G.14 below). Likewise the time charterers' right to reject the ship, as in *The Aegean Dolphin* [1992] 2 Lloyd's Rep. 178. In that case, a written acceptance of the ship by the time charterers was found by arbitrators to be an acceptance that she was satisfactory in her entirety for the performance of the charter despite her inability to make the speed contemplated by the parties as essential to the planned cruise itineraries. The charterers could not thereafter reject the ship, although they retained the right to claim damages.

G.14 In *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303 (see paragraph 16.76, above) Lord Scarman said this at page 314, in considering whether owners had waived their right to withdraw under the Baltime Clause 6 for non-payment of hire: "The present case is concerned with the process of election. The consequence of the election, if established, is the abandonment, i.e., the waiver, of a right. . . . When a man, faced with two alternative and mutually exclusive courses of action, chooses one and has communicated his choice to the person concerned in such a way as to lead him to believe that he has made his choice, he has completed his election." Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 and paragraph 10.64, above, noted at page 399 that "His election once made is final; it is not dependent upon reliance on it by the other party."

G.15 In recognition that waiver in the sense of election is concerned with informed choices, and is unilateral, the law requires actual knowledge of the facts giving rise to the legal right said to have been waived and actual knowledge of that legal right: see *Peyman* v. *Lanjani* [1985] Ch. 457 (C.A.) and *The Uhenbels* [1986] 2 Lloyd's Rep. 294, *per* Hirst, J., at page 298. It also requires communication to the other party of the choice that has been made, although no particular form is required and unequivocal conduct will suffice: see the decision of the House of Lords in *Vitol* v. *Norelf (The Santa Clara)* [1996] 2 Lloyd's Rep. 225, where the question was whether a c.i.f. sale contract had been terminated for breach and Lord Steyn said this, at page 229: "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that [the] aggrieved party is treating the contract as at an end." Where there is no waiver in the sense of election only because the party said to have waived his rights was in ignorance, as to fact or law, he may nonetheless be precluded by estoppel from exercising the rights of which he was unaware (see paragraph G.16, below).

Estoppel

G.16 Estoppel, by contrast with election (paragraph G.13, above), is not confined to situations where a party must choose between inconsistent courses of action. An estoppel may arise where, because of one party's conduct in response to a statement or promise (made by words or conduct) or a shared understanding, it is unfair to allow the other party to resile from that statement or promise or understanding. Thus, it is not possible for the innocent party unilaterally to waive, that is to say to lose by mere election, his right to damages for breach of contract; but it is possible, in principle, for such a right to be lost by estoppel, in that the innocent party can become estopped from pursuing his claim for damages. For an example, although perhaps doubtful on its facts,

see *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, the facts of which are set out at paragraph 37.44, above and which is also discussed at paragraph 10.66, above. A party unaware of his rights, because he does not know the true facts or is ignorant as to the law, cannot lose those rights by election, but can become estopped from exercising them, as the bedrock of estoppel is not his state of knowledge but the impact his words and conduct have had on the other party.

Implied terms

G.17 The law recognises that sometimes the parties intend to be bound by obligations which they have not expressed. Such obligations are called 'implied' terms. Usually, the law will recognise an implied term where it is either necessary, logically or commercially, to make the contract work or where it is obvious that the parties must have intended to be bound by the term in question. In certain rare cases, a term is automatically implied by law. Deciding whether a term is to be implied, that is to say whether the contract, properly understood, has some meaning or effect not expressly stated in it, is now recognised to be, ultimately, one aspect of a single overall process of construction (paragraph G.9, above): see *Attorney General for Belize* v. *Belize Telecom* [2009] 1 WLR 1988.

Intermediate (or innominate) terms

G.18 An 'intermediate term' is a term breach of which may entitle the innocent party to terminate the contract, but only if the consequences of the breach are sufficiently serious. Where there has been a breach of such a term, the court will ask whether, in the words of Lord Diplock in *Photo Production* v. *Securicor*, [1980] 1 Lloyd's Rep. 545, at page 553 of the report, "the event resulting. . . has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract". If the event has this effect, the innocent party may treat the contract as discharged; otherwise he can make only a claim for damages. In practice, most contractual terms are intermediate terms. Unless there is some reason to conclude that a term was supposed to be a condition, it is likely to be an intermediate term. The test applied, in cases of breach of an intermediate term, is not at all favourable to treating the contract as discharged. Thus the leading case, *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 (C.A.), concerned a 24-month time charter under which by reason of unseaworthiness in breach of contract the ship was unavailable to the charterers for some 20 weeks out of the first six months, yet it was held that the breach was not serious enough (the unseaworthiness having been rectified by the end of that period) to justify the discharge of the charter.

Injunctions

G.19 Whilst the primary remedy for breach of contract in English law has always been damages (see paragraph G.10, above), a court, and usually an arbitral tribunal, also has a power to issue injunctions. That is, it may order a party to a contract not to break his contract or not to do certain acts inconsistent with his contract. It may also positively order a party to perform his contract or to undo the consequences of his breach of contract. Such orders may be interim, i.e. for a period pending further consideration by the court, or final. For a discussion of the circumstances in which a court will grant an injunction in relation to a ship under time charter, see paragraphs 4.95 *et seq*., above.

Misrepresentation

G.20 Normally, the liability of contractual parties to each other is governed by the terms of their contract. However, in some circumstances, a contractual party can be held legally responsible for the things that he has said during the negotiation of the contract. This may happen where one party is guilty of having misrepresented some significant fact or matter during the negotiation of the contract.

G.21 A misrepresentation is a false statement (representation) of present or past fact. A statement of opinion or intention, or as to the future, cannot amount itself to a misrepresentation, but will often imply a statement as to present belief. Such a statement may also carry with it an implicit statement that grounds, perhaps reasonable grounds, exist for holding such a belief. A statement, whether express or implied, as to present belief or as to the grounds for presently holding a belief, is a representation of present fact.

G.22 Where a representation, made to induce the conclusion of a contract, in fact induces the representee to enter into a contract, or to contract on particular terms, the representee may have remedies if the representation was false. Those remedies may vary depending on whether the misrepresentor knew the statement was false, or was reckless as to its falsity, was negligent in relation to the accuracy of the statement, or was guilty of no such fault (a so-called 'innocent' misrepresentation).

G.23 Where a misrepresentation has been made, the representee may have a right to claim damages on the following bases:

(1) *Fraudulent misrepresentation*. A party who suffers loss caused by reliance on a fraudulent misrepresentation is entitled to claim damages in tort for deceit. A fraudulent misrepresentation is one "made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false": Lord Herschell in *Derry* v. *Peek* (1889) 14 App. Cas. 337.

(2) *Negligent misrepresentation under the Misrepresentation Act, Section 2(1)*. Where a party has entered into a contract after a misrepresentation has been made to him and he has suffered loss as a result, he may recover damages from the party making the misrepresentation, unless that party "proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true": Misrepresentation Act 1967, Section 2(1).

(3) *Negligent misrepresentation as a tort*. A party to whom a negligent misrepresentation has been made may be entitled to recover damages in tort. But the circumstances in which the misrepresentation was made must have been such as to impose a duty of care upon the party making it. It is difficult to envisage a negligent misrepresentation made prior to contract by a person who becomes a party to that contract which would not be covered by Section 2(1) of the 1967 Act (above): and, as it is easier for a claimant to succeed under that section because the misrepresentor must prove that he acted honestly and upon reasonable grounds, the importance to the business of time charters of the remedy in tort is slight.

G.24 Damages awarded for actionable misrepresentation aim to compensate for loss suffered in reliance upon the misrepresentation. Usually that will not include loss of profits expected under the main contract, as the premise of the damages claim is that the main contract should not have been entered into. Damages for fraud may in some cases go somewhat further than those for negligence as there is no limit of remoteness (see paragraph G.11 above) placed upon such damages (see *Doyle* v. *Olby* [1969] 2 Q.B. 158). On the language of Section 2(1) of the Misrepresentation Act

1967 it has been held that the rules for fraud also apply to the calculation of damages under that section: *Royscot Trust* v. *Rogerson* [1991] 2 Q.B. 297 (C.A.). (The correctness of this decision has, however, been doubted in *Avon Insurance* v. *Swire Fraser* [2000] 1 All E.R. (Comm.) 573.)

G.25 Alternatively, where a misrepresentation – whether fraudulent, negligent or innocent – has induced a contract, the representee may seek to rescind the contract: see paragraphs G.32 to G.34, below.

Penalty

G.26 Where a contract term fixes an amount to be paid in the event of some breach of contract that is not a genuine pre-estimate of the loss likely to be caused by the breach, the term is unenforceable, being a penalty for breaking the contract and not a liquidated damages provision.

Remoteness of loss or damage

G.27 See paragraph G.11, above.

Renunciation and anticipatory breach

G.28 There is in general no right at common law merely to suspend performance because it appears that the other party is or may be unable or unwilling to perform or to continue performance. However, where one party makes it clear to the other, before the time for performance, that he will not perform the contract, he is said to have 'renounced' or 'repudiated' the contract. This is also referred to as an anticipatory breach. In such circumstances, the other party can terminate the contract (or, possibly, can do so as long as he had in fact concluded that the repudiating party did not intend to perform; see *The Pro Victor* [2010] 2 Lloyd's Rep. 158, *obiter per* Flaux, J., at [89] – [98]). It is also (with the same possible qualification) an anticipatory breach where a party makes it clear that when the time for performance arrives he will only perform in such a manner as would entitle the other party to terminate for breach (see paragraphs G.30 and G.31 below). Finally, if it has become impossible that a party will perform, when the time for performance comes, the other party may terminate, for anticipatory breach.

G.29 A party may be held to have repudiated his contract by refusing to perform even if (*a*) he genuinely believes that the contract allows him to do so and (*b*) he has no intention of repudiating; see, for example, the drastic actions of the owners, after taking legal advice, in *The Nanfri* (H.L.), described at paragraph 21.58, above. However, the mere assertion of a genuinely held but erroneous view as to the effect of the contract may not be repudiatory; see *Woodar* v. *Wimpey* [1980] 1 W.L.R. 277 (H.L.) and also the comparison of this case with *The Nanfri* by Lord Woolf, giving the judgment of the Privy Council in *Vaswani* v. *Italian Motors* [1996] 1 W.L.R. 270.

Repudiation: discharge of the contract by breach

G.30 Following certain breaches of contract, the innocent party is entitled to treat the contract as 'discharged' or 'repudiated' and sue for damages for the loss of the rest of the contract. This is sometimes also referred to as 'termination', 'cancellation' or 'rescission' of the contract, but to avoid confusion with rights of cancellation that do not depend on breach (see, for example, chapter 24, above) and rights of rescission for misrepresentation (see paragraphs G.32 to G.34, below), it is better to speak only of 'termination' or 'discharge' in this context.

G.31 The question whether the innocent party is entitled to terminate the contract depends first

on what type of clause has been broken. The innocent party may terminate the contract for any breach of a condition (see paragraphs G.2 *et seq.*, above) or for a breach of an intermediate term which deprives the other party of substantially the whole benefit of the contract (see paragraph G.18, above).

Rescission

G.32 In certain circumstances, principally where a person has been induced to make a contract by a misrepresentation, he may have the right to 'rescind' the contract. In modern parlance, the right to rescind means the right to avoid or undo the contract. Where a contract is rescinded, it is undone '*ab initio*', that is to say as from its very beginning. The party who rescinds may refuse to perform the contract, or to perform it any further, and may take proceedings to recover money paid or property transferred. However, it must be borne in mind that, in older cases, the word rescission is sometimes used as a synonym for termination, which is an altogether different way of bringing a contract to an end.

G.33 In cases of misrepresentation, the right to rescind may be affected by Section 2(2) of the Misrepresentation Act 1967, and it may also be lost in some other circumstances (see paragraph G.34, below). Section 2(2) of the Misrepresentation Act 1967 confers upon the court or arbitrator the power to award damages instead of rescission "if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party". In effect, it gives a discretion to the court or arbitrator to remove the right to rescind and replace it with damages when this seems fair. It does not, however, apply where the misrepresentation was fraudulent. Where a court may refuse rescission for misrepresentation, Section 2(3) provides that it can award damages instead. There is no indication as to how these are to be calculated, save that Section 2(3) implies that the calculation would not be the same as under Section 2(1). A more limited award seems to be contemplated. See the matter discussed in another context in *William Sindall* v. *Cambridgeshire C.C.* [1994] 1 W.L.R. 1016. In *The Lucy* [1983] 1 Lloyd's Rep. 188, a sub-charter was entered into following a misrepresentation as to the terms of the head charter and, when the sub-charterers discovered the truth about nine months into the sub-charter they sought to rescind. It was held that the misrepresentation had not induced them to conclude the sub-charter, so they were not entitled to rescind. Mustill, J., went on to say that in his view Section 2(2) of the Act entitles the court to annul retrospectively a rescission that has taken place in the past, but the exercise of the discretion in such circumstances will give rise to formidable difficulties. Any such difficulties were reduced in *The Lucy* because the sub-charterers' purported rescission had not been accepted as a repudiation and the charter had continued until the ship was redelivered under a without prejudice agreement. Mustill, J., said that had the misrepresentation claim succeeded in principle, he would have exercised the discretion in favour of an award of damages instead of rescission because the damage to the head charterers from having the ship returned to them by the sub-charterers on a collapsing spot market would be great; there was no evidence that there would have been any material differences in the rate of sub-charter hire consequent upon the special agreement between the owners and the head charterers; and even if the finding had been that the misrepresentation had induced the charter, it was of quite a trivial nature.

G.34 The right to rescind for misrepresentation may also be lost: (*a*) where the party originally entitled to rescind knows the relevant facts but nevertheless expressly or impliedly declares that he will go on with the contract (called 'affirmation', an instance of waiver in the sense of election, see paragraphs G.13 to G.15, above); or (*b*) where that party can no longer restore the other party to substantially the same position he was in before the contract; or (*c*) where an innocent third party

has in the meantime acquired an interest in the subject matter of the contract; or (*d*) where a party originally entitled to rescind for innocent misrepresentation takes unduly long before doing so.

Restitution

G.35 In English law, the law of 'restitution' refers to a body of rules of law under which a party may be ordered to pay money, or return property, to another in order to prevent unjust enrichment. A full discussion and explanation of those rules may be found in Goff & Jones, *The Law of Unjust Enrichment*.

Waiver

G.36 Where a party has a right to do something, or to refuse to do something, it may be said that he has 'waived' that right, or the question whether there has been a 'waiver' may be raised. Waiver is usually used as a synonym either for election (sometimes referred to as 'waiver in the sense of an election', 'mere waiver' or even 'true waiver') or for estoppel (sometimes referred to as 'waiver in the sense of an estoppel'). For a discussion of election and estoppel, see paragraphs G.13 to G.16, above.

Warranties

G.37 In modern usage, the words 'warranted' and 'warranty' most often refer to a contractual obligation of a particular kind, namely a term by which one party undertakes that a certain state of affairs exists (as opposed to a term by which a party promises to do or not to do something, or to bring about a state of affairs or prevent a state of affairs from arising in the future). So, for example, it is sometimes said that the owners 'warrant' that the ship is in class when the charter is concluded. The statements in a time charter concerning the characteristics and state of the ship at the time the charter is entered into, such as those in Lines 4 to 11 of the New York Produce form, are obligations of this kind.

G.38 However, it may be important to bear in mind that the word 'warranty' can be used in other senses.

G.39 In older authorities, for example, the word 'warranty' is often used simply as a synonym for a contractual term. Even today, English lawyers frequently speak, for example, of the 'warranty of seaworthiness'. Given one of the other meanings of warranty (paragraph G.40, below), this is particularly misleading as terms relating to seaworthiness are ordinarily intermediate terms (see paragraph G.18, above).

G.40 The word 'warranty' can be used, differently, to signify a term of the contract of such minor importance that no breach of it will entitle the innocent party to treat the whole contract as discharged. For breach of such a term the innocent party can only ever make a claim for damages. Such terms are rarely (if ever) encountered in practice, at all events in relation to time charters. This usage of the term became prominent after the Sale of Goods Act 1893 (now the Sale of Goods Act 1979) gave it a statutory foundation in the field of sale of goods.

G.41 Finally, and confusingly given paragraph G.40, above, the word 'warranty' has a special meaning in contracts of marine insurance, in which if the insured warrants a state of affairs, the insurer is ordinarily discharged from all liability under the contract if that state of affairs did not exist, or ceases to exist or is not brought into existence (as the case may be depending on the precise nature of the warranty).

F1. New York Produce Exchange Form

Time Charter

GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913—Amended October 20th, 1921; August 6th, 1931; October 3rd, 1946

This Charter Party, made and concluded in .....day of.....19.....

Between .....

Owners of the good..... { Steamship / Motorship } .....of.....

of .....tons gross register, and.....tons net register, having engines of .....indicated horse power and with hull, machinery and equipment in a thoroughly efficient state, and classed .....

at..... of about.....cubic feet bale capacity, and about .....tons of 2240 lbs. deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding one and one-half percent of ship's deadweight capacity, allowing a minimum of fifty tons) on a draft of.....feet .....inches on ..... Summer freeboard, inclusive of permanent bunkers, which are of the capacity of about .....tons of fuel, and capable of steaming, fully laden, under good weather conditions about..... knots on a consumption of about..... tons of best Welsh coal—best grade fuel oil—best grade Diesel oil, now .....

..... and.....Charterers of the City of..... .....

Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for about .....

..... within below mentioned trading limits.

Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charter Party.

Vessel to be placed at the disposal of the Charterers, at .....

.....

in such dock or at such wharf or place (where she may safely lie, always afloat, at all times of tide, except as otherwise provided in clause No. 6), as the Charterers may direct. If such dock, wharf or place be not available time to count as provided for in clause No. 5. Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying lawful merchandise, including petroleum or its products, in proper containers, excluding .....

(vessel is not to be employed in the carriage of Live Stock, but Charterers are to have the privilege of shipping a small number on deck at their risk, all necessary fittings and other requirements to be for account of Charterers), in such lawful trades, between safe port and/or ports in British North America, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or Mexico, and/or South America..... and/or Europe and/or Africa, and/or Asia, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River St. Lawrence between October 31st and May 15th, Hudson Bay and all unsafe ports; also excluding, when out of season, White Sea, Black Sea and the Baltic,

.....

.....

.....

as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Crew) and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterers account. All other fumigations to be for Charterers account after vessel has been on charter for a continuous period of six months or more.

Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but Owners to allow them the use of any dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards for dunnage, they making good any damage thereto.

3. That the Charterers, at the port of delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel at the current prices in the respective ports, the vessel to be delivered with not less than ..... tons and not more than ..... tons and to be re-delivered with not less than ..... tons and not more than ..... tons.

4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of ..... United States Currency per ton on vessel's total deadweight carrying capacity, including bunkers and stores, on ..... summer freeboard, per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) at ..... unless otherwise mutually agreed. Charterers are to give Owners not less than ..... days notice of vessel's expected date of re-delivery, and probable port.

5. Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to Charterers or their Agents before 4 p.m., but if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire.

Cash for vessel's ordinary disbursements at any port may be advanced as required by the Captain, by the Charterers or their Agents, subject to $2\frac{1}{2}\%$ commission and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide, except at such places where it is customary for similar size vessels to safely lie aground.

7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel. Charterers have the privilege of passengers as far as accommodations allow, Charterers paying Owners ..... per day per passenger for accommodations and meals. However, it is agreed that in case any fines or extra expenses are incurred in the consequence of the carriage of passengers, Charterers are to bear such risk and expense.

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

9. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captian, Officers, or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the vessel and see that voyages are prosecuted

with the utmost despatch. He is to be furnished with free accommodation, and same fare as provided for Captain's table, Charterers paying at the rate of $1.00 per day. Owners to victual Pilots and Customs Officers, and also, when authorized by Charterers or their Agents, to victual Tally Clerks, Stevedore's Foreman, etc., Charterers paying at the current rate per meal, for all such victualling.

11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charterers, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

12. That the Captain shall use diligence in caring for the ventilation of the cargo.

13. That the Charterers shall have the option of continuing this charter for a further period of .....
.....
on giving written notice thereof to the Owners or their Agents .....days previous to the expiration of the first-named term, or any declared option.

14. That if required by Charterers, time not to commence before .....and should vessel not have given written notice of readiness on or before ..... but not later than 4 p.m. Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.

15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.

16. That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted.

The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General Average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in United States money.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belonged to strangers.

Provisions as to General Average in accordance with the above are to be included in all bills of lading issued hereunder.

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

21. That as the vessel may be from time to time employed in tropical waters during the term of this Charter, Vessel is to be docked at a convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every six months, reckoning from time of last painting, and payment of the hire to be suspended until she is again in proper state for the service.

.....

.....

22. Owners shall maintain the gear of the ship as fitted, providing gear (for all derricks) capable of handling lifts up to three tons, also providing ropes, falls, slings and blocks. If vessel is fitted with derricks capable of handling heavier lifts, Owners are to provide necessary gear for same, otherwise equipment and gear for heavier lifts shall be for Charterers' account. Owners also to provide on the vessel lanterns and oil for night work, and vessel to give use of electric light when so fitted, but any additional lights over those on board to be at Charterers' expense. The Charterers to have the use of any gear on board the vessel.

23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; steamer to provide one winchman per hatch to work winches day and night, as required, Charterers agreeing to pay officers, engineers, winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles. If the rules of the port, or labor unions, prevent crew from driving winches, shore Winchmen to be paid by Charterers. In the event of a disabled winch or winches, or insufficient power to operate winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby.

24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc.," in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses, both of which are to be included in all bills of lading issued hereunder:

U.S.A. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Both-to-Blame Collision Clause

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

25 The vessel shall not be required to enter any ice-bound port, or any port where lights or light-ships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging.

26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

27. A commission of $2\frac{1}{2}$ per cent is payable by the Vessel and Owners to

.....

on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

28. An address commission of $2\frac{1}{2}$ per cent payable to ..... on the hire earned and paid under this Charter.

By cable authority from

The original Charter Party in our possession. As ..... For Owners

BROKERS.

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F2. NYPE 93

Code Name: **"NYPE 93"**
Recommended by:
The Baltic and International Maritime Council (BIMCO)
The Federation of National Associations of
Ship Brokers and Agents (FONASBA)

TIME CHARTER©

New York Produce Exchange Form

Issued by the Association of Ship Brokers and Agents (U.S.A.), Inc.

November 6th, 1913 - Amended October 20th, 1921; August 6th, 1931; October 3rd, 1946;
Revised June 12th, 1981; September 14th 1993.

THIS CHARTER PARTY, made and concluded in .....
this ..... day of ..... 19.....

Between.....
.....
Owners of the Vessel described below, and.....
.....
.....
Charterers.

Description of Vessel

Name ..... Flag ..... Built .....(year).
Port and number of Registry .....
Classed .....in .....
Deadweight .....long*/metric* tons (cargo and bunkers, including freshwater and
stores not exceeding ..... long*/metric* tons) on a salt water draft of .....
on summer freeboard.
Capacity ..... cubic feet grain ..... cubic feet bale space.
Tonnage..... GT/GRT.
Speed about ..... knots, fully laden, in good weather conditions up to and including maximum
Force ..... on the Beaufort wind scale, on a consumption of about ..... long*/metric*
tons of.....

** Delete as appropriate.*
For further description see Appendix "A" (if applicable)

1. **Duration**

The Owners agree to let and the Charterers agree to hire the Vessel from the time of delivery for a period
of.....
.....
.....
.....within below mentioned trading limits.

2. **Delivery**

The Vessel shall be placed at the disposal of the Charterers at .....
.....
.....
..... The Vessel on her delivery
shall be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted
for ordinary cargo service, having water ballast and with sufficient power to operate all cargo-handling gear
simultaneously.

The Owners shall give the Charterers not less than .....days notice of expected date of delivery.

3. On-Off Hire Survey

Prior to delivery and redelivery the parties shall, unless otherwise agreed, each appoint surveyors, for their respective accounts, who shall not later than at first loading port/last discharging port respectively, conduct joint on-hire/off-hire surveys, for the purpose of ascertaining quantity of bunkers on board and the condition of the Vessel. A single report shall be prepared on each occasion and signed by each surveyor, without prejudice to his right to file a separate report setting forth items upon which the surveyors cannot agree. If either party fails to have a representative attend the survey and sign the joint survey report, such party shall nevertheless be bound for all purposes by the findings in any report prepared by the other party. On-hire survey shall be on Charterers' time and off-hire survey on Owners' time.

4. Dangerous Cargo/Cargo Exclusions

(a) The Vessel shall be employed in carrying lawful merchandise excluding any goods of a dangerous, injurious, flammable or corrosive nature unless carried in accordance with the requirements or recommendations of the competent authorities of the country of the Vessel's registry and of ports of shipment and discharge and of any intermediate countries or ports through whose waters the Vessel must pass. Without prejudice to the generality of the foregoing, in addition the following are specifically excluded: livestock of any description, arms, ammunition, explosives, nuclear and radioactive materials,
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

(b) If IMO-classified cargo is agreed to be carried, the amount of such cargo shall be limited to ..... tons and the Charterers shall provide the Master with any evidence he may reasonably require to show that the cargo is packaged, labelled, loaded and stowed in accordance with IMO regulations, failing which the Master is entitled to refuse such cargo or, if already loaded, to unload it at the Charterers' risk and expense.

5. Trading Limits

The Vessel shall be employed in such lawful trades between safe ports and safe places within .....
.....excluding
.....
.....
.....as the Charterers shall direct.

6. Owners to Provide

The Owners shall provide and pay for the insurance of the Vessel, except as otherwise provided, and for all provisions, cabin, deck, engine-room and other necessary stores, including boiler water; shall pay for wages, consular shipping and discharging fees of the crew and charges for port services pertaining to the crew; shall maintain the Vessel's class and keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service, and have a full complement of officers and crew.

7. Charterers to Provide

The Charterers, while the Vessel is on hire, shall provide and pay for all the bunkers except as otherwise agreed; shall pay for port charges (including compulsory watchmen and cargo watchmen and compulsory garbage disposal), all communication expenses pertaining to the Charterers' business at cost, pilotages, towages, agencies, commissions, consular charges (except those pertaining to individual crew members or flag of the Vessel), and all other usual expenses except those stated in Clause 6, but when the Vessel puts into a port for causes for which the Vessel is responsible (other than by stress of weather), then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew

shall be for the Owners' account. Fumigations ordered because of cargoes carried or ports visited while the Vessel is employed under this Charter Party shall be for the Charterers' account. All other fumigations shall be for the Charterers' account after the Vessel has been on charter for a continuous period of six months or more.

The Charterers shall provide and pay for necessary dunnage and also any extra fittings requisite for a special trade or unusual cargo, but the Owners shall allow them the use of any dunnage already aboard the Vessel. Prior to redelivery the Charterers shall remove their dunnage and fittings at their cost and in their time.

8. Performance of Voyages

(a) The Master shall perform the voyages with due despatch, and shall render all customary assistance with the Vessel's crew. The Master shall be conversant with the English language and (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense, under the supervision of the Master.

(b) If the Charterers shall have reasonable cause to be dissatisfied with the conduct of the Master or officers, the Owners shall, on receiving particulars of the complaint, investigate the same, and if necessary, make a change in the appointments.

9. Bunkers

(a) The Charterers on delivery, and the Owners on redelivery, shall take over and pay for all fuel and diesel oil remaining on board the Vessel as hereunder. The Vessel shall be delivered with: ..... long*/metric* tons of fuel oil at the price of ..... per ton; ..... tons of diesel oil at the price of ..... per ton. The vessel shall be redelivered with: ..... tons of fuel oil at the price of ..... per ton; ..... tons of diesel oil at the price of ..... per ton.

** Same tons apply throughout this clause.*

(b) The Charterers shall supply bunkers of a quality suitable for burning in the Vessel's engines and auxiliaries and which conform to the specification(s) as set out in Appendix A.

The Owners reserve their right to make a claim against the Charterers for any damage to the main engines or the auxiliaries caused by the use of unsuitable fuels or fuels not complying with the agreed specification(s). Additionally, if bunker fuels supplied do not conform with the mutually agreed specification(s) or otherwise prove unsuitable for burning in the Vessel's engines or auxiliaries, the Owners shall not be held responsible for any reduction in the Vessel's speed performance and/or increased bunker consumption, nor for any time lost and any other consequences.

10. Rate of Hire/Redelivery Areas and Notices

The Charterers shall pay for the use and hire of the said Vessel at the rate of $..... U.S. currency, daily, **or** $..... U.S. currency per ton on the Vessel's deadweight carrying capacity, including bunkers and stores, on ..... summer freeboard, per 30 days, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire shall continue until the hour of the day of her redelivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless Vessel lost) at..... .... unless otherwise mutually agreed.

The Charterers shall give the Owners not less than ..... days notice of the Vessel's expected date and probable port of redelivery.

For the purpose of hire calculations, the times of delivery, redelivery or termination of charter shall be adjusted to GMT.

11. **Hire Payment**

(a) *Payment*

Payment of Hire shall be made so as to be received by the Owners or their designated payee in ..... , viz .... in ..... currency, or in United States Currency, in funds available to the Owners on the due date, 15 days in advance, and for the last month or part of same the approximate amount of hire, and should same not cover the actual time, hire shall be paid for the balance day by day as it becomes due, if so required by the Owners. Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers.

At any time after the expiry of the grace period provided in Sub-clause 11 (b) hereunder and while the hire is outstanding, the Owners shall, without prejudice to the liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the Charterers' account.

(b) *Grace Period*

Where there is failure to make punctual and regular payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners ..... clear banking days (as recognized at the agreed place of payment) written notice to rectify the failure, and when so rectified within those .....days following the Owners' notice, the payment shall stand as regular and punctual.

Failure by the Charterers to pay the hire within ..... days of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-clause 11 (a) above.

(c) *Last Hire Payment*

Should the Vessel be on her voyage towards port of redelivery at the time the last and/or the penultimate payment of hire is/are due, said payment(s) is/are to be made for such length of time as the Owners and the Charterers may agree upon as being the estimated time necessary to complete the voyage, and taking into account bunkers actually on board, to be taken over by the Owners and estimated disbursements for the Owners' account before redelivery. Should same not cover the actual time, hire is to be paid for the balance, day by day, as it becomes due. When the Vessel has been redelivered, any difference is to be refunded by the Owners or paid by the Charterers, as the case may be.

(d) *Cash Advances*

Cash for the Vessel's ordinary disbursements at any port may be advanced by the Charterers, as required by the Owners, subject to 2½ percent commission and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

12. **Berths**

The Vessel shall be loaded and discharged in any safe dock or at any safe berth or safe place that Charterers or their agents may direct, provided the Vessel can safely enter, lie and depart always afloat at any time of tide.

13. **Spaces Available**

(a) The whole reach of the Vessel's holds, decks, and other cargo spaces (not more than she can reasonably and safely stow and carry), also accommodations for supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for the Vessel's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

(b) In the event of deck cargo being carried, the Owners are to be and are hereby indemnified by the Charterers for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded.

14. **Supercargo and Meals**

The Charterers are entitled to appoint a supercargo, who shall accompany the Vessel at the Charterers' risk and see that voyages are performed with due despatch. He is to be furnished with free accommodation and same fare as provided for the Master's table, the Charterers paying at the rate of ..... per day. The Owners shall victual pilots and customs officers, and also, when authorized by the Charterers or their agents, shall victual tally clerks, stevedore's foreman, etc. Charterers paying at the rate of ..... per meal for all such victualling.

15. **Sailing orders and Logs**

The Charterers shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, in the English language, and the Master shall keep full and correct deck and engine logs of the voyage or voyages, which are to be patent to the Charterers or their agents, and furnish the Charterers, their agents or supercargo, when required, with a true copy of such deck and engine logs, showing the course of the Vessel, distance run and the consumption of bunkers. Any log extracts required by the Charterers shall be in the English language.

16. **Delivery/Cancelling**

If required by the Charterers, time shall not commence before ..... and should the Vessel not be ready for delivery on or before.....but not later than.....hours, the Charterers shall have the option of cancelling this Charter Party.

Extension of Cancelling

If the Owners warrant that, despite the exercise of due diligence by them, the Vessel will not be ready for delivery by the cancelling date, and provided the Owners are able to state with reasonable certainty the date on which the Vessel will be ready, they may, at the earliest seven days before the Vessel is expected to sail for the port or place of delivery, require the Charterers to declare whether or not they will cancel the Charter Party. Should the Charterers elect not to cancel, or should they fail to reply within two days or by the cancelling date, whichever shall first occur, then the seventh day after the expected date of readiness for delivery as notified by the Owners shall replace the original cancelling date. Should the Vessel be further delayed, the Owners shall be entitled to require further declarations of the Charterers in accordance wtih this Clause.

17. **Off Hire**

In the event of loss of time from deficiency and/or default and/or strike of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by average accidents to the Vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, drydocking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost. Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom. All bunkers used by the Vessel while off hire shall be for the Owners' account. In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbors or to rivers or ports with bars, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers' account. If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire

18. **Sublet**

Unless otherwise agreed, the Charterers shall have the liberty to sublet the Vessel for all or any part of the time covered by the Charter Party, but the Charterers remain responsible for the fulfillment of this Charter Party.

19. **Drydocking**

The Vessel was last drydocked .....

* (a) The Owners shall have the option to place the Vessel in drydock during the currency of this Charter at a convenient time and place, to be mutually agreed upon between the Owners and the Charterers, for bottom cleaning and painting and/or repair as required by class or dictated by circumstances.

* (b) Except in case of emergency no drydocking shall take place during the currency of this Charter Party.

* *Delete as appropriate*

20. **Total Loss**

Should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once.

21. **Exceptions**

The act of God, enemies, fire, restraint of princes, rulers and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and navigation, and errors of navigation throughout this Charter, always mutually excepted.

22. **Liberties**

The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

23. **Liens**

The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

The Charterers will not directly or indirectly suffer, nor permit to be continued, any lien or encumbrance which might have priority over the title and interest of the Owners in the Vessel. The Charterers undertake that during the period of this Charter Party, they will not procure any supplies or necessaries or service, including any port expenses and bunkers, on the credit of the Owners or in the Owners' time.

24. **Salvage**

All derelicts and salvage shall be for the Owners' and the Charterers' equal benefit after deducting Owners' and Charterers' expenses and crew's proportion

25. **General Average**

General average shall be adjusted according to York-Antwerp Rules 1974, as amended 1990, or any subsequent modification thereof, in ..... and settled in ..... currency.

The Charterers shall procure that all bills of lading issued during the currency of the Charter Party will contain a provision to the effect that general average shall be adjusted according to York-Antwerp Rules 1974, as amended 1990, or any subsequent modification thereof and will include the "New Jason Clause" as per Clause 31.

Time charter hire shall not contribute to general average.

26. **Navigation**

Nothing herein stated is to be construed as a demise of the Vessel to the Time Charterers. The Owners shall remain responsible for the navigation of the Vessel, acts of pilots and tug boats, insurance, crew, and all other matters, same as when trading for their own account.

27. **Cargo Claims**

Cargo claims as between the Owners and the Charterers shall be settled in accordance with the Inter-Club New York Produce Exchange Agreement of February 1970, as amended May, 1984, or any subsequent modification or replacement thereof.

28. **Cargo Gear and Lights**

The Owners shall maintain the cargo handling gear of the Vessel which is as follows:.....
.....
.....
.....
providing gear (for all derricks or cranes) capable of lifting capacity as described. The Owners shall also provide on the Vessel for night work lights as on board, but all additional lights over those on board shall be at the Charterers' expense. The Charterers shall have the use of any gear on board the Vessel. If required by the Charterers, the Vessel shall work night and day and all cargo handling gear shall be at the Charterers' disposal during loading and discharging. In the event of disabled cargo handling gear, or insufficient power to operate the same, the Vessel is to be considered to be off hire to the extent that time is actually lost to the Charterers and the Owners to pay stevedore stand-by charges occasioned thereby, unless such disablement or insufficiency of power is caused by the Charterers' stevedores. If required by the Charterers, the Owners shall bear the cost of hiring shore gear in lieu thereof, in which case the Vessel shall remain on hire.

29. **Crew Overtime**

In lieu of any overtime payments to officers and crew for work ordered by the Charterers or their agents, the Charterers shall pay the Owners, concurrently with the hire ..... per month or pro rata.

30. **Bills of Lading**

(a) The Master shall sign the bills of lading or waybills for cargo as presented in conformity with mates or tally clerk's receipts. However, the Charterers may sign bills of lading or waybills on behalf of the Master, with the Owner's prior written authority, always in conformity with mates or tally clerk's receipts.

(b) All bills of lading or waybills shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading or waybills signed by the Charterers or by the Master at their request.

(c) Bills of lading covering deck cargo shall be claused: "Shipped on deck at Charterers', Shippers' and Receivers' risk, expense and responsibility, without liability on the part of the Vessel, or her Owners for any loss, damage, expense or delay howsoever caused."

31. **Protecive Clauses**

This Charter Party is subject to the following clauses all of which are also to be included in all bills of lading or waybills issued hereunder:

(a) CLAUSE PARAMOUNT

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation as may mandatorily apply by virtue of origin or destination of the bills of lading, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any if its rights or immunities of any of its responsibilities or liabilities under said applicable Act. If any term of this bill of lading be repugnant to said applicable Act to any extent, such

term shall be void to that extent, but no further."

and

(b) BOTH-TO-BLAME COLLISION CLAUSE

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact."

and

(c) NEW JASON CLAUSE

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the carrier is not responsible, by statute, contract, or otherwise the goods, shippers, consignees, or owners of the goods shall contribute wth the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery."

and

(d) U.S. TRADE -DRUG CLAUSE

"In pursuance of the provisions of the U.S. Anti Drug Abuse Act 1986 or any re-enactment thereof, the Charterers warrant to exercise the highest degree of care and dilligence in preventing unmanifested narcotic drugs and marijuana to be loaded or concealed on board the Vessel.

Non-compliance with the provisions of this clause shall amount to breach of warranty for consequences of which the Charterers shall be liable and shall hold the Owners, the Master and the crew of the Vessel harmless and shall keep them indemnified against all claims whatsoever which may arise and be made against them individually or jointly. Furthermore, all time lost and all expenses incurred, including fines, as a result of the Charterers' breach of the provisions of this clause shall be for the Charterer's account and the Vessel shall remain on hire.
Should the Vessel be arrested as a result of the Charterers' non-compliance with the provisions of this clause, the Charterers shall at their expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their expense put up the bails to secure release of the Vessel.

The Owners shall remain responsible for all time lost and all expenses incurred, including fines, in the event that unmanifested narcotic drugs and marijuana are found in the possession or effects of the Vessel's personnel."

and

(e) WAR CLAUSES

"(i) No contraband of war shall be shipped. The Vessel shall not be required, without the consent of the Owners, which shall not be unreasonably withheld, to enter any port or zone which is involved in a state of war, warlike operations, or hostilities, civil strife, insurrection or piracy whether there be a declaration of war or not, where the Vessel, cargo or crew might reasonably be expected to be subject to capture, seizure or arrest, or to a hostile act by a belligerent power (the term "power" meaning any de jure or de facto authority or any purported governmental organization maintaining naval, military or air forces).

(ii) If such consent is given by the Owners, the Charterers will pay the provable additional cost of insuring the Vessel against hull risks in an amount equal to the value under her ordinary hull policy but not exceeding a valuation of ..... In addition, the Owners may purchase and the Charterers will pay for war risk insurance on ancillary risks such as loss of hire, freight disbursements, total loss, blocking and trapping, etc. If such insurance is not obtainable commercially or through a government program, the Vessel shall not be required to enter or remain at any such port or zone.

(iii) In the event of the existence of the conditions described in (i) subsequent to the date of this Charter, or while the Vessel is on hire under this Charter, the Charterers shall, in respect of voyages to any such port or zone assume the provable additional cost of wages and insurance properly incurred in connection with master, officers, and crew as a consequence of such war, warlike operations or hostilities.

(iv) Any war bonus to officers and crew due to the Vessels's trading or cargo carried shall be for the Charterers' account."

32. **War Cancellation**

In the event of the outbreak of war (whether there be a declaration of war or not) between any two or more of the following countries: .....
.....
.....
.....
either the Owners or the Charterers may cancel this Charter Party. Whereupon, the Charterers shall redeliver the Vessel to the Owners in accordance with Clause 10; if she has cargo on board, after discharge thereof at destination, or, if debarred under this Clause from reaching or entering it, at a near open and safe port as directed by the Owners; or if she has no cargo on board, at the port at which she then is; or, if at sea, at a near open and safe port as directed by the Owners. In all cases hire shall continue to be paid in accordance with Clause 11 and except as aforesaid all other provisions of this Charter Party shall apply until redelivery.

33. **Ice**

The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights or lightships have been or are about to be withdrawn by reason of ice, nor where there is risk that in the ordinary course of things the Vessel will not be able on account of ice to safely enter and remain in the port or area to get out after having completed loading or discharging. Subject to the Owners' prior approval the Vessel is to follow ice-breakers when reasonably required with regard to her size, construction and ice class.

34. **Requisition**

Should the Vessel be requisitioned by the government of the Vessel's flag during the period of this Charter Party, the Vessel shall be deemed to be off hire during the period of such requisition, and any hire paid by the said government in respect of such requisition period shall be retained by the Owners. The period during which the Vessel is on requisition to the said government shall count as part of the period provided for in this Charter Party.

If the period requisition exceeds ..... months, either party shall have the option of cancelling this Charter Party and no consequential claim may be made by either party.

35. **Stevedore Damage**

Notwithstanding anything contained herein to the contrary, the Charterers shall pay for any and all damage to the Vessel caused by stevedores provided the Master has notified the Charterers and/or their agents in writing as soon as practical but not later than 48 hours after any damage is discovered. Such notice to specify the damage in detail and to invite Charterers to appoint a surveyor to assess the extent of such damage.

(a) In case of any and all damage(s) affecting the Vessel's seaworthiness and/or the safety of the crew and/or affecting the trading capabilities of the Vessel, the Charterers shall immediately arrange for repairs of such damage(s) at their expense and the Vessel is to remain on hire until such repairs are completed and if required passed by the Vessel's classification society.

(b) Any and all damage(s) not described under point (a) above shall be repaired at the Charterers' option, before or after redelivery concurrently with the Owners' work. In such case no hire and/or expenses will be paid to the Owners except and insofar as the time and/or the expenses required for the repairs for which the Charterers are responsible, exceed the time and/or expenses necessary to carry out the Owners' work.

36. **Cleaning of Holds**

The Charterers shall provide and pay extra for sweeping and/or washing and/or cleaning of holds between voyages and/or between cargoes provided such work can be undertaken by the crew and is permitted by local regulations, at the rate of ..... per hold.

In connection with any such operation, the Owners shall not be responsible if the Vessel's holds are not accepted or passed by the port or any other authority. The Charterers shall have the option to re-deliver the Vessel with unclean/unswept holds against a lumpsum payment of.....in lieu of cleaning.

37. **Taxes**

Charterers to pay all local, State, National taxes and/or dues assessed on the Vessel or the Owners resulting from the Charterers' orders herein, whether assessed during or after the currency of this Charter Party including any taxes and/or dues on cargo and/or freights and/or sub-freights and/or hire (excluding taxes levied by the country of the flag of the Vessel or the Owners).

38. **Charterers' Colors**

The Charterers shall have the privilege of flying their own house flag and painting the Vessel with their own markings. The Vessel shall be repainted in the Owners' colors before termination of the Charter Party. Cost and time of painting, maintaining and repainting those changes effected by the Charterers shall be for the Charterers' account.

39. **Laid Up Returns**

The Charterers shall have the benefit of any return insurance premium receivable by the Owners from their underwriters as and when received from underwriters by reason of the Vessel being in port for a minimum period of 30 days if on full hire for this period or pro rata for the time actually on hire.

40. **Documentation**

The Owners shall provide any documentation relating to the Vessel that may be required to permit the Vessel to trade within the agreed trade limits, including, but not limited to certificates of financial responsibility for oil pollution, provided such oil pollution certificates are obtainable from the Owners' P & I club, valid international tonnage certificate, Suez and Panama tonnage certificates, valid certificate of registry and certificates relating to the strengh and/or serviceability of the Vessel's gear.

41. **Stowaways**

(a) (i) The Charterers warrant to exercise due care and diligence in preventing stowaways in gaining access to the Vessel by means of secreting away in the goods and/or containers shipped by the Charterers.

(ii) If, despite the exercise of due care and diligence by the Charterers, stowaways have gained access to the Vessel by means of secreting away in the goods and/or containers shipped by the Charterers, this shall amount to breach of charter for the consequences of which the Charterers shall be liable and shall hold the Owners harmless and shall keep them indemnified against all claims whatsoever which may arise and be made against them. Furthermore, all time lost and all expenses whatsoever and howsoever incurred, including fines, shall be for the Charterers' account and the Vessel shall remain on hire.

(iii) Should the Vessel be arrested as a result of the Charterers' breach of charter according to sub-clause (a)(ii) above, the Charterers shall take all reasonable steps to secure that, within a reasonable time, the Vessel is released and at their expense put up bail to secure release of the Vessel.

(b) (i) If, despite the exercise of due care and diligence by the Owners, stowaways have gained access to the Vessel by means other than secreting away in the goods and/or containers shipped by the Charterers, all time lost and all expenses whatsoever and howsoever incurred, including fines, shall be for the Owners' account and the Vessel shall be off hire.

(ii) Should the Vessel be arrested as a result of stowaways having gained access to the Vessel by means other than secreting away in the goods and/or containers shipped by the Charterers, the Owners shall take all reasonable steps to secure that, within a reasonable time, the Vessel is released and at their expense put up bail to secure release of the Vessel.

42. **Smuggling**

In the event of smuggling by the Master, Officers and/or crew, the Owners shall bear the cost of any fines, taxes, or imposts levied and the Vessel shall be off hire for any time lost as a result thereof.

43. **Commissions**

A commission of .....percent is payable by the Vessel and the Owners to.....
.....
.....
.....
on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

44. **Address Commission**

An address commission of ..... percent is payable to.....
.....
.....
.....on hire earned and paid under this Charter.

45. **Arbitration**

(a) NEW YORK
All disputes arising out of this contract shall be arbitrated at New York in the following manner, and subject to U.S. Law:

One Arbitrator is to be appointed by each of the parties hereto and a third by the two so chosen. Their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the court. The Arbitrators shall be commercial men, conversant with shipping matters. Such Arbitration is to be conducted in accordance with the rules of the Society of Maritime Arbitators Inc.

For disputes where the total amount claimed by either party does not exceed US $ .....** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitators Inc.

(b) LONDON
All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action to be taken before the award is made. Any dispute arising hereunder shall be governed by English Law.

For disputes where the total amount claimed by either party does not exceed US $ .....** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

* *Delete para (a) or (b) as appropriate*

** *Where no figure is supplied in the blank space this provision only shall be void but the other provisions of this clause shall have full force and remain in effect.*

If mutually agreed, clauses ..... to ....., both inclusive, as attached hereto are fully incorporated in this Charter Party.

APPENDIX "A" 525

To Charter Party dated 526
Between..... Owners 527
and ..... Charterers 528

Further details of the Vessel: 529
530

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F3. Baltime Form

1. Shipbroker	**BIMCO UNIFORM TIME-CHARTER (AS REVISED 2001) CODE NAME: "BALTIME 1939"** PART I
	2. Place and Date of Charter
3. Owners/Place of business	4. Charterers/Place of business
5. Vessel's Name	6. GT/NT
7. Class	8. Indicated brake horse power (bhp)
9. Total tons d.w. (abt.) on summer freeboard	10. Cubic feet grain/bale capacity
11. Permanent bunkers (abt.)	12. Speed capability in knots (abt.) on a consumption in tons (abt.) of
13. Present position	14. Period of hire (Cl. 1)
15. Port of delivery (Cl. 1)	16. Time of delivery (Cl. 1)
17. (a) Trade limits (Cl. 2)	
(b) Cargo exclusions specially agreed	
18. Bunkers on re-delivery (state min. and max. quantity)(Cl. 5)	19. Charter hire (Cl. 6)
20. Hire payment (state currency, method and place of payment; also beneficiary and bank account) (Cl. 6)	
21. Place or range of re-delivery (Cl. 7)	22. Cancelling date (Cl. 21)
23. Dispute resolution (state 22(A), 22(B) or 22(C); if 22(C) agreed Place of Arbitration must be stated) (Cl. 22)	24. Brokerage commission and to whom payable (Cl. 24)
25. Numbers of additional clauses covering special provisions, if agreed	

It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include PART I as well as PART II. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II to the extent of such conflict.

Signature (Owners)	Signature (Charterers)

Issued 1909; Amended 1911; 1912; 1920; 1939; 1950; 1974; and 2001

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PART II
"BALTIME 1939" Uniform Time-Charter (as revised 2001)

It is agreed between the party mentioned in Box 3 as Owners of the Vessel named in Box 5 of the gross/net tonnage indicated in Box 6, classed as stated in Box 7 and of indicated brake horse power (bhp) as stated in Box 8, carrying about the number of tons deadweight indicated in Box 9 on summer freeboard inclusive of bunkers, stores and provisions, having as per builder's plan a cubic-feet grain/bale capacity as stated in Box 10, exclusive of permanent bunkers, which contain about the number of tons stated in Box 11, and fully loaded capable of steaming about the number of knots indicated in Box 12 in good weather and smooth water on a consumption of about the number of tons fuel oil stated in Box 12, now in position as stated in Box 13 and the party mentioned as Charterers in Box 4, as follows:

1. Period/Port of Delivery/Time of Delivery

The Owners let, and the Charterers hire the Vessel for a period of the number of calendar months indicated in Box 14 from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers between 9 a.m. and 6 p.m., or between 9 a.m. and 2 p.m. if on Saturday, at the port stated in Box 15 in such available berth where she can safely lie always afloat, as the Charterers may direct, the Vessel being in every way fitted for ordinary cargo service. The Vessel shall be delivered at the time indicated in Box 16.

2. Trade

The Vessel shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the Vessel can safely lie always afloat within the limits stated in Box 17. No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) shall be shipped.

3. Owners' Obligations

The Owners shall provide and pay for all provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service. The Owners shall provide winchmen from the crew to operate the Vessel's cargo handling gear, unless the crew's employment conditions or local union or port regulations prohibit this, in which case qualified shore-winchmen shall be provided and paid for by the Charterers.

4. Charterers' Obligations

The Charterers shall provide and pay for all fuel oil, port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug-assistance, consular charges (except those pertaining to the Master, officers and crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also shall arrange and pay for loading, trimming, stowing (including dunnage and shifting boards, excepting any already on board), unloading, weighing, tallying and delivery of cargoes, surveys on hatches, meals supplied to officials and men in their service and all other charges and expenses whatsoever including detention and expenses through quarantine (including cost of fumigation and disinfection). All ropes, slings and special runners actually used for loading and discharging and any special gear, including special ropes and chains required by the custom of the port for mooring shall be for the Charterers' account. The Vessel shall be fitted with winches, derricks, wheels and ordinary runners capable of handling lifts up to 2 tons.

5. Bunkers

The Charterers at port of delivery and the Owners at port of re-delivery shall take over and pay for all fuel oil remaining in the Vessel's bunkers at current price at the respective ports. The Vessel shall be re-delivered with not less than the number of tons and not exceeding the number of tons of fuel oil in the Vessel's bunkers stated in Box 18.

6. Hire

The Charterers shall pay as hire the rate stated in Box 19 per 30 days, commencing in accordance with Clause 1 until her re-delivery to the Owners.

Payment of hire shall be made in cash, in the currency stated in Box 20, without discount, every 30 days, in advance, and in the manner prescribed in Box 20. In default of payment the Owners shall have the right of withdrawing the Vessel from the service of the Charterers, without noting any protest and without interference by any court or any other formality whatsoever and without prejudice to any claim the Owners may otherwise have on the Charterers under the Charter.

7. Re-delivery

The Vessel shall be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in the Charterers' option at the place or within the range stated in Box 21, between 9 a.m. and 6 p.m., and 9 a.m. and 2 p.m. on Saturday, but the day of re-delivery shall not be a Sunday or legal Holiday.

The Charterers shall give the Owners not less than ten days' notice at which port and on about which day the Vessel will be re-delivered. Should the Vessel be ordered on a voyage by which the Charter period will be exceeded the Charterers shall have the use of the Vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow redelivery about the time fixed for the termination of the Charter, but for any time exceeding the termination date the Charterers shall pay the market rate if higher than the rate stipulated herein.

8. Cargo Space

The whole reach and burthen of the Vessel, including lawful deck-capacity shall be at the Charterers' disposal, reserving proper and sufficient space for the Vessel's Master, officers, crew, tackle, apparel, furniture, provisions and stores.

9. Master

The Master shall prosecute all voyages with the utmost despatch and shall render customary assistance with the Vessel's crew. The Master shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods. The Owners shall not be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise. If

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the Charterers have reason to be dissatisfied with the conduct of the Master or any officer, the Owners, on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointments.

10. Directions and Logs
The Charterers shall furnish the Master with all instructions and sailing directions and the Master shall keep full and correct logs accessible to the Charterers or their Agents.

11. Suspension of Hire etc.
(A) In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the Vessel and continuing for more than twenty-four consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly.
(B) In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers' account even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by, the negligence of the Owners' servants.

12. Responsibility and Exemption
The Owners only shall be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners shall not be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants. The Owners shall not be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, officers or crew) whether partial or general. The Charterers shall be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.

13. Advances
The Charterers or their Agents shall advance to the Master, if required, necessary funds for ordinary disbursements for the Vessel's account at any port charging only interest at 6 per cent. p.a., such advances shall be deducted from hire.

14. Excluded Ports
The Vessel shall not be ordered to nor bound to enter:
(A) any place where fever or epidemics are prevalent or to which the Master, officers and crew by law are not bound to follow the Vessel;
(B) any ice-bound place or any place where lights, lightships, marks and buoys are or are likely to be withdrawn by reason of ice on the Vessel's arrival or where there is risk that ordinarily the Vessel will not be able on account of ice to reach the place or to get out after having completed loading or discharging. The Vessel shall not be obliged to force ice. If on account of ice the Master considers it dangerous to remain at the loading or discharging place for fear of the Vessel being frozen in and/or damaged, he has liberty to sail to a convenient open place and await the Charterers' fresh instructions. Unforeseen detention through any of above causes shall be for the Charterers' account.

15. Loss of Vessel
Should the Vessel be lost or missing, hire shall cease from the date when she was lost. If the date of loss cannot be ascertained half hire shall be paid from the date the Vessel was last reported until the calculated date of arrival at the destination. Any hire paid in advance shall be adjusted accordingly.

16. Overtime
The Vessel shall work day and night if required. The Charterers shall refund the Owners their outlays for all overtime paid to officers and crew according to the hours and rates stated in the Vessel's articles.

17. Lien
The Owners shall have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers shall have a lien on the Vessel for all moneys paid in advance and not earned.

18. Salvage
All salvage and assistance to other vessels shall be for the Owners' and the Charterers' equal benefit after deducting the Master's, officers' and crew's proportion and all legal and other expenses including hire paid under the charter for time lost in the salvage, also repairs of damage and fuel oil consumed. The Charterers shall be bound by all measures taken by the Owners in order to secure payment of salvage and to fix its amount.

19. Sublet
The Charterers shall have the option of subletting the Vessel, giving due notice to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of the Charter.

20. War ("Conwartime 1993")
(A) For the purpose of this Clause, the words:
(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and
(ii) "War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.
(B) The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where

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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. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(C) The Vessel shall not be required to load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to a belligerent's right of search and/or confiscation.

(D) (i) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Vessel is within, or is due to enter and remain within, any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then such premiums and/or calls shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due.

(E) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then such bonus or additional wages shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due.

(F) The Vessel shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the order, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to divert and discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

(v) to divert and call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(G) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within 48 hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice.

(H) If in compliance with any of the provisions of sub-clauses (B) to (G) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter.

21. Cancelling

Should the Vessel not be delivered by the date indicated in Box 22, the Charterers shall have the option of cancelling. If the Vessel cannot be delivered by the cancelling date, the Charterers, if required, shall declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the Vessel.

22. Dispute Resolution

*) **(A)** This Charter shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

*) **(B)** This Charter shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Contract shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

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In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

*) **(C)** This Charter shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(D) Notwithstanding (A), (B) or (C) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter.

In the case of a dispute in respect of which arbitration has been commenced under (A), (B) or (C) above, the following shall apply:-

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(E) If Box 23 in Part I is not appropriately filled in, sub-clause (A) of this Clause shall apply. Sub-clause (D) shall apply in all cases.

*) *(A), (B) and (C) are alternatives; indicate alternative agreed in Box 23.*

23. General Average

General Average shall be settled according to York/Antwerp Rules, 1994 and any subsequent modification thereof. Hire shall not contribute to General Average.

24. Commission

The Owners shall pay a commission at the rate stated in Box 24 to the party mentioned in Box 24 on any hire paid under the Charter, but in no case less than is necessary to cover the actual expenses of the Brokers and a reasonable fee for their work. If the full hire is not paid owing to breach of Charter by either of the parties the party liable therefor shall indemnify the Brokers against their loss of commission. Should the parties agree to cancel the Charter, the Owners shall indemnify the Brokers against any loss of commission but in such case the commission not to exceed the brokerage on one year's hire.

F4. Shelltime Form

Code word for this Charter Party
"SHELLTIME 4"

Issued December 1984 amended December 2003, Version 1.1 Apr06

Time Charter Party

LONDON, 20

IT IS THIS DAY AGREED between _____
of _____(hereinafter referred to as "Owners"), being owners
of the good motor/steam vessel called _____
(hereinafter referred to as "the vessel") described as per Clause 1 hereof and _____
of _____ (hereinafter referred to as "Charterers"):

Description And Condition of Vessel

1. At the date of delivery of the vessel under this charter and throughout the charter period:
(a) she shall be classed by a Classification Society which is a member of the International Association of Classification Societies;
(b) she shall be in every way fit to carry crude petroleum and/or its products;
(c) she shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator, radar, computers and computer systems) in a good and efficient state;
(d) her tanks, valves and pipelines shall be oil-tight;
(e) she shall be in every way fitted for burning, in accordance with the grades specified in Clause 29 hereof:
(i) at sea, fuel oil for main propulsion and fuel oil/marine diesel oil* for auxiliaries;
(ii) in port, fuel oil/marine diesel oil* for auxiliaries;
(f) she shall comply with the regulations in force so as to enable her to pass through the Suez and Panama Canals by day and night without delay;
(g) she shall have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay;
(h) she shall comply with the description in the OCIMF Harmonised Vessel Particulars Questionnaire appended hereto as Appendix A, provided however that if there is any conflict between the provisions of this questionnaire and any other provision, including this Clause 1, of this charter such other provisions shall govern;
(i) her ownership structure, flag, registry, classification society and management company shall not be changed;

Safety Management

(j) Owners will operate:
(i) a safety management system, certified to comply with the International Safety Management Code ("ISM Code") for the Safe Operation of Ships and for Pollution Prevention;
(ii) a documented safe working procedures system (including procedures for the identification and mitigation of risks);
(iii) a documented environmental management system;
(iv) documented accident/incident reporting system compliant with flag state requirements;
(k) Owners shall submit to Charterers a monthly written report detailing all accidents/incidents and environmental reporting requirements, in accordance with the "Shell Safety and Environmental Monthly Reporting Template" appended hereto as Appendix B;
(l) Owners shall maintain Health Safety Environmental ("HSE") records sufficient to demonstrate compliance with the requirements of their HSE system and of this charter. Charterers reserve the right to confirm compliance with HSE requirements by audit of Owners.
(m) Owners will arrange at their expense for a SIRE inspection to be carried out at intervals of six months plus or minus thirty days.

Shipboard Personnel And their Duties

2. (a) At the date of delivery of the vessel under this charter and throughout the charter period:
(i) she shall have a full and efficient complement of master, officers and crew for a vessel of her tonnage, who shall in any event be not less than the number required by the laws of the flag state and who shall be trained to operate the vessel and her equipment competently and safely;
(ii) all shipboard personnel shall hold valid certificates of competence in accordance with the requirements of the law of the flag state;
(iii) all shipboard personnel shall be trained in accordance with the relevant provisions of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1995 or any additions, modifications or subsequent versions thereof;
(iv) there shall be on board sufficient personnel with a good working knowledge of the English language to enable cargo operations at loading and discharging places to be carried out efficiently and safely and to enable communications between the vessel and those loading the vessel or accepting discharge there from to be carried out quickly and efficiently;
(v) the terms of employment of the vessel's staff and crew will always remain acceptable to The International Transport Worker's Federation and the vessel will at all times carry a Blue Card;
(vi) the nationality of the vessel's officers given in the OCIMF Vessel Particulars Questionnaire referred to in Clause 1(h) will not change without Charterers' prior agreement;
(b) Owners guarantee that throughout the charter service the master shall with the vessel's officers and crew, unless otherwise ordered by Charterers;
(i) prosecute all voyages with the utmost despatch;

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Issued December 1984 amended December 2003, Version 1.1 Apr06

(ii) render all customary assistance; and
(iii) load and discharge cargo as rapidly as possible when required by Charterers or their agents to do so, by night or by day, but always in accordance with the laws of the place of loading or discharging (as the case may be) and in each case in accordance with any applicable laws of the flag state.

Duty to Maintain

3. (a) Throughout the charter service Owners shall, whenever the passage of time, wear and tear or any event (whether or not coming within Clause 27 hereof) requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain or restore the vessel.

(b) If at any time whilst the vessel is on hire under this charter the vessel fails to comply with the requirements of Clauses 1, 2(a) or 10 then hire shall be reduced to the extent necessary to indemnify Charterers for such failure. If and to the extent that such failure affects the time taken by the vessel to perform any services under this charter, hire shall be reduced by an amount equal to the value, calculated at the rate of hire, of the time so lost.
Any reduction of hire under this sub-Clause (b) shall be without prejudie to any other remedy available to Charterers, but where such reduction of hire is in respect of time lost, such time shall be excluded from any calculation under Clause 24.

(c) If Owners are in breach of their obligations under Clause 3(a), Charterers may so notify Owners in writing and if, after the expiry of 30 days following the receipt by Owners of any such notice, Owners have failed to demonstrate to Charterers' reasonable satisfaction the exercise of due diligence as required in Clause 3(a), the vessel shall be off-hire, and no further hire payments shall be due, until Owners have so demonstrated that they are exercising such due diligence.

(d) Owners shall advise Charterers immediately, in writing, should the vessel fail an inspection by, but not limited to, a governmental and/or port state authority, and/or terminal and/or major charterer of similar tonnage. Owners shall simultaneously advise Charterers of their proposed course of action to remedy the defects which have caused the failure of such inspection.

(e) If, in Charterers reasonably held view:
(i) failure of an inspection, or,
(ii) any finding of an inspection,
referred to in Clause 3(d), prevents normal commercial operations then Charterers have the option to place the vessel off-hire from the date and time that the vessel fails such inspection, or becomes commercially inoperable, until the date and time that the vessel passes a re-inspection by the same organisation, or becomes commercially operable, which shall be in a position no less favourable to Charterers than at which she went off-hire

(f) Furthermore, at any time while the vessel is off-hire under this Clause 3 (with the exception of Clause 3(e)(ii), Charterers have the option to terminate this charter by giving notice in writing with effect from the date on which such notice of termination is received by Owners or from any later date stated in such notice. This sub-Clause (f) is without prejudice to any rights of Charterers or obligations of Owners under this charter or otherwise (including without limitation Charterers' rights under Clause 21 hereof).

Period, Trading Limits and Safe Places

4. (a) Owners agree to let and Charterers agree to hire the vessel for a period of ——— plus or minus —— days in Charterers' option, commencing from the time and date of delivery of the vessel, for the purpose of carrying all lawful merchandise (subject always to Clause 28) including in particular;
———
in any part of the world, as Charterers shall direct, subject to the limits of the current British Institute Warranties and any subsequent amendments thereof. Notwithstanding the foregoing, but subject to Clause 35, Charterers may order the vessel to ice-bound waters or to any part of the world outside such limits provided that Owner's consent thereto (such consent not to be unreasonably withheld) and that Charterers pay for any insurance premium required by the vessel's underwriters as a consequence of such order.

(b) Any time during which the vessel is off-hire under this charter may be added to the charter period in Charterers' option up to the total amount of time spent off-hire. In such cases the rate of hire will be that prevailing at the time the vessel would, but for the provisions of this Clause, have been redelivered.

(c) Charterers shall use due diligence to ensure that the vessel is only empoloyed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid. Subject as above, the vessel shall be loaded and discharged at any places as Charterers may direct, provided that Charterers shall exercise due diligence to ensure that any ship-to-ship transfer operations shall conform to standards not less than those set out in the latest published edition of the ICS/OCIMF Ship-to-Ship Transfer Guide.

(d) Unless otherwise agreed, the vessel shall be delivered by Owners dropping outward pilot at a port in
———
at Owners' option and redelivered to Owners dropping outward pilot at a port in
———,
at Charterers' option.

(e) The vessel will deliver with last cargo(es) of —— and will redeliver with last cargo(es) of ——

(f) Owners are required to give Charterers —— days prior notice of delivery and Charterers are required to give Owners —— days prior notice of redelivery.

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Laydays/ Cancelling

5. The vessel shall not be delivered to Charterers before ——— and Charterers shall have the option of cancelling this charter if the vessel is not ready and at their disposal on or before ———

Owners to Provide

6. Owners undertake to provide and to pay for all provisions, wages (including but not limited to all overtime payments), and shipping and discharging fees and all other expenses of the master, officers and crew; also, except as provided in Clauses 4 and 34 hereof, for all insurance on the vessel, for all deck, cabin and engine-room stores, and for water; for all drydocking, overhaul, maintenance and repairs to the vessel; and for all fumigation expenses and de-rat certificates. Owners' obligations under this Clause 6 extend to all liabilities for customs or import duties arising at any time during the performance of this charter in relation to the personal effects of the master, officers and crew, and in relation to the stores, provisions and other matters aforesaid which Owners are to provide and pay for and Owners shall refund to Charterers any sums Charterers or their agents may have pad or been compelled to pay in respect of any such liability. Any amounts allowable in general average for wages and provisions and stores shall be credited to Charterers insofar as such amounts are in respect of a Period when the vessel is on-hire

Charterers to Provide

7. (a) Charterers shall provide and pay for all fuel (except fuel used for domestic services), towage and pilotage and shall pay agency fees, port charges, commissions, expenses of loading and unloading cargoes, canal dues and all charges other than those payable by Owners in accordance with Clause 6 hereof, provided that all charges for the said items shall be for Owners' account when such items are consumed, employed or incurred for Owners' purposes or while the vessel is off-hire (unless such items reasonably relate to any service given or distance made good and taken into account under Clause 21 or 22); and provided further that any fuel used in connection with a general average sacrifice or expenditure shall be paid for by Owners.

(b) In respect of bunkers consumed for Owners' purposes these will be charged on each occasion by Charterers on a "first-in-first-out" basis valued on the prices actually paid by Charterers.

(c) If the trading limits of this charter include ports in the United States of America and/or its protectorates then Charterers shall reimburse Owners for port specific charges relating to additional premiums charged by providers of oil pollution cover, when incurred by the vessel calling at ports in the United States of America and/or its protectorates in accordance with Charterers orders.

Rate of Hire

8. Subject as herein provided, Charterers shall pay for the use and hire of the vessel at the rate of United States Dollars —— per day, and pro rata for any part of a day, from the time and date of her delivery (local time) to Charterers until the time and date of redelivery (local time) to Owners.

Payment of Hire

9. Subject to Clause 3(c) and 3(e), payment of hire shall be made in immediately available funds to: ———

———

Account: ———

———

in United States Dollars per calendar month in advance, less:

(i) any hire paid which Charterers reasonably estimate to relate to off-hire periods, and;

(ii) any amounts disbursed on Owners' behalf, any advances and commission thereon, and charges which are for Owners' account pursuant to any provision hereof, and;

(iii) any amounts due or reasonably estimated to become due to Charterers under Clause 3(c) or 24 hereof,

any such adjustments to be made at the due date for the next monthly payment after the facts have been ascertained. Charterers shall not be responsible for any delay or error by Owners' bank in crediting Owners' account provided that Charterers have made proper and timely payment.

In default of such proper and timely payment:

(a) Owners shall notify Charterers of such default and Charterers shall within seven days of receipt of such notice pay to Owners the amount due, including interest, failing which Owners may withdraw the vessel from the service of Charterers without prejudice to any other rights Owners may have under this charter or otherwise; and;

(b) Interest on any amount due but not paid on the due date shall accrue from the day after that date up to and including the day when payment is made, at a rate per annum which shall be 1% above the U.S. Prime Interest Rate as published by the Chase Manhattan Bank in New York at 12.00 New York time on the due date, or, if no such interest rate is published on that day, the interest rate published on the next preceding day on which such a rate was so published, computed on the basis of a 360 day year of twelve 30-day months, compounded semi-annually.

Space Available to Charterers

10. The whole reach, burthen and decks on the vessel and any passenger accommodation (including Owners' suite) shall be at Charterers' disposal, reserving only proper and sufficient space for the vessel's master, officers, crew, tackle, apparel, furniture, provisions and stores, provided that the weight of stores on board shall not, unless specially agreed, exceed —— tonnes at any time during the charter period.

Segregated Ballast

11. In connection with the Council of the European Union Regulation on the Implementation of IMO Resolution A747(18) Owners will ensure that the following entry is made on the International Tonnage Certificate (1969) under the section headed "remarks":

"The segregated ballast tanks comply with the Regulation 13 of Annex 1 of the International Convention for the prevention of pollution from ships, 1973, as modified by the Protocol of 1978 relating thereto, and the total tonnage of such tanks exclusively used for the carriage of segregated water ballast is ——The reduced gross tonnage which should be used for the calculation of tonnage based fees is ——".

Instructions And Logs

12. Charterers shall from time to time give the master all requisite instructions and sailing directions, and the master shall keep a full and, correct log of the voyage or voyages, which Charterers or their agents

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may inspect as required. The master shall when required furnish Charterers or their agents with a true copy of such log and with properly completed loading and discharging port sheets and voyage reports for each voyage and other returns as Charterers may require. Charterers shall be entitled to take copies at Owners' expense of any such documents which are not provided by the master.

Bills of Lading

13. (a) The master (although appointed by Owners) shall be under the orders and direction of Charterers as regards employment of the vessel, agency and other arrangements, and shall sign Bills of Lading as Charterers or their agents may direct (subject always to Clauses 35(a) and 40) without prejudice to this charter. Charterers hereby indemnify Owners against all consequences or liabilities that may arise;

(i) from signing Bills of Lading in accordance with the directions of Charterers or their agents, to the extent that the terms of such Bills of Lading fail to conform to the requirements of this charter, or (except as provided in Clause 13(b)) from the master otherwise complying with Charterers' or their agents' orders;

(ii) from any irregularities in papers supplied by Charterers or their agents.

(b) If Charterers by telex, facsimile or other form of written communication that specifically refers to this Clause request Owners to discharge a quantity of cargo either without Bills of Lading and/or at a discharge place other than that named in a Bill of Lading and/or that is different from the Bill of Lading quantity, then Owners shall discharge such cargo in accordance with Charterer's instructions in consideration of receiving the following indemnity which shall be deemed to be given by Charterers on each and every such occasion and which is limited in value to 200% of the CIF value of the cargo carried on board;

"(i) Charterers shall indemnify Owners and Owners' servants and agents in respect of any liability loss or damage of whatsoever nature (including legal costs as between attorney or solicitor and client and associated expenses) which Owners may sustain by reason of delivering such cargo in accordance with Charterers' request.

(ii) If any proceeding is commenced against Owners or any of Owners' servants or agents in connection with the vessel having delivered cargo in accordance with such request, Charterers shall provide Owners or any of Owners' servants or agents from time to time on demand with sufficient funds to defend the said proceedings.

(iii) If the vessel or any other vessel or property belonging to Owners should be arrested or detained, or if the arrest or detention thereof should be threatened, by reason of discharge in accordance with Charterers instruction as aforesaid, Charterers shall provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such vessel or property and Charterers shall indemnify Owners in respect of any loss, damage or expenses caused by such arrest or detention whether or not same may be justified.

(iv) Charterers shall, if called upon to do so at any time while such cargo is in Charterers' possession, custody or control, redeliver the same to Owners.

(v) As soon as all original Bills of Lading for the above cargo which name as discharge port the place where delivery actually occurred shall have arrived and/or come into Charterers' possession, Charterers shall produce and deliver the same to Owners whereupon Charterers' liability hereunder shall cease.

Provided however, if Charterers have not received all such original Bills of Lading by 24.00 hours on the day 36 calendar months after the date of discharge, that this indemnity shall terminate at that time unless before that time Charterers have received from Owners written notice that:

a) Some person is making a claim in connection with Owners delivering cargo pursuant to Charterers request or,

b) Legal proceedings have been commenced against Owners and/or carriers and/or Charterers and/or any of their respective servants or agents and/or the vessel for the same reason.

When Charterers have received such a notice, then this indemnity shall continue in force until such claim or legal proceedings are settled. Termination of this indemnity shall not prejudice any legal rights a party may have outside this indemnity.

(vi) Owners shall promptly notify Charterers if any person (other than a person to whom Charterers ordered cargo to be delivered) claims to be entitled to such cargo and/or if the vessel or any other property belonging to Owners is arrested by reason of any such discharge of cargo.

vii) This indemnity shall be governed and construed in accordance with the English law and each and any dispute arising out of or in connection with this indemnity shall be subject to the jurisdiction of the High Court of Justice of England".

(c) Owners warrant that the Master will comply with orders to carry and discharge against one or more Bills of Lading from a set of original negotiable Bills of Lading should Charterers so require.

Conduct of Vessel's Personnel

14. If Charterers complain of the conduct of the master or any of the officers or crew, Owners shall immediately investigate the complaint. If the complaint proves to be well founded, Owners shall, without delay, make a change in the appointments and Owners shall in any event communicate the result of their investigations to Charterers as soon as possible.

Bunkers at Delivery and Redelivery

15. Charterers shall accept and pay for all bunkers on board at the time of delivery, and Owners shall on redelivery (whether it occurs at the end of the charter or on the earlier termination of this charter) accept and pay for all bunkers remaining on board, at the price actually paid, on a "first-in-first-out" basis. Such prices are to be supported by paid invoices.

Vessel to be delivered to and redelivered from the charter with, at least, a quantity of bunkers on board sufficient to reach the nearest main bunkering port.

Notwithstanding anything contained in this charter all bunkers on board the vessel shall, throughout the duration of this charter, remain the property of Charterers and can only be purchased on the terms

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specified in the charter at the end of the charter period or, if earlier, at the termination of the charter.

Stevedores, Pilots, Tugs

16. Stevedores, when required, shall be employed and paid by Charterers, but this shall not relieve Owners from responsibility at all times for proper stowage, which must be controlled by the master who shall keep a strict account of all cargo loaded and discharged. Owners hereby indemnify Charterers, their servants and agents against all losses, claims, responsibilities and liabilities arising in any way whatsoever from the employment of pilots, tugboats or stevedores, who although employed by Charterers shall be deemed to be the servants of and in the service of Owners and under their instructions (even if such pilots, tugboat personnel or stevedores are in fact the servants of Charterers their agents or any affiliated company); provided, however, that;
(a) the foregoing indemnity shall not exceed the amount to which Owners would have been entitled to limit their liability if they had themselves employed such pilots, tugboats or stevedores, and;
(b) Charterers shall be liable for any damage to the vessel caused by or arising out of the use of stevedores, fair wear and tear excepted, to the extent that Owners are unable by the exercise of due diligence to obtain redress therefor from stevedores.

Super-Numeraries

17. Charterers may send representatives in the vessel's available accommodation upon any voyage made under this charter, Owners finding provisions and all requisites as supplied to officers, except alcohol. Charterers paying at the rate of United States Dollars 15 (fifteen) per day for each representative while on board the vessel.

Sub-letting/ Assignment/ Novation

18. Charterers may sub-let the vessel, but shall always remain responsible to Owners for due fulfilment of this charter. Additionally Charterers may assign or novate this charter to any company of the Royal Dutch/Shell Group of Companies.

Final Voyage

19. If when a payment of hire is due hereunder Charterers reasonably expect to redeliver the vessel before the next payment of hire would fall due, the hire to be paid shall be assessed on Charterers' reasonable estimate of the time necessary to complete Charterers' programme up to redelivery, and from which estimate Charterers may deduct amounts due or reasonably expected to become due for;
(a) disbursements on Owners' behalf or charges for Owners' account pursuant to any provision hereof, and;
(b) bunkers on board at redelivery pursuant to Clause 15.
Promptly after redelivery any overpayment shall be refunded by Owners or any underpayment made good by Charterers.
If at the time this charter would otherwise terminate in accordance with Clause 4 the vessel is on a ballast voyage to a port of redelivery or is upon a laden voyage, Charterers shall continue to have the use of the vessel at the same rate and conditions as stand herein for as long as necessary to complete such ballast voyage, or to complete such laden voyage and return to a port of redelivery as provided by this charter, as the case may be.

Loss of Vessel

20. Should the vessel be lost, this charter shall terminate and hire shall cease at noon on the day of her loss; should the vessel be a constructive total loss, this charter shall terminate and hire shall cease at noon on the day on which the vessel's underwriters agree that the vessel is a constructive total loss; should the vessel be missing, this charter shall terminate and hire shall cease at noon on the day on which she was last heard of. Any hire paid in advance and not earned shall be returned to Charterers and Owners shall reimburse Charterers for the value of the estimated quantity of bunkers on board at the time of termination, at the price paid by Charterers at the last bunkering port.

Off-hire

21. (a) On each and every occasion that there is loss of time (whether by way of interruption in the vessel's service or, from reduction in the vessel's performance, or in any other manner);
(i) due to deficiency of personnel or stores; repairs; gas-freeing for repairs; time in and waiting to enter dry dock for repairs; breakdown (whether partial or total) of machinery, boilers or other parts of the vessel or her equipment (including without limitation tank coatings); overhaul, maintenance or survey; collision, stranding, accident or damage to the vessel; or any other similar cause preventing the efficient working of the vessel; and such loss continues for more than three consecutive hours (if resulting from interruption in the vessel's service) or cumulates to more than three hours (if resulting from partial loss of service); or;
(ii) due to industrial action, refusal to sail, breach of orders or neglect of duty on the part of the master, officers or crew; or;
(iii) for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a Charterers' representative carried under Clause 17 hereof) or for the purpose of landing the body of any person (other than a Charterers' representative), and such loss continues for more than three consecutive hours; or;
(iv) due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents, or to any detention by customs or other authorities caused by smuggling or other infraction of local law on the part of the master, officers, or crew; or;
(v) due to detention of the vessel by authorities at home or abroad attributable to legal action against or breach of regulations by the vessel, the vessel's owners, or Owners (unless brought about by the act or neglect of Charterers); then;
without prejudice to Charterers' rights under Clause 3 or to any other rights of Charterers hereunder, or otherwise, the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced; provided, however, that any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire.
(b) If the vessel fails to proceed at any guaranteed speed pursuant to Clause 24, and such failure

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arises wholly or partly from any of the causes set out in Clause 21(a) above, then the period for which the vessel shall be off-hire under this Clause 21 shall be the difference between:
(i) the time the vessel would have required to perform the relevant service at such guaranteed speed, and;
(ii) the time actually taken to perform such service (including any loss of time arising from interruption in the performance of such service).
For the avoidance of doubt, all time included under (ii) above shall be excluded from any computation under Clause 24.

(c) Further and without prejudice to the foregoing, in the event of the vessel deviating (which expression includes without limitation putting back, or putting into any port other than that to which she is bound under the instructions of Charterers) for any cause or purpose mentioned in Clause 21(a), the vessel shall be off-hire from the commencement of such deviation until the time when she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which the deviation commenced, provided, however, that any service given or distance made good by the vessel whilst so off-hire shall be taken into account in assessing the amount to be deducted from hire. If the vessel, for any cause or purpose mentioned in Clause 21(a), puts into any port other than the port to which she is bound on the instructions of Charterers, the port charges, pilotage and other expenses at such port shall be borne by Owners. Should the vessel be driven into any port or anchorage by stress of weather hire shall continue to be due and payable during any time lost thereby.

(d) If the vessel's flag state becomes engaged in hostilities, and Charterers in consequence of such hostilities find it commercially impracticable to employ the vessel and have given Owners written notice thereof then from the date of receipt by owners of such notice until the termination of such commercial impracticability the vessel shall be off-hire and Owners shall have the right to employ the vessel on their own account.

(e) Time during which the vessel is off-hire under this charter shall count as part of the charter peeriod except where Charterers declare their option to add off-hire periods under Clause 4(b).

(f) All references to "time" in this charter party shall be references to local time except where otherwise stated.

Periodical Drydocking

22. (a) Owners have the right and obligation to drydock the vessel at regular intervals of —— On each occasion Owners shall propose to Charterers a date on which they wish to drydock the vessel, not less than —— before such date, and Charterers shall offer a port for such periodical drydocking and shall take all reasonable steps to make the vessel available as near to such date as practicable.
Owners shall put the vessel in drydock at their expense as soon as practicable after Charterers place the vessel at Owners' disposal clear of cargo other than tank washings and residues. Owners shall be responsible for and pay for the disposal into reception facilities of such tank washings and residues and shall have the right to retain any monies received therefor, without prejudice to any claim for loss of cargo under any Bill of Lading or this charter.

(b) If a periodical drydocking is carried out in the port offered by Charterers (which must have suitable accommodation for the purpose and reception facilities for tank washings and residues), the vessel shall be off-hire from the time she arrives at such port until drydocking is completed and she is in every way ready to resume Charterers' service and is at the position at which she went off-hire or a position no less favourable to Charterers, whichever she first attains. However;
(i) provided that Owners exercise due diligence in gas-freeing, any time list in gas-freeing to the standard required for entry into drydock for cleaning and painting the hull shall not count as off-hire, whether lost on passage to the drydocking port or after arrival there (notwithstanding Clause 21), and;
(ii) any additional time lost in further gas-freeing to meet the standard required for hot work or entry to cargo tanks shall count as off-hire, whether lost on passage to the drydocking port or after arrival there.
Any time which, but for sub-Clause (i) above, would be off-hire, shall not be included in any calculation under Clause 24.
The expenses of gas-freeing, including without limitation the cost of bunkers, shall be for Owners account.

(c) If Owners require the vessel, instead of proceeding to the offeered port, to carry out periodical drydocking at a special port selected by them, the vessel shall be off-hire from the time when she is released to proceed to the special port until she next presents for loading in accordance with Charterers' instructions, provided, however, that Charterers shall credit Owners with the time which would have been taken on passage at the service speed had the vessel not proceeded to drydock. All fuel consumed shall be paid for by Owners but Charterers shall credit Owners with the value of the fuel which would have been used on such notional passage calculated at the guaranteed daily consumption for the service speed, and shall further credit Owners with any benefit they may gain in purchasing bunkers at the special port.

(d) Charterers shall, insofar as cleaning for periodical drydocking may have reduced the amount of tank-cleaning necessary to meet Charterers' requirements, credit Owners with the value of any bunkers which Charterers calculate to have been saved thereby, whether the vessel drydocks at an offered or a special port.

Ship Inspection

23. Charterers shall have the right at any time during the charter period to make such inspection of the vessel as they may consider necessary. This right may be exercised as often and at such intervals as Charterers in their absolute discretion may determine and whether the vessel is in port or on passage. Owners affording all necessary co-operation and accommodation on board provided, however:
(a) that neither the exercise nor the non-exercise, nor anything done or not done in the exercise or non-exercise, by Charterers of such right shall in any way reduce the master's or Owners'

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authority over, or responsibility to Charterers or third parties for, the vessel and every aspect of her operation, nor increase Charterers' responsibilities to Owners or third parties for the same; and;

(b) that Charterers shall not be liable for any act, neglect or default by themselves, their servants or agents in the exercise or non-exercise of the aforesaid right.

Detailed Description and Performance

24. (a) Owners guarantee that the speed and consumption of the vessel shall be as follows:-

Average speed in knots	Maximum average bunker consumption per day main propulsion fuel oil/diesel oil	auxiliaries fuel oil/diesel oil
Laden	tonnes	tonnes
———	———/———	———/———
———	———/———	———/———
———	———/———	———/———
Ballast		
———	———/———	———/———
———	———/———	———/———
———	———/———	———/———

The foregoing bunker consumptions are for all purposes except cargo heating and tank cleaning and shall be pro-rated between the speeds shown.

The service speed of the vessel is —— knots laden and —— knots in ballast and in the absence of Charterers' orders to the contrary the vessel shall proceed at the service speed. However if more than one laden and one ballast speed are shown in the table above Charterers shall have the right to order the vessel to steam at any speed within the range set out in the table (the "ordered speed").

If the vessel is ordered to proceed at any speed other than the highest speed shown in the table, and the average speed actually attained by the vessel during the currency of such order exceeds such ordered speed plus 0.5 knots (the "maximum recognised speed"), then for the purpose of calculating a decrease of hire under this Clause 24 the maximum recognised speed shall be used in place of the average speed actually attained.

For the purposes of this charter the "guaranteed speed" at any time shall be the then-current ordered speed or the service speed, as the case may be.

The average speeds and bunker consumptions shall for the purposes of this Clause 24 be calculated by reference to the observed distance from pilot station to pilot station on all sea passages during each period stipulated in Clause 24(c), but excluding any time during which the vessel is (or but for Clause 22(b)(i) would be) off-hire and also excluding "Adverse Weather Periods", being;

(i) any periods during which reduction of speed is necessary for safety in congested waters or in poor visibility;

(ii) any days, noon to noon, when winds exceed force 8 on the Beaufort Scale for more than 12 hours.

(b) If during any year from the date on which the vessel enters service (anniversary to anniversary) the vessel falls below or exceeds the performance guaranteed in Clause 24(a) then if such shortfall or excess results;

(i) from a reduction or an increase in the average speed of the vessel, compared to the speed guaranteed in Clause 24(a), then an amount equal to the value at the hire rate of the time so lost or gained, as the case may be, shall be included in the performance calculation;

(ii) from an increase or a decrease in the total bunkers consumed, compared to the total bunkers which would have been consumed had the vessel performed as guaranteed in Clause 24(a), an amount equivalent to the value of the additional bunkers consumed or the bunkers saved, as the case may be, based on the average price paid by Charterers for the vessel's bunkers in such period, shall be included in the performance calculation.

The results of the performance calculation for laden and ballast mileage respectively shall be adjusted to take into account the mileage steamed in each such condition during Adverse Weather Periods, by dividing such addition or deduction by the number of miles over which the performance has been calculated and multiplying by the same number of miles plus the miles steamed during the Adverse Weather Periods, in order to establish the total performance calculation for such period.

Reduction of hire under the foregoing sub-Clause (b) shall be without prejudice to any other remedy available to Charterers.

(c) Calculations under this Clause 24 shall be made for the yearly periods terminating on each successive anniversary of the date on which the vessel enters service, and for the period between the last such anniversary and the date of termination of this charter if less than a year. Claims in repsect of reduction of hire arising under this Clause during the final year or part year of the charter period shall in the first instance be settled in accordance with Charterers' estimate made two months before the end of the charter period. Any necessary adjustment after this charter terminates shall be made by payment by Owners to Charterers or by Charterers to Owners as the case may require.

(d) Owners and Charterers agree that this Clause 24 is assessed on the basis that Owners are not entitled to additional hire for performance in excess of the speeds and consumptions given in this Clause 24.

Salvage

25. Subject to the provisions of Clause 21 hereof, all loss of time and all expenses (excluding any damage to or loss of the vessel or tortious liabilities to third parties) incurred in saving or attempting to save life or in successful or unsuccessful attempts at salvage shall be borne equally by Owners and

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Charterers provided that Charterers shall not be liable to contribute towards any salvage payable by Owners arising in any way out of services rendered under this Clause 25.
All salvage and all proceeds from derelicts shall be divided equally between Owners and Charterers after deducting the master's, officers' and crew's share.

Lien 26. Owners shall have a lien upon all cargoes and all freights, sub-freights and demurrage for any amounts due under this charter; and Charterers shall have a lien on the vessel for all monies paid in advance and not earned, and for all claims for damages arising from any beach by Owners of this Charter.

Exceptions 27. (a) The vessel, her master and Owners shall not, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure arising or resulting from any act, neglect or default of the master, pilots, mariners or other servants of Owners in the navigation or management of the vessel; fire, unless caused by the actual fault or privity of Owners; collision or stranding; dangers and accidents of the sea; explosion, bursting of boilers, breakage of shafts or any latent defect in hull, equipment or machinery; provided, however, that Clauses 1, 2, 3 and 24 hereof shall be unaffected by the foregoing. Further, neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure in performance hereunder arising or resulting from act of God, act of war, seizure under legal process, quarantine restrictions, strikes, lock-outs, riots, restraints of labour, civil commotions or arrest or restraint of princes, rulers or people.

(b) The vessel shall have liberty to sail with or without pilots, to tow or go to the assistance of vessels in distress and to deviate for the purpose of saving life or property.

(c) Clause 27(a) shall not apply to, or affect any liability of Owners or the vessel or any other relevant person in respect of;

(i) loss or damage caused to any berth, jetty, dock, dolphin, buoy, mooring line, pipe or crane or other works or equipment whatsoever at or near any place to which the vessel may proceed under this charter, whether or not such works or equipment belong to Charterers, or;

(ii) any claim (whether brought by Charterers or any other peerson) arising out of any loss of or damage to or in connection with cargo. Any such claim shall be subject to the Hague-Visby Rules or the Hague Rules or the Hamburg Rules, as the case may be, which ought pursuant to Clause 38 hereof to have been incorporated in the relevant Bill of lading (whether or not such Rules were so incorporated) or, if no such Bill of Lading is issued, to the Hague-Visby Rules unless the Hamburg Rules compulsorily apply in which case to the Hamburg Rules.

(d) In particular and without limitation, the foregoing subsections (a) and (b) of this Clause shall not apply to or in any way affect any provision in this charter relating to off-hire or to reduction of hire.

Injurious Cargoes 28. No acids, explosives or cargoes injurious to the vessel shall be shipped and without prejudice to the foregoing any damage to the vessel caused by the shipment of any such cargo, and the time taken to repair such damage, shall be for Charterers' account. No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments.

Grade of Bunkers 29. Charterers shall supply fuel oil with a maximum viscosity of —— centistokes at 50 degrees centigrade and/or marine diesel oil for main propulsion and fuel oil with a maximum viscosity of —— centistokes at 50 degrees centigrade and/or diesel oil for the auxiliaries. If Owners require the vessel to be supplied with more expensive bunkers they shall be liable for the extra cost thereof.
Charterers warrant that all bunkers provided by them in accordance herewith shall be of a quality complying with ISO Standard 8217 for Marine Residual Fuels and Marine Distillate Fuels as applicable.

Disbursements 30. Should the master require advances for ordinary disbursements at any port, Charterers or their agents shall make such advances to him, in consideration of which Owners shall pay a commission of two and a half per cent, and all such advances and commission shall be deducted from hire.

Laying-up 31. Charterers shall have the option, after consultation with Owners, of requiring Owners to lay up the vessel at a safe place nominated by Charterers, in which case the hire provided for under this charter shall be adjusted to reflect any net increases in expenditure reasonably incurred or any net saving which should reasonably be made by Owners as a result of such lay up. Charterers may exercise the said option any number of times during the charter period.

Requisition 32. Should the vessel be requisitioned by any government, de facto or de jure, during the period of this charter, the vessel shall be off-hire during the period of such requisition, and any hire paid by such governments in respect of such requisition period shall be for Owners' account. Any such requisition period shall count as part of the charter period.

Outbreak of War 33. If war or hostilities break out between any two or more of the following countries: U.S.A., the countries or republics having been part of the former U.S.S.R. (except that declaration of war or hostilities solely between any two or more of the countries or republics having been part of the former USSR shall be exempted), P.R.C., U.K., Netherlands, then both Owners and Charterers shall have the right to cancel this charter.

Additional War Expenses 34. If the vessel is ordered to trade in areas where there is war (de facto or de jure) or threat of war, Charterers shall reimburse Owners for any additional insurance premia, crew bonuses and other expenses which are reasonably incurred by Owners as a consequence of such orders, provided that Charterers are given notice of such expenses as soon as practicable and in any event before such expenses are incurred, and provided further that Owners obtain from their insurers a waiver of any subrogated rights against Charterers in respect of any claims by Owners under their war risk insurance arising out of compliance with such orders.
Any payments by Charterers under this clause will only be made against proven documentation. Any

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discount or rebate refunded to Owners, for whatever reason, in respect of additional war risk premium shall be passed on to Charterers.

War Risks

35. (a) The master shall not be required or bound to sign Bills of Lading for any place which in his or Owners' reasonable opinion is dangerous or impossible for the vessel to enter or reach owing to any blockade, war, hostilities, warlike operations, civil war, civil commotions or revolutions.

(b) If in the reasonable opinion of the master or Owners it becomes, for any of the reasons set out in Clause 35(a) or by the operation of international law, dangerous, impossible or prohibited for the vessel to reach or enter, or to load or discharge cargo at, any place to which the vessel has been ordered pursuant to this charter (a "place of peril"), then Charterers or their agents shall be immediately notified in writing or by radio messages, and Charterers shall thereupon have the right to order the cargo, or such part of it as may be affected, to be loaded or discharged, as the case may be, at any other place within the trading limits of this charter (provided such other place is not itself a place of peril). If any place of discharge is or becomes a place of peril, and no orders have been received from Charterers or their agents within 48 hours after dispatch of such messages, then Owners shall be at liberty to discharge the cargo or such part of it as may be affected at any place which they or the master may in their or his discretion select within the trading limits of this charter and such discharge shall be deemed to be due fulfilment of Owners' obligations under this charter so far as cargo so discharged is concerned.

(c) The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any other wise whatsoever given by the government of the state under whose flag the vessel sails or any other government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or local authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations anything is done or is not done, such shall not be deemed a deviation.

If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to any place of discharge to which she has been ordered pursuant to this charter, the vessel may proceed to any place which the master or Owners in his or their discretion select and there discharge the cargo or such part of it as may be affected. Such discharge shall be deemed to be due fulfilment of Owners' obligations under this charter so far as cargo so discharged is concerned.

Charterers shall procure that all Bills of Lading issued under this charter shall contain the Chamber of Shipping War Risks Clause 1952.

Both to Blame Collision Clause

36. If the liability for any collision in which the vessel is involved while performing this charter fails to be determined in accordance with the laws of the United States of America, the following provision shall apply:

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the cargo carried hereunder will indemnify the carrier against all loss, or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of the said cargo and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

"The foregoing provisions shall also apply where the owners, operators or those in cargo of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

Charterers shall procure that all Bills of Lading issued under this charter shall contain a provision in the foregoing terms to be applicable where the liability for any collision in which the vessel is involved fails to be determined in accordance with the laws of the United States of America.

New Jason Clause

37. General average contributions shall be payable according to York/Antwerp Rules, 1994, as amended from time to time, and shall be adjusted in London in accordance with English law and practice but should adjustment be made in accordance with the law and practice of the United States of America, the following position shall apply:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible by statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo."

"If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the carrier before delivery."

Charterers shall procure that all Bills of Lading issued under this charter shall contain a provision in the foregoing terms, to be applicable where adjustment of general average is made in accordance with the laws and practice of the United States of America.

Clause Paramount

38. Charterers shall procure that all Bills of Lading issued pursuant to this charter shall contain the following:

Code word for this Charter Party
"SHELLTIME 4"

Issued December 1984 amended December 2003, Version 1.1 Apr06

"(1) Subject to sub-clause (2) or (3) hereof, this Bill of Lading shall be governed by, and have effect subject to, the rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25th August 1924 (hereafter the "Hague Rules") as amended by the Protocol signed at Brussels on 23rd February 1968 (hereafter the "Hague-Visby Rules"). Nothing contained herein shall be deemed to be either a surrender by the carrier of any of his rights or immunities or any increase of any of his responsibilities or liabilities under the Hague-Visby Rules."

"(2) If there is governing legislation which applies the Hague Rules compulsorily to this Bill of Lading, to the exclusion of the Hague-Visby Rules, then this Bill of Lading shall have effect subject to the Hague Rules. Nothing therein contained shall be deemed to be either a surrender by the carrier of any of his rights or immunities or any increase of any of his responsibilities or liabilities under the Hague Rules."

"(3) If there is governing legislation which applied the United Nations Convention on the Carriage of Goods by Sea 1978 (hereafter the "Hamburg Rules") compulsorily to this Bill of Lading, to the exclusion of the Hague-Visby Rules, then this Bill of Lading shall have effect subject to the Hamburg Rules. Nothing therein contained shall be deemed to be either a surrender by the carrier of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the Hamburg Rules."

"(4) If any term of this Bill of Lading is repugnant to the Hague-Visby Rules, or Hague Rules, or Hamburg Rules, as applicable, such term shall be void to that extent but no further."

"(5) Nothing in this Bill of Lading shall be construed as in any way restricting, excluding or waiving the right of any relevant party or person to limit his liability under any available legislation and/or law."

Insurance/ ITOPF

39. Owners warrant that the vessel is now, and will, throughout the duration of the charter:

(a) be owned or demise chartered by a member of the International Tanker Owners Pollution Federation Limited;

(b) be properly entered in —— P & I Club, being a member of the International Group of P and I Clubs;

(c) have in place insurance cover for oil pollution for the maximum on offer through the International Group of P&I Clubs but always a minimum of United States Dollars 1,000,000,000 (one thousand million);

(d) have in full force and effect Hull and Machinery insurance placed through reputable brokers on Institute Time Clauses or equivalent for the value of United States Dollars —— as from time to time may be amended with Charterers' approval, which shall not be unreasonably withheld.

Owners will provide, within a reasonable time following a request from Charterers to do so, documented evidence of compliance with the warranties given in this Clause 39.

Export Restrictions

40. The master shall not be required or bound to sign Bills of Lading for the carriage of cargo to any place to which export of such cargo is prohibited under the laws, rules or regulations of the country in which the cargo was produced and/or shipped.

Charterers shall procure that all Bills of Lading issued under this charter shall contain the following clause:

"If any laws rules or regulations applied by the government of the country in which the cargo was produced and/or shipped, or any relevant agency thereof, impose a prohibition on export of the cargo to the place of discharge designated in or ordered under this Bill of Lading, carriers shall be entitled to require cargo owners forthwith to nominate an alternative discharge place for the discharge of the cargo, or such part of it as may be affected, which alternative place shall not be subject to the prohibition, and carriers shall be entitled to accept orders from cargo owners to proceed to and discharge at such alternative place. If cargo owners fail to nominate an alternative place within 72 hours after they or their agents have received from carriers notice of such prohibition, carriers shall be at liberty to discharge the cargo or such part of it as may be affected by the prohibition at any safe place on which they or the master may in their or his absolute discretion decide and which is not subject to the prohibition, and such discharge shall constitute due performance of the contract contained in this Bill of Lading so far as the cargo so discharged is concerned".

The foregoing provision shall apply mutatis mutandis to this charter, the references to a Bill of Lading being deemed to be references to this charter.

Business Principles

41. Owners will co-operate with Charterers to ensure that the "Business Principles", as amended from time to time, of the Royal Dutch/Shell Group of Companies, which are posted on the Shell Worldwide Web (www.Shell.com), are complied with.

Drugs and Alcohol

42. (a) Owners warrant that they have in force an active policy covering the vessel which meets or exceeds the standards set out in the "Guidelines for the Control of Drugs and Alcohol On Board Ship" as published by the Oil Companies International Marine Forum (OCIMF) dated January 1990 (or any subsequent modification, version, or variation of these guidelines) and that this policy will remain in force throughout the charter period, and Owners will exercise due diligence to ensure the policy is complied with.

(b) Owners warrant that the current policy concerning drugs and alcohol on board is acceptable to ExxonMobil and will remain so throughout the charter period.

Oil Major Acceptability

43. If, at any time during the charter period, the vessel becomes unacceptable to any Oil Major, Charterers shall have the right to terminate the charter.

Pollution and Emergency Response

44. Owners are to advise Charterers of organisational details and names of Owners personnel together with their relevant telephone/facsimile/e-mail/telex numbers, including the names and contact details of Qualified Individuals for OPA 90 response, who may be contacted on a 24 hour basis in the event of oil spills or emergencies.

ISPS Code/US

45. (a) (i) From the date of coming into force of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS

Code word for this Charter Party "SHELLTIME 4"

Issued December 1984 amended December 2003, Version 1.1 Apr06

MTSA 2002

Code) and the US Maritime Transportation Security Act 2002 (MTSA) in relation to the Vessel and thereafter during the currency of this charter, Owners shall procure that both the Vessel and "the Company" (as defined by the ISPS Code) and the "owner" (as defined by the MTSA) shall comply with the requirements of the ISPS Code relating to the Vessel and "the Company" and the requirements of MTSA relating to the vessel and the "owner". Upon request Owners shall provide documentary evidence of compliance with this Clause 45(a)(i).

(ii) Except as otherwise provided in this charter, loss, damage, expense or delay, caused by failure on the part of Owners or "the Company"/"owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for Owners' account.

(b) (i) Charterers shall provide Owners/Master with their full style contact details and shall ensure that the contact details of all sub-charterers are likewise provided to Owners/Master. Furthermore, Charterers shall ensure that all sub-charter parties they either into during the period of this charter contain the following provision: "The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners".

(ii) Except as otherwise provided in this charter, loss, damage, expense or delay, caused by failure on the part of Charterers to comply with this sub-Clause 45(b) shall be for Charterers' account.

(c) Notwithstanding anything else contained in this charter costs or expenses related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for Charterers' account, unless such costs or expenses result solely from Owners' negligence in which case such costs or expenses shall be for Owners' account. All measures required by Owners to comply with the security plan required by the ISPS Code/MTSA shall be for Owners' account.

(d) Notwithstanding any other provision of this charter, the vessel shall not be off-hire where there is a loss of time caused by Charterers' failure to comply with the ISPS Code/MTSA (when in force).

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

Law and Litigation

46. (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.

(b) All disputes arising out of this charter shall be referred to Arbitration in London in accordance with the Arbitration Act 1996 (or any re-enactment or modification thereof for the time being in force) subject to the following appointment procedure:

(i) The parties shall jointly apoint a sole arbitrator not later than 28 days after service of a request in writing by either party to do so.

(ii) If the parties are unable or unwilling to agree the appointment of a sole arbitrator in accordance with (i) then each party shall appoint one arbitrator, in any event not later than 14 days after receipt of a further request in writing by either party to do so. The two arbitrators so appointed shall appoint a third arbitrator before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

(iii) If a party fails to appoint an arbitrator within the time specified in (ii) (the "Party in Default"), the party who has duly appointed his arbitrator shall give notice in writing to the Party in Default that he proposes to appoint his arbitrator to act as sole arbitrator.

(iv) If the Party in Default does not within 7 days of the notice given pursuant to (iii) make The required appointment and notify the other party that he has done so the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

(v) Any Award of the arbitrator(s) shall be final and binding and not subject to appeal.

(vi) For the purposes of this clause 46(b) any requests or notices in writing shall be sent by fax, e-mail or telex and shall be deemed received on the day of transmission.

(c) It shall be a condition precedent to the right of any party to a stay of any legal proceedings in which maritime property has been, or may be, arrested in connection with a dispute under this charter, that that party furnishes to the other party security to which that other party would have been entitled in such legal proceedings in the absence of a stay.

Confidentiality

47. All terms and conditions of this charter arrangement shall be kept private and confidential

Construction

48. The side headings have been included in this charter for convenience of reference and shall in no way affect the construction hereof.

Appendix A: OCIMF Vessel Particulars Questionnaire for the vessel, as attached, shall be incorporated herein.

Appendix B: Shell Safety and Environmental Monthly Reporting Templage, as attached, shall be incorporated herein.

Additional Clauses: As attached, shall be incorporated herein.

SIGNED FOR OWNERS	SIGNED FOR CHARTERERS
FULL NAME _____	FULL NAME _____
POSITION _____	POSITION _____

F5. ExxonMobil Form 2005

ExxonMobil Time 2005

TANKER TIME CHARTER PARTY

Vessel Name: M.T. ***[Insert vessel name]***

Date: ***[Insert date of agreement]***

ExxonMobil Time 2005

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1

IT IS THIS [insert day] DAY of [insert month and year] MUTUALLY AGREED between *[Insert full-style name of the owner, or chartered owner]*, a company organized under the laws of *[insert Owner's domicile]* and having its head office at *[insert address of Owner's head office]*, as owner (**"Owner"**) of the M.T. *[Insert the name of the vessel using all italics]*, as more fully described and warranted herein (**"Vessel"**), and *[Insert the full-style name of the Charterer]*, a company organized under the laws of *[insert Charterer's domicile]* and having its head office at *[insert address of Charterer's head office]*, as charterer (**"Charterer"**), that Owner lets and Charterer hires the use and services of the Vessel for the carriage of *[Insert cargo description]*, in bulk, and such other lawful merchandise as may be suitable for a vessel of her description, for the term and on the terms and conditions hereinafter set forth in this time charter party (**"Charter"**).

1 Term

a Firm Period

The term of the Charter shall be for a period of about *[Insert the term of firm period]* (**"Firm Period"**) plus any extensions thereof as provided in Clause 1b and Clause 1c. The Firm Period shall commence at the time when the Vessel is placed at Charterer's disposal as provided in Clause 5. The word "about," as used in Clause 1a, shall mean up to forty-five (45) days more or less, at Charterer's option, and shall apply to the term of the Charter consisting of the Firm Period plus any optional periods or extensions as provided in Clause 1b and/or Clause 1c. The term of the Charter, as stipulated in Clause 1a, shall hereinafter be referred to as (**"Charter Term"**).

b Optional Period(s)

Charterer shall have the option of extending the term of the Charter for additional period(s) (**"Optional Period(s)"**) by written notice to Owner as follows:

[Insert the description of the optional period(s), if any. For example:

"There are no Optional Periods under the Charter.", or

(1) First Optional Period

One (1) year, to be declared not less than three (3) months prior to the expiration of the Firm Period.

(2) Second Optional Period

One (1) year, to be declared not less than three (3) months prior to the expiration of the first Optional Period.]

c Off-Hire Extensions

The term of the Charter may also be extended by Charterer for periods of all, or any part, of the time the Vessel is off-hire during the Firm Period and/or Optional Period(s) (**"Off-Hire Extension(s)"**) by giving written notice to Owner at least thirty (30) days before the expiration of the Firm Period or the Optional Period, as the case may be. If Charterer so elects, and gives a further written notice to Owner at least fifteen (15) days before the expiration of any such Off-Hire Extension, all or any part of the time the Vessel is off-hire following the previous notice shall be added to the term of the Charter. The term "off-hire", as used in Clause 1c and elsewhere in the Charter, shall include any period(s) as specified in Clause 11, as well as any other period(s) for which cesser or suspension of hire is otherwise provided for in the Charter, or which are stipulated in the Charter to be for Vessel's or Owner's time and/or account.

2 Vessel Particulars

Owner warrants that, as of the date and time of Vessel delivery hereunder and during the Charter Term, the Vessel and its equipment will have the particulars, capabilities, and capacities as shown in Schedule A hereto. Should there be any conflict between the particulars, capabilities, and capacities shown in Schedule A and any other provision within a Clause of the Charter, the particulars, capabilities, and capacities as specified in the Clause of the Charter shall prevail to the extent of the conflict.

3 Hire

a Payment of Hire

Charterer shall pay hire for the use of the Vessel in United States dollars per day, or pro rata for part of a day. Payments shall be made monthly. Owner shall send invoices for hire to Charterer by the first (1st) day of the calendar month for which hire is due and Charterer shall pay hire due by the tenth (10th) day of the calendar month or five (5) working days after receipt of Owner's invoice, whichever is later. Payments shall be made to:

[Insert the full-style payment instructions]

Payments shall be made by electronic funds transfer, without discount or adjustment except as specified in Clause 3 or elsewhere in the Charter, commencing with the date and hour (UTC) the Vessel is placed at Charterer's disposal as specified in Clause 5 and continuing to the date and hour (UTC) the Vessel is redelivered to Owner at the expiration or any termination of the Charter, except as may otherwise be provided in the Charter. Any hire paid in advance and not earned shall be returned to Charterer at once by Owner and/or by any party to whom Owner may have permissively assigned the hire hereunder. Owner, in any event, shall be jointly and separately responsible, along with any such assignee, for such return of hire. In no event will initial payment of hire be made until the Vessel is placed at Charterer's disposal as provided in the Charter. Charterer shall not be responsible for any delay or error by Owner's bank in crediting Owner's account with hire, provided Charterer has made proper payment of hire within the time permitted under Clause 3, including, without limitation, the grace period specified in Clause 3f.

(1) Hire Rate for Firm Period

[Insert the appropriate rate(s) of hire.]

(2) Hire Rate for Optional Period(s)

[Insert "There are no Optional Periods under the Charter," or the appropriate hire rate(s) for the optional period(s), if any. For example:

(a) First Optional Period

[Insert hire rate].

(b) Second Optional Period

[Insert hire rate].

(3) Hire Rate for Off-Hire Extensions

The daily rate of hire for any extended period due to off-hire in accordance with Clause 1c shall be the rate that was in effect at the time of the off-hire.

b Deductions

Charterer shall be entitled to deduct from hire payments any:

1) disbursements for Owner's account, including commissions thereon;

2) lay-up savings calculated in accordance with Clause 17;

3) previous overpayments of hire, including the value of past off-hire;

4) amounts representing expenses incurred by Charterer relating to off-hire periods ("Related Off-Hire Expense");

5) amounts representing the value of off-hire periods and Related Off-Hire Expense anticipated to occur during the month or other period for which a payment of hire to be is made, it being understood and agreed that Charterer shall not be required to make a monthly advance or other payment of hire if Vessel is, on the due date for payment, off-hire;

6) any sums due pursuant to Clause 3e;

7) claims pursuant to Clause 9, and;

8) other sums to which Charterer is entitled under the Charter.

Charterer shall have the right of deduction under subparagraphs 1) through 8) above, even where right of deduction is disputed, provided Charterer's claim of deduction is made in good faith. Any required adjustment for hire deduction shall be made after all facts are established. Any difference between the amount(s) withheld and the amount(s) due shall be refunded or credited, as the case may be, in hire installment(s) due after any adjustment is determined.

c Final Voyage

(1) Use of the Vessel

Notwithstanding Clause 1a, should the Vessel be on a final ballast/laden voyage or on a ship-to-ship transfer (**"Final Voyage"**) at the expiry of the Charter Term as calculated in accordance with Clauses 1a, 1b and 1c, Charterer shall have the continued use of the Vessel under the same Charter terms and rate of hire then prevailing under the Charter for such length of time as is necessary to complete the voyage or ship-to-ship transfer, as the case may be, and to thereafter effect redelivery of the Vessel to Owner at the place of redelivery under the Charter. Any such period of continued use shall be deemed to be part of the Charter Term.

(2) Hire payment

Should a payment of hire become due, when the Vessel is on the Final Voyage, said payment shall be made for the time estimated by Charterer to be necessary to complete the Final Voyage and effect redelivery of the Vessel to Owner in accordance with the Charter, less all deductions provided for in Clause 3b, which deductions shall be estimated by Charterer if the actual amounts cannot then be reasonably ascertained, and also less the amount estimated by Charterer to become payable by Owner for fuel on redelivery as provided in Clause 19. Upon Vessel redelivery, any difference between the estimated and actual amounts shall be refunded to or paid by Charterer, as the case may require.

d Loss of Vessel

Should the Vessel be lost, or be missing and presumed lost, hire shall cease at the time of the loss, or if such time is unknown, at the time when the Vessel was last heard from. If the Vessel should become a Constructive Total Loss (**"CTL"**), hire shall cease at the time of the casualty resulting in such loss. In either case, any hire paid in advance and not earned shall be returned to Charterer and, in

addition, Owner shall reimburse Charterer for the value of the estimated bunkers on board the Vessel at the time the Vessel went off-hire. If the Vessel should be missing when a payment of hire would otherwise be due, such payment shall be postponed until the safety of the Vessel is ascertained. If the Vessel should become a CTL, Charterer shall have the option to cancel the Charter on written notice to Owner. The Vessel shall be deemed a CTL under the Charter when the cost of recovering and repairing the Vessel is reasonably estimated to exceed either the Vessel's then current insured value or the fair market value of the Vessel when repaired, without in the latter case taking into consideration any value of the Charter.

e Reduction in Hire

Should the Vessel, for any reason during the Charter Term, fail to fulfill the particulars, capabilities, capacities, and/or conditions stipulated in Clause 2, Clause 4, or elsewhere in the Charter, Charterer shall be entitled, without prejudice to any claim Charterer may otherwise have under the Charter, to a reduction in the hire to compensate Charterer for such failure; and, where the failure affects the time taken by the Vessel to perform any services under the Charter or the availability of the Vessel for such services, hire shall be reduced by an amount equal to the value of the time so lost, using the rate of hire applicable at that time.

f Default

In default of punctual and regular payment of hire as specified in the Charter, Owner will notify Charterer at:

[Insert full-style of Charterer's payment contact]

(or such other address as Charterer may, subsequent to the date of the Charter, advise Owner in writing) whereupon Charterer shall make payment of the amount due within ten (10) working days of receipt of said notification from Owner, failing which Owner shall have the right, on written notice to Charterer given prior to any receipt of late payment by or on behalf of Owner, to withdraw the Vessel from the service of Charterer without prejudice to any claim Owner may otherwise have against Charterer under the Charter.

g Extra Expenses and Advances

The hire rate(s) set forth in Clauses 3a(1) and 3a(2) cover in full any and all expenses for extra victualling by the Master, communications charges, and all overtime worked by the Vessel's officers and crew at Charterer's request. Charterer shall be entitled to a two and one-half percent (2.5%) commission on any sums advanced or disbursements made for Owner's account. Charterer shall make no cash advances to the Master. However, Owner shall have the option of making advances to Charterer, or its designated agent, for disbursement (provided such advances are deemed adequate and reasonable by Charterer) and, in such event, no commission shall be paid to Charterer.

h Hourly Rate of Hire

The hourly rate of hire (**"Hourly Rate of Hire"**) for any period under the Charter shall be one twenty-fourth (1/24th) of the then-prevailing daily rate of hire.

i Taxes

All taxes, and dues in the nature of a tax, on Owner's income (howsoever described) shall be for Owner's account. All taxes and dues on the Vessel and/or cargo and/or on freights, arising out of cargoes carried or ports at which the

Vessel calls in accordance with Charterer's orders under the Charter, shall be for Charterer's account if and to the extent that they are imposed because of Charterer's orders or in connection with the Vessel's service to Charterer under the Charter.

If Charterer is obliged to deduct withholding tax from any payment due Owner, because of any action by or responsibility of Owner (whether in relation to Owner's business generally or to the Vessel), Charterer shall pay only the net amount due Owner after such deduction. However, where a tax or dues is for Charterer's account but such tax or dues takes the form of a mandatory withholding of part of a payment due to Owner from Charterer, then such payment shall be increased such that the net amount received by Owner after the mandatory withholding shall be amount contractually due from Charterer to Owner.

Notwithstanding any other provision of the Charter, Charterer shall not be liable for any taxes or dues:

1) if they are imposed at ports and/or places where the Vessel calls solely for Owner's purposes, or to the extent that they are imposed with reference to periods when the Vessel has deviated from Charterer's ordered voyage or is off-hire, and/or

2) if they would not have been imposed but for some action or fact that is the responsibility of Owner not related exclusively to the service of the Vessel under the Charter, and/or

3) to the extent that they are subject to increase due to some action, fact or reason that is the responsibility of Owner and is not related exclusively to the service of the Vessel under the Charter.

4 Owner's Warranties

a Vessel Condition

Owner warrants that, at the time the Vessel is placed at Charterer's disposal, the Vessel shall be tight, staunch, and strong; in thoroughly efficient order and condition, and in every way fit, manned, equipped and supplied for the service contemplated; with holds, cargo tanks, pipelines and valves clear, clean and tight; and its machinery, pumps, boilers, inert gas system, crude oil washing system, navigational equipment, heating coils, and all other equipment fully functional and in good working order and condition, and in every way seaworthy and fit to carry cargoes required under the Charter. Such description, particulars, and capabilities of the Vessel shall be maintained by Owner throughout the Charter Term, so far as is possible by the exercise of due diligence. In the event of a conflict between Clause 4a and Clause 2, Clause 2 shall prevail to the extent of the conflict.

b Vessel Management and Operation

Owner warrants that the Vessel will be managed and operated during the Charter Term by the company or companies named in Schedule A. Owner shall not change the management and/or operation of the Vessel during the Charter Term without the prior written consent of Charterer. If Owner transfers the operation and/or management of the Vessel to another entity without Charterer's prior written consent, in addition to its other rights Charterer may (in its absolute discretion and upon written notice to Owner) terminate the Charter.

c Evaporator

Owner warrants that, during the Charter Term, the Vessel shall be equipped with a fresh water evaporator, which shall be maintained in good operating condition. Owner warrants that this evaporator is capable of making sufficient fresh water to supply the Vessel's needs.

d Stability and Structural Integrity

Owner warrants that, during the Charter Term, the Vessel shall be suitable to carry cargoes in any size ranging from no cargo to a full cargo (up to the appropriate Classification Society load line), with relative density ranging from 0.6 to 1.2, without incurring operational restrictions resulting from potential stability or structural problems.

e Cargo Heating

If the Vessel is described in Schedule A as being fitted with cargo heating coils or heat exchangers, Owner warrants that, during the Charter Term, the Vessel shall be capable of maintaining the temperature of the cargo loaded and/or increasing such temperature by 4.0°C per day during the voyage up to a maximum of 57° C (in either case as instructed by Charterer) and maintaining same throughout the voyage and during the entire discharge. Should the Vessel fail to heat cargo in accordance with Charterer's instructions, Charterer shall have the option to:

1) delay discharge of the cargo; and/or

2) delay berthing of the Vessel; and/or

3) discontinue discharge and remove the Vessel from the discharge berth or place until cargo is heated in accordance with Charterer's instructions.

Any time lost due to the Vessel's failure to maintain the temperature of the cargo, or to heat the cargo, in accordance with Charterer's instructions shall be off-hire time and for Owner's account; including, without limitation, any delay in moving the Vessel from and then back to a berth or place of discharging and any intermediate waiting in a vessel queue. In addition, any expense incurred by reason of such delay or otherwise shall be for Owner's account.

f Cargo Manifolds

Owner warrants that, during the Charter Term, the Vessel shall be equipped with pressure gauges fitted outboard of the valve at each discharge manifold connection. Such gauges shall be maintained in proper working condition and each gauge shall have a valid test certificate. The Vessel shall be equipped with a sufficient number of cargo manifold reducing pieces, of steel or comparable material (excluding aluminum and gray cast iron) and that meet the most recent Oil Companies International Marine Forum (**"OCIMF"**) standards, to make available appropriate flanges for cargo hoses or arms at all manifold connections on one side of the Vessel as follows:

Vessels less than 16 kDWT shall be equipped to present flanges of 4", 6" and 8" (ASA) and

Vessels from 16 to 60 kDWT shall be equipped to present flanges of 8", 10" and 12" (ASA) and

Vessels over 60 kDWT shall be equipped to present flanges of 10", 12" 14", 16", and 20" (ASA).

g Communications

Owner warrants that, during the Charter Term, the Vessel shall be equipped with VHF radiotelephone, satellite communications earth station, facsimile machine, radio teletypewriter, electronic mail capability, and such other radio telecommunications equipment as may be required by international, flag state, and port state regulations. The Vessel shall also be fitted with a computer capable of sending and receiving electronic mail (including attachments) as well as maintaining and transmitting Charterer's logs via electronic mail to Charterer.

h Crew Complement

Owner warrants that, during the Charter Term, the Vessel shall have a full and efficient complement of Master, officers and crew, with adequate training and experience in operating all of the Vessel's equipment, and that the Master and all officers shall possess valid and current certificates and/or documents issued or approved by the country of the Vessel's registry. Owner shall provide and maintain navigation and bridge organization manual(s) and procedures that conform to the latest International Chamber of Shipping and International Maritime Organization standards. The deck officer complement shall be not less than the Master and three (3) deck officers, except when the Vessel is engaged in discharging cargo to lighters when four (4) deck officers shall be provided.

Conversational English language proficiency is required for the Master and any officer in charge of cargo or bunker oil handling, and is warranted under the Charter.

i Drug and Alcohol Policy

Owner warrants that, during the Charter Term, it shall have a policy (**"Policy"**) on drug and alcohol abuse applicable to the Vessel that meets or exceeds the standards in the latest edition of OCIMF Guidelines for the Control of Drugs and Alcohol Onboard Ship. Under the Policy, alcohol impairment shall be defined as a blood alcohol content of 40 mg/100 ml or greater, the appropriate seafarers to be tested shall be all the Vessel's officers, and the drug/alcohol testing and screening shall include unannounced testing in addition to routine medical examinations. An objective of the Policy should be that the frequency of the unannounced testing be adequate to act as an effective abuse deterrent, and that all officers be tested at least once a year through a combined program of unannounced testing and routine medical examinations. Owner further warrants that the Policy will remain in effect during the Charter Term and that Owner shall exercise due diligence to ensure that the Policy is complied with. It is understood that an actual impairment, or any test finding of impairment, shall not in and of itself mean Owner has failed to exercise due diligence. Persons who test positive, refuse to test, or are unfit for duty (impaired because of drug or alcohol use) shall be removed from the Vessel during the remaining Charter Term and shall not be reassigned to service of Charterer or any of Charterer's associated or affiliated companies.

j Compliance

Owner warrants that the Vessel shall, at all times during the Charter Term, be in full compliance with all applicable international conventions, all applicable laws, regulations, and/or other requirements of the country of the Vessel's registry and of the countries of the port(s) and/or place(s) to which the Vessel may be ordered hereunder, and all applicable regulations and/or requirements of any terminals or facilities in such port(s) or place(s) where the Vessel may load or discharge. Owner further warrants that the Vessel shall have on board, during the Charter Term, all certificates, records, or other documents required by the aforesaid

conventions, laws, regulations, or requirements, including any required for transiting of the Suez or Panama Canal, by day or night, if such transit is possible. Without limitation, the conventions, laws, regulations, and requirements referred to in Clause 4j mean conventions, laws, regulations, and requirements concerning ship size, ship design, safety, operation of ship's equipment (including inert gas and crude oil washing systems, if the Vessel is so equipped), navigation, pollution, and other like matters. At the time of delivery and during the entire Charter Term, the Vessel shall have on board an International Tonnage Certificate, or equivalent, and shall meet applicable guidelines published by the OCIMF. In addition, Owner warrants that, if required by Charterer or the Vessel's trade, the Vessel will hold a valid International Transport Workers' Federation (**"ITF"**) certificate or an equivalent document acceptable to Charterer throughout the Charter Term. The Vessel shall be off-hire during any time lost as a consequence of ITF action and Owner shall reimburse Charterer for any Related Off-Hire Expense.

k Charterer's Representatives

Owner warrants that, during the Charter Term, Charterer shall have the right to have its representatives visit the Vessel to observe operations as often and at such intervals as Charterer elects. Such visits shall include, but not be limited to, access to pump room(s), engine room(s), cargo control room(s), navigation bridge, and deck areas. Owner shall allow Charterer's representatives to survey and take samples of all the Vessel's bunker tanks and cofferdams at loading, discharge and/or bunkering ports. Charterer's representatives shall also have the right to attend on board the Vessel to ascertain the circumstances of any incident involving cargo carried hereunder. Neither the exercise nor non-exercise by Charterer of any such right shall in any way absolve or reduce the obligations of Master and/or Owner under the Charter.

l Quality Assurance

(1) The Vessel

If at any time during the Charter Term one or more of the below circumstances occur:

- Owner is in breach of its obligations under Clause 2 and/or any of Clauses 4a through 4k and Owner fails, to Charterer's reasonable satisfaction, to cure such breach within thirty (30) consecutive days after Charterer sends written notice to Owner specifying the breach(s) and demanding correction, and/or
- the Vessel is responsible for an incident that results in damage to the Vessel, its equipment, or other property in excess of US$ 100,000, or that results in a discharge of oil of 10,000 U.S. gallons or more, and/or
- the Vessel is off-hire for a total of two hundred forty (240) cumulative unplanned hours during any one (1) year period during the Charter Term,

upon each occurrence of any of the above circumstances, Charterer shall have the option on written notice to Owner to terminate the Charter with immediate effect if the Vessel is free of cargo or at a date and time as stated in Charterer's notice, such termination being without prejudice to any other rights and remedies Charterer may have under the circumstances. Owner warrants that Owner and the Vessel's Master will comply with all orders and/or instructions given by Charterer with respect to the reporting to Charterer of any incidents affecting the Vessel and/or cargo. In all cases, Owner shall ensure that Charterer is promptly advised of all accidents to

and/or pollution incidents involving the Vessel, and of any Vessel system failure.

(2) The Operator

Charterer's designated vetting affiliate has rated the Vessel Operator named in item 2.2 of Schedule A as being eligible for time charters as indicated in item 2.2.9 of Schedule A. Such rating is based in part upon an assessment of the Vessel Operator's OCIMF Tanker Management and Self Assessment report ("TMSA") provided by the Vessel Operator. Owner warrants that, as of the date of the Charter and throughout the Charter Term, the TMSA does and will continue to accurately reflect the status of the Vessel Operator's safety and quality-management systems. Owner further warrants that during the Charter Term the Vessel Operator will maintain or improve the safety and quality-management achievement levels for each Element identified in the TMSA as of the date of the Charter and set forth in Schedule D. Owner shall authorize or procure permission for Charterer's representatives to audit the status of the Vessel Operator's safety and quality-management systems with respect to the levels of achievement for each Element stated in the TMSA at any time during the Charter Term; provided, however, that reasonable notice of any such audit has been given to Owner and the date(s) of such audit agreed with the Vessel Operator. If Charterer's representatives find that the Vessel Operator has failed to maintain the safety and quality-management achievement levels identified in the TMSA as required by this Clause, and corrective action acceptable to Charterer (which acceptance shall not be unreasonably withheld) is not taken within three (3) months after notice of such failure is given by Charterer to Owner, Charterer may, at its option and upon written notice to Owner, require Owner to promptly change the Vessel Operator to another operator of Owner's choice that is then eligible for time charters as specified in item 2.2.9 of Schedule A. If Owner does not promptly change the Vessel Operator in accordance with this Clause 4l(2), such failure shall be deemed a fundamental breach of the Charter and in such event Charterer shall have the option to terminate the Charter upon written notice to Owner and redeliver the Vessel to Owner when the Vessel is free of cargo, without prejudice to any other rights and remedies Charterer may have.

Clause 4 shall be without prejudice to Clause 13.

5 Delivery

a Place of Delivery

The use and services of the Vessel shall be placed at the disposal of Charterer *[Insert specific place of delivery, and any conditions on delivery; e.g. "all-fast alongside the berth"]* (**"Place of Delivery"**). Charter hire shall commence when the Vessel is at the Place of Delivery and in all respects ready to load and otherwise fully perform the Charter and ready for sea, and written notice thereof has been given by the Master to Charterer or its Agents at the Place of Delivery.

b Laydays

Hire shall not commence before *[Insert the first day of the delivery range]*, except with Charterer's written pre-consent, and the Vessel shall be placed at Charterer's disposal, in accordance with the provisions of Clause 5a, no later than *[Insert the last day of the delivery range]* (**"Canceling Date"**), in default of which Charterer shall have the option to cancel the Charter. Charterer's option to cancel the Charter is declarable not later than seventy-two (72) hours after expiration of the Canceling Date, local time at the Place of Delivery. Cancellation by Charterer, or

acceptance of the use of the Vessel's services, shall be without prejudice to any claims for damages Charterer may have for late tender of the Vessel's services or other breach of Owner's obligations under the Charter. Owner shall give Charterer written notices of the Vessel's estimated time of arrival at the Place of Delivery *[Insert notification requirements (e.g.; 180, 90, 60, 30, 20, 10, 5, 2, and 1)]* days prior to Owner's anticipated time of delivery. If, prior to the Canceling Date, it appears to Charterer that the Vessel will not be ready for delivery under the Charter by the Canceling Date, Charterer shall have the option on written notice to Owner:

1) to cancel the Charter, or

2) to require Owner to promptly give in writing to Charterer a new canceling date, with continuing right in Charterer to cancel the Charter, at any time prior to the original Canceling Date, either before or after receipt of any new canceling date that Owner may provide in accordance with Charterer's requirement.

If Charterer accepts a new canceling date in writing, the Vessel shall use utmost dispatch to meet such date and the terms of Clause 5b shall otherwise apply to this new date as if it was the original Canceling Date.

c Fuel at Delivery

Charterer shall accept and pay for all fuel in the Vessel's bunker tanks at the time the Vessel is placed at Charterer's disposal. Payment for such fuel shall be in accordance with the last documented net price paid by Owner, excluding any delivery charges.

d Space Available to Charterer

The whole reach and burthen of the Vessel (but not more than she can reasonably stow and safely carry) shall be at the Charterer's disposal, reserving proper and sufficient space for the Vessel's officers, crew, Master's cabin, tackle, apparel, furniture, fuel, provisions, and stores.

6 Trading Limits

a Trading Range

The Vessel may be employed in any part of the world trading between and at ports, places, berths, docks, anchorages, and submarine pipelines in such lawful trades as Charterer or its agents may direct, subject to the limits of the current British Institute Warranties and any subsequent amendments thereto, but may be sent to ports and places on the St. Lawrence River and tributaries between May 15 and November 15 and through the Straits of Magellan and around Cape Horn and the Cape of Good Hope at any time of the year without payment of any extra premium. Notwithstanding the foregoing restrictions, the Vessel may be sent to Baltic Sea ports not north of Stockholm, and to Helsingfors and Abo, Finland, and other ports and places as set forth in the British Institute Warranties and Clauses, provided, however, that Charterer shall reimburse Owner for any additional documented premium properly assessed by the Vessel's underwriters and paid by Owner for breach of such trade warranties. In the event that the Vessel shall, for any reason, be unable to be employed in trade to any port or place not excluded by Clause 6a, all time lost shall be for Owner's account and Charterer shall have the option to terminate the Charter upon written notice to Owner and redeliver the Vessel to Owner when the Vessel is free of cargo, without prejudice to any other rights and remedies Charterer may have.

b Berths and Lightering

The Vessel shall be loaded, discharged, or lightened at any suitable port, place, berth, dock, anchorage, submarine pipeline, or alongside other vessels or lighters, whether in port or not and while at anchorage or underway, as Charterer may direct. Notwithstanding anything contained in Clause 6 or any other provisions of the Charter, Charterer shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage, submarine pipeline, vessel, or lighter, and shall not be liable for any loss, damage, injury, or delay resulting from conditions of, or at, ports, places, berths, docks, anchorages, submarine pipelines, vessels, or lighters not caused by Charterer's fault or neglect when directing the Vessel to such ports or places or which could have been avoided by the exercise of reasonable care on the part of the Master or Owner.

When the Vessel is employed as a lightering vessel, in order to assist the Vessel, Master, and Owner in the lightering operation, whether at anchorage or underway, Charterer may, at its option, provide and pay for lightering advisor(s) and lightering gang to be employed under the exclusive direction, supervision, and control of the Vessel's Master, who shall continue to be fully responsible for the operation, management, and navigation of the Vessel during the entire lightering operation. In the event it is necessary for Owner to incur additional hull insurance premium directly related to the employment of the Vessel as a lightering vessel, Charterer agrees that such provable and necessary additional premium shall be for Charterer's account.

Lightering and ship-to-ship transfer operations shall be performed in accordance with, and meet or exceed, the standards in the latest OCIMF guidelines for ship-to-ship transfers.

c Vessel Speed Orders

Charterer may issue orders directly to the Master to slow down or speed up the Vessel, consistent with the safe operation of the Vessel and its machinery, on ballast and/or laden passages. A copy of any such orders shall also be sent to Owner.

d Controlled Passages

The following passages shall not be navigated by the Vessel while performing under the Charter without Charterer's prior written agreement:

1) The Strait of Messina
2) The Strait of Bonifacio
3) Between the Scilly Islands and Land's End
4) The Minches, if the Vessel is over 10,000 Gross Tons
5) If bound to port(s) on the East Coast of the U.K., north of the River Thames, the in-shore traffic zones in the English Channel
6) The Old Bahama Channel

When transiting the Florida Straits, from Key Biscayne south to the Dry Tortugas, the Vessel shall maintain a distance of not less than ten (10) miles off the outer navigational aids marking the reefs off the Florida Keys. When transiting the Windward Passage or the Yucatan Channel, the Vessel shall give the coast of Cuba a wide berth. It is understood and agreed that the daily rate of hire includes all compensation for the restrictions in Clause 6d.

e Ship Inspection Report (SIRE) Program

Owner shall ensure that during the Charter Term there is on file with OCIMF a complete and correct SIRE Vessel Particulars Questionnaire. Further, Owner shall make its best efforts to ensure that, throughout the Charter Term, there shall be on file with OCIMF a SIRE report submitted within the past six (6) months by a major international oil company that is a member of OCIMF and not an associated or affiliated company of Charterer. Any cost of complying with this Clause 6e, and any time lost by reason of Owner's failure to so comply, shall be for Owner's account.

7 Dry Cargoes

Charterer shall have the option of shipping any lawful dry cargo in bulk, for which the Vessel and her tanks are suitable, and any lawful merchandise in cases and/or cans and/or other packages in the Vessel's forehold, between decks, and/or other suitable space available, subject, however, to the Master's approval as to kind and character, amount and stowage. All charges for dunnage, loading, stowing, and discharging so incurred shall be paid by Charterer.

8 Speed, Fuel and Pumping Warranties

Owner warrants that, during the Charter Term, the Vessel shall fully meet the speed, fuel, and pumping warranties stipulated in Clause 8.

a Speed Performance Warranty

Owner warrants that the Vessel is capable of maintaining, and shall maintain, on all sea passages from sea buoy to sea buoy, a guaranteed average speed of not less than *[Insert the proper warranty speed]* knots in a laden condition and not less than *[Insert the proper warranty speed]* knots in a ballast condition (**"Warranty Speed"**). Speed warranty performance to be excluded for periods of wind conditions exceeding force six (6) on the Beaufort Scale persisting for more than twelve (12) consecutive hours. The Master shall promptly advise Charterer in writing whenever the Vessel encounters wind conditions exceeding Beaufort Force Six (6), and again when the wind conditions moderate to Beaufort Force Six (6) or less.

b Fuel Consumption Warranty

(1) Propulsion and Auxiliary Fuel

Owner warrants a maximum daily fuel consumption on all sea passages from sea buoy to sea buoy of high viscosity fuel oil meeting the latest quality standards of ISO 8217 RMG 380 if reasonably available, or RMH 380 if RMG 380 is not reasonably available (**"HFO"**) and marine diesel fuel meeting the latest quality standards of ISO 8217 DMB or better (**"DMB"**) for all purposes excluding heating and tank cleaning (**"Warranty Consumption"**) as listed below. Fuel consumption warranty performance to be excluded for periods of wind conditions exceeding force six (6) on the Beaufort Scale persisting for more than twelve (12) consecutive hours.

[Insert the appropriate speed and consumption figures in the following table and paragraphs]

Speed (knots)	HFO Laden (MT)	HFO Ballast (MT)	DMB (MT)

10.0	-	-	-
10.5	-	-	-
11.0	-	-	-
11.5	-	-	-
12.0	-	-	-
12.5	-	-	-
13.0	-	-	-
13.5	-	-	-
14.0	-	-	-
14.5	-	-	-
15.0	-	-	-
15.5	-	-	-
16.0	-	-	-
16.5	-	-	-
17.0	-	-	-

(2) Heating and Tank Cleaning Fuel

For each day heat is applied to the cargo or slop tanks, Owner warrants that the fuel consumption will not exceed *[Insert the appropriate quantity]* metric tons of HFO per day for maintaining heat, or *[Insert the appropriate quantity]* metric tons per day for increasing heat, of all tanks and pro rata for part of the tanks. For tank cleaning, other than crude oil washing, Owner warrants that the fuel consumption will not exceed *[Insert the appropriate quantity]* metric tons of HFO for washing all tanks, and pro rata for washing part of the tanks, which also includes shifting ballast and other tank cleaning functions.

(3) Fuel Consumption in Port

Owner warrants that the maximum fuel consumption in port shall be as follows:

Idle (at anchor or on berth):	*[Insert the appropriate quantity]* MT of HFO per day (with boiler secured). *[Insert the appropriate quantity]* MT of HFO per day (on standby with boiler on).
Loading:	The Idle consumption warranted above for standby with boiler on plus an additional *[Insert the appropriate quantity]* MT of HFO for loading a full cargo, or pro rata for part cargo.
Discharging:	The Idle consumption warranted above for standby with boiler on plus an additional *[Insert the appropriate quantity]* MT of HFO for discharging a full cargo, or pro rata for part cargo.

c Pumping Performance Warranty

Owner warrants that the Vessel will discharge cargo at the following minimum rates:

Light petroleum (viscosity less than 69 cSt at 50° C) *[Insert the appropriate quantity]* m^3/hr.;

Medium petroleum (viscosity of 69 to 690 cSt at 50° C) *[Insert the appropriate quantity]* m^3/hr.;

Heavy petroleum (viscosity above 690 cSt at 50° C) *[Insert the appropriate quantity]* m^3/hr.;

or that the Vessel will maintain throughout the entire period of discharge, including crude oil washing and stripping, an average pressure of 100 pounds per square inch gauge (PSIG) at the ship's manifold should the foregoing minimum rates not be met. Charterer shall have the option to Crude Oil Wash all or part of the Vessel's cargo tanks. In the event the Vessel uses crude oil cargo to wash cargo tanks during discharge, the Vessel shall be allowed an additional eight (8) hours for crude washing of all tanks or pro rata for crude washing part of the tanks.

9 Performance Reviews

a Performance Review Frequency and Compensation

The speed, fuel consumption, and pumping performance guaranteed by Owner under Clause 8 will be reviewed by Charterer at the end of approximately six (6) months, counting from the time of delivery of the Vessel to Charterer in accordance with the Charter, and thereafter at approximately six (6) month intervals. The Vessel's performance will be reviewed on a voyage-by-voyage basis in accordance with Clause 9b. If it is found that the Vessel has failed to maintain the speed, fuel consumption, or pumping performance warranted during the preceding performance review period (or at any time during the Charter Term), Charterer shall be retroactively compensated in respect of such failings as follows:

(1) Speed Warranty Compensation

Payment to Charterer of the Hourly Rate of Hire for each hour, or pro rata for each part of an hour, that the Vessel steams in excess of the time the Vessel would have taken at the Warranty Speed under Clause 8a. Owner will receive no credit or compensation if Vessel performance with respect to speed is greater than the Warranty Speed.

(2) Fuel Performance Warranty Compensation

Payment to Charterer for each metric ton, or pro rata for part of a ton, in excess of the guaranteed daily consumption under Clause 8b for all purposes at sea for main engine and/or auxiliaries and/or heating and/or tank cleaning and while at anchor, loading, or discharging, including any excess not borne by Owner in accordance with Clause 11 of the Charter, at the average actual price paid for the particular grade of fuel oil purchased by Charterer for the total period under review. Charterer shall provide supporting price vouchers or invoices for such purchased fuel oil as soon as possible after completion of the review for the specified performance period. Subject to Clause 9b(2), Owner will receive no credit or compensation if the Vessel's fuel consumption is less than the Warranty Consumption.

(3) Pumping Performance Warranty Compensation

Charterer is to be compensated at the Hourly Rate of Hire for each hour, or pro rata for each part of an hour, that the Vessel takes in excess of the pumping time allowed per the rates warranted in Clause 8c. Owner will receive no credit or compensation if the Vessel is able to discharge at a rate greater than warranted in Clause 8c. If the terminal or place of discharging does not allow or permit the Vessel to meet the warranty specified in Clause 8c, the Master shall forthwith issue a Letter of Protest (which shall, if possible, be acknowledged) to such terminal or place and shall immediately advise Charterer in writing by electronic mail, telex, or facsimile. If the Master fails to issue the Letter of Protest, Owner shall be deemed to waive any rights to contest that time was lost as a result of the Vessel's failure to comply with the pumping warranties in Clause 8c. Any delay to Vessel's discharge caused by shore conditions identified in Master's Letter of Protest shall be taken into account in the assessment of pumping and loading performance.

(4) Performance Review Basis

The basis for determining the Vessel's performance in Clauses 9a(1) through 9a(3) shall be the statistical data supplied by the Master in the Sea Logs, Port Logs, and Pump Logs provided by Charterer.

(5) Performance Claims Review

Charterer shall provide Owner with an opportunity to review any claim submitted by Charterer under Clause 9a and Owner shall complete such review and provide Charterer with the results thereof within fifteen (15) days from the date such claim was sent by electronic mail or facsimile from Charterer to Owner. Charterer may deduct from hire any amount to which it claims it is entitled under Clause 9a after the expiration of twenty-five (25) days from the date of Charterer's sending of a claim relating thereto to Owner. Such deduction shall be without prejudice to Owner defending such claim.

(6) Claim for Final Period

In the event of Charterer having a claim in respect of Vessel's performance during the final performance review period, the amount of such claim shall be withheld from hire in accordance with Charterer's estimate made not earlier than three (3) months before the end of the Charter Term and any necessary adjustment after the termination of the Charter shall be made by Owner to Charterer or Charterer to Owner, as the case may require.

b Performance Review Calculations

(1) Speed Warranty Calculations

Speed performance will be determined by taking the shortest safe distance for the sea passage from the BP Shipping Marine Distance Tables (**"BP Distance"**), less the distance reported in the Vessel's Sea Log for steaming from the sea buoy to the loading/discharge berth or place inbound and from the loading/discharge berth or place to the sea buoy outbound, divided by the Warranty Speed to determine charter party hours at sea. Total actual hours at sea, as reported in the Vessel's Sea Log, will be compared to the charter party hours at sea to determine lost or saved hours. Each laden and ballast sea passage shall be calculated independently and the results of different sea passages shall not be averaged over time. For the avoidance of doubt, Vessel over-performance with respect to speed on any voyage(s) shall not be deemed to offset Vessel under-performance on any other voyage(s).

(a) Speed Warranty Adjustments

All stops at sea and any sea passage covered by an off-hire calculation will be excluded from speed warranty calculations.

In the event the Vessel is ordered by Charterer to deviate during a sea passage, such actual deviation miles and actual hours shall be recorded in the Vessel's Sea Log. For the purpose of Clause 9b, deviation shall mean a change in course caused by a change in destination ordered by Charterer after the Vessel has commenced its voyage to the initial port or place ordered by Charterer. The actual deviation miles reported in the Vessel's Sea Log will be added to the BP Distance for the sea passage performed up to the point of deviation to determine the charter party hours for the passage.

In the event Charterer orders the Vessel to proceed at speed(s) greater than the Warranty Speed on any sea passage, and the Vessel is able to achieve speed(s) greater than the Warranty Speed, such sea passage will be excluded from speed and fuel warranty calculations. In such cases, if the Vessel is unable to achieve speed(s) greater than the Warranty Speed, then the speed and fuel warranty calculations for that sea passage shall be based on the Warranty Speed.

In the event Charterer orders the Vessel to proceed at speed(s) equal to or less than the Warranty Speed on any sea passage, such sea passage will not be excluded from speed and fuel warranty calculations which shall be based on Charterer's ordered speed.

In the event Charterer orders the Vessel to adjust speed on any sea passage to arrive at a port or place at a specified time, such sea passage shall be excluded from speed and fuel warranty calculations,

Actual hours at sea recorded in the Vessel's Sea Log and corresponding BP Distance(s) for passage in the following restricted waters will be excluded from speed warranty calculations:

English Channel — Between NW/SE line through Bassurelle Light and NW/SE line through Noord Hinder Light Vessel.

Malacca/Singapore Straits, Eastbound through Passage — Between NE/SW line through 03-00 N, 100-40 E and Latitude 01-35 N.

Malacca/Singapore Straits, Westbound through Passage — Between Horsbourgh Lighthouse and the Brothers Lighthouse.

Malacca/Singapore Straits, Eastbound to Singapore Only — Between NE/SW line through 03-00 N, 100-40 E and 1 mile SW of Sultan Shoal Light.

Malacca/Singapore Straits, From Singapore to Westbound Only — Between 1 mile SW of Sultan Shoal Light and the Brothers Lighthouse.

(b) Speed Warranty Calculation Method

Each sea passage not excluded from the speed performance review process as detailed above will be calculated as follows:

(i) The BP Distance for the sea passage, minus the sum of the distance reported in the Vessel's Sea Log for steaming from the sea buoy to the loading/discharge berth or place inbound and from the loading/discharge berth or place to the sea buoy outbound and the

distance reported for passages in restricted waters, divided by the Warranty Speed equals charter party hours.

(ii) Total actual hours at sea, minus the sum of time stopped at sea and time reported for passage of restricted waters, minus charter party hours as determined in (i) above equals hours saved or lost.

(iii) Hours lost, times the Hourly Rate of Hire, equals the amount due Charterer.

(2) Fuel Warranty Calculations

For each grade of fuel the following calculation is performed for each sea passage. Each laden and ballast sea passage shall be calculated independently. Within each performance review period, fuel saved on any voyage (including in-port consumption determined in accordance with Clause 9b(4)) shall be credited against any excess consumption on other voyages performed during the same performance review period. However, any net savings of fuel during one performance review period shall not be credited against excess consumption in any other performance review period and Owner shall receive no credit or compensation for any net fuel savings during a performance review period.

(a) Average Speed

The BP Distance for the sea passage minus the sum of the distance reported in the Vessel's Sea Log for steaming from the sea buoy to the loading/discharge berth or place inbound and from the loading/discharge berth or place to the sea buoy outbound divided by the actual hours at sea minus stops at sea reported in the Vessel's sea log equals the average speed for fuel consumption purposes. The distance steamed in restricted waters is not excluded from the BP Distance included in this calculation.

(b) Days at Sea

Total actual hours at sea, minus the sum of stops at sea, divided by 24 equals the total days at sea.

(c) Warranted Consumption

Average speed as calculated in Clause 9b(2)(a) and rounded to the nearest tenth (1/10) of a knot is compared to the fuel consumption table of guaranteed consumption and the appropriate value(s), tons per day, is chosen. The appropriate value is chosen as follows:

(i) If the average speed equals a value in the table, the corresponding fuel value is selected.

(ii) If the average speed falls between any two values in the table, the appropriate value is determined by linear interpolation using the next lowest and the next highest values in the table.

(iii) If the average speed falls below the lowest or above the highest value in the table, the appropriate value is determined by linear extrapolation using the lowest two values in the table when the speed is below the lowest value, or using the highest two values in the table when the speed is above the highest value in the table.

Example of linear extrapolation:

Actual speed above the highest value in the table; e.g., 14.3 knots

Speed	MT/Day
14.3 (Actual)	?
14.0	38.0
13.5	35.0

[(14.3k-14k) x (38MT - 35MT) / (14k - 13.5k)*]* + 38MT = 39.8MT

Actual speed below the lowest value in the table; e.g., 11.8 knots

Speed	MT/Day
12.5	31.0
12.0	29.0
11.8 (Actual)	?

29MT - *[*(12k-11.8k) x (31MT - 29MT) / (12.5k - 12k)*]* = 28.2MT

(d) Allowed Consumption

The total days at sea from Clause 9b(2)(b) times the appropriate value, in tons per day, from the fuel table as detailed in Clause 9b(2)(c) equals Charter Party Allowed Consumption.

(e) Amount Due Charterer

Charter Party Allowed Consumption minus actual consumption as reported in the Vessel's Sea Log equals tons saved or excess tons consumed.

Excess tons consumed, times the appropriate price as determined in accordance with Clause 9a(2) equals amount due Charter.

(3) Pumping Warranty Calculations

For each discharge, the following calculations will be performed to determine any time lost during pumping, and any compensation due to Charterer.

(a) Warranty Pumping Time

The gross volume discharged, divided by the appropriate warranted pumping rate from Clause 8c, equals the Warranty Pumping Time.

(b) Crude Oil Washing ("COW") Allowance

The number of tanks crude oil washed, divided by the total number of cargo tanks, times the total time allowed for crude oil washing all tanks from Clause 8c equals the COW Allowance.

(c) Charter Party Pumping Hours

The sum of the Warranty Pumping Time, plus the COW Allowance, equals the Charter Party Pumping Hours.

(d) Actual Pumping Hours

The actual hours spent discharging cargo, including COW and stripping, equal the Actual Pumping Hours.

(e) Hours Lost

If the Actual Pumping Hours exceeds the Charter Party Pumping Hours, the difference equals Hours Lost.

(f) Compensation Due Charterer

Hours Lost, times the Hourly Rate of Hire, equals the amount of Compensation Due Charterer.

(g) Waiver of Compensation Due Charterer

If the minimum discharge pressure specified in Clause 8c is maintained throughout the discharge, including COW and stripping, there shall be no Compensation Due Charterer for that discharge.

(4) In-Port Fuel Warranty Calculations

For each grade of fuel the following calculation is performed for each port call. Each port call shall be calculated independently and the results of different port calls shall be included in the voyage calculations in accordance with Clause 9b(2).

(a) Warranty In-Port Time

The gross elapsed time from sea buoy inbound to sea buoy outbound less the time elapsed during passage inbound, passage outbound, and shifting between berths is the Warranty In-Port Time.

(b) Idle Consumption Allowance

The Warranty In-Port Time from Clause 9b(4)(a) times the appropriate value, in tons per day, from the idle allowance as detailed in Clause 8b(3) equals the Idle Consumption Allowance.

(c) Loading Allowance

The metric tons of cargo loading at the port, divided by the total metric tons loaded on the voyage, multiplied by the Loading warranty in Clause 8b(3) equals the Loading Allowance.

(d) Discharging Allowance

The metric tons of cargo discharged at the port, divided by the total metric tons discharged on the voyage, multiplied by the Discharging warranty in Clause 8b(3) equals Discharging Allowance.

(e) Allowed Consumption

(i) Port Calls without Loading or Discharge

If no cargo is loaded or discharged during a port call, the Allowed Consumption is the Idle Consumption Allowance.

(ii) Loading Port Calls

If cargo is loaded during a port call, the Allowed Consumption is the Idle Consumption Allowance plus the Loading Allowance.

(iii) Discharging Port Calls

If the cargo is discharged during a port call, the Allowed Consumption is the Idle Consumption Allowance plus the Discharging Allowance.

(iv) Loading and Discharging Port Calls

If cargo is discharged and loaded during a port call, the Allowed Consumption is the Idle Consumption Allowance plus the Discharging Allowance plus the Loading Allowance.

(f) Amount Due Charterer

Allowed Consumption minus actual consumption as reported in the Vessel's Sea Log equals tons saved or excess tons consumed.

Excess tons consumed, multiplied by the appropriate price as determined in accordance with Clause 9a(2) equals amount due Charter.

10 Liens

Owner shall have a lien on all cargoes for all amounts due Owner under the Charter, and Charterer shall have a lien on the Vessel for all monies paid in advance and not earned, all disbursements and advances for Owner's account, all amounts due to Charterer under Clause 9 and other provisions of the Charter, including, without limitation, the value of fuel in the Vessel's bunker tanks supplied or paid for by Charterer, and for any damages sustained by Charterer as a result of the breach of the Charter by Owner.

11 Off-Hire

a General Provisions

(i) In the event of loss of time from repairs; breakdown of machinery (whether partial or otherwise) including, without limitation, tank coatings; interference by authorities; collision, stranding, fire, or other accident or damage to the Vessel or cargo (not caused by the fault of Charterer) preventing, or which would prevent, the full and efficient working of the Vessel for more than three (3) consecutive hours, or

(ii) In the event of loss of time (whether or not continuing for any length of time) from deficiency of men or stores; breach of orders or neglect of duty by the Master, officers or crew; or from the consequences of illness or injury to, or strikes by, or refusal, inability or unwillingness to sail or otherwise do work on the part of the Master, officers or crew; or from labor-related picketing or boycott due to the Vessel or crew union affiliation or lack thereof, at places of loading, discharge, bunkering, or elsewhere by persons or organizations other than the Master, officers or crew of the Vessel; or from deviation (which expression includes, without limitation, putting back or putting into any port or place other than that to which the Vessel was bound under orders from Charterer) for the purpose of obtaining medical advice or treatment, or landing any injured, ill or other person, or the body of a deceased person on board (other than any person who may be carried at Charterer's request); while saving or attempting to save life or property or going to the aid of a ship in distress (whether voluntary or not), or

(iii) In the event of loss of time (taking into account, where appropriate, the three-hour franchise in sub-paragraph (i) above) from failure of the Vessel for any reason to fulfill the requirements of Clause 2 and/or Clause 4; then,

payment of hire shall cease for all time lost until the Vessel is again in an efficient state to resume her service and has regained a point of progress equivalent to that when the hire ceased hereunder, including, without limitation, return to the berth, queue position, or place occupied by the Vessel when the Vessel went off-hire. The cost of fuel consumed while the Vessel is off-hire hereunder, as well as all port charges, pilotage, and other expenses incurred during such period or consequent to the putting-in to any port or place other than that to which the Vessel is bound, shall be borne by Owner; but should the Vessel be driven into port or to anchorage by stress of weather or on account of accident to her cargo, such loss of time shall be for Charterer's account. If, upon the voyage, the speed of the Vessel is reduced or her fuel consumption is increased by breakdown, casualty, or inefficiency of Master, officers, or crew, so as to cause a delay of more than eight hours in arriving at the Vessel's next port or an excess consumption of more than one day's fuel, hire for the time lost and cost of extra

fuel consumed, if any, shall be borne by Owner. Any delay by ice or time spent in quarantine shall be for Charterer's account, except delay in quarantine resulting from the Master, officers, or crew having communications with the shore at an infected port where Charterer has given the Master adequate written notice of infection, which shall be for Owner's account, as shall also be any loss of time through detention by authorities as a result of charges of smuggling or of other infraction of law by the Master, officers, or crew.

b Cumulative Off-Hire

If the periods of time lost, for which hire does not cease to be payable under the provisions of Clause 11a because each such period or delay is not of more than three (3) consecutive hours duration, exceed in the aggregate twenty-four (24) hours in any charter party year (and pro rata for part of a year), hire shall not be payable for all time lost during such twenty-four (24) hour franchise period as well as the excess beyond such period and any hire overpaid by Charterer shall be repaid by Owner. The term "charter party year" means consecutive periods of one year, with the first commencing on the date of delivery under the Charter.

c Detention of the Vessel

In the event of loss of time by detention of the Vessel by authorities at any place in consequence of legal proceeding against the Vessel, Owner, Vessel operator, Master and/or crew, or by reason of any strike or boycott against the Vessel, payment of charter hire shall cease for all time so lost. The cost of fuel consumed as well as all additional port charges, pilotage, and other expenses incurred during the time so lost shall be borne by Owner. If any such loss of time shall exceed thirty (30) consecutive days, Charterer shall have the option to cancel the Charter by written notice given to Owner while the Vessel remains so detained, without prejudice to any other right Charterer may have in the premises.

d Owner's Due Diligence

The provisions of the Charter providing for Vessel off-hire and Related Off-Hire Expense, including, without limitation, Clause 3 and Clause 11, shall be fully operative regardless of any due diligence Owner may have exercised.

e Trading While Off-Hire

Owner may not, under any circumstances, trade the Vessel for its own account during any period of off-hire.

f Reservation

Nothing in Clause 11 shall affect any other provisions of the Charter stipulating loss of time for Vessel's or Owner's account or otherwise providing for suspension or cessation of hire or other rights and remedies for loss or diminution of Vessel services under the Charter.

12 Dry-docking and Repairs

a General Provisions

Owner, at its expense, shall dry-dock the Vessel, clean and paint the Vessel's bottom, and make all overhaul and other necessary repairs at reasonable intervals. Such overhaul or repair intervals shall not be less than thirty (30) months and such dry-docking intervals shall not be less than sixty (60) months unless the Vessel's flag state or classification society requires shorter intervals. For the purpose of dry-docking or repair, Charterer shall allow the Vessel to proceed to an appropriate port. Owner shall be solely responsible for such dry-

docking and repairs, and also for gas-freeing the Vessel upon each occasion. All towing, pilotage, fuel, and other expenses incurred while proceeding to and from and while in and waiting for dry dock or repair shall also be for Owner's account. Fuel used during such dry-docking or repair periods, as provided in Clause 12 or Clause 15, or used in proceeding to or from the port of dry-docking or repair, will be charged to Owner by Charterer at the price charged to Charterer by its bunker supplier at such port if bunkers are obtained there, or at the next replenishment port.

b Adjustment of Hire

In case of dry-docking or repair pursuant to Clause 12 at a port where the Vessel is to load, discharge or bunker under Charterer's orders, hire shall be suspended from the time the Vessel receives free pratique on arrival, if in ballast, or upon completion of discharge of cargo, if loaded, until the Vessel is again in all respects ready for service. In case of dry-docking or repair at a port other than where the Vessel loads, discharges or bunkers under Charterer's orders, the following time and bunkers shall be deducted from hire: The total time and bunkers, including dry-dock or repair port call, for the actual voyage from the last port of call under Charterer's orders to the next port of call under Charterer's orders, less the theoretical voyage time and bunkers for the direct voyage from said last port of call to said next port of call. The theoretical voyage will be calculated on the basis of the sea buoy to sea buoy distance at the warranted speed and consumption stipulated in Clauses 8a and 8b.

c Accumulation of Off-Hire Time

The period during which hire is suspended, including time in and waiting for dry dock and repairs, until the Vessel again comes on-hire under the terms of Clause 12b shall count as off-hire time under the terms of the Charter.

d Dry-docking Area

When dry-docking or repair is required, the Vessel may only be dry-docked or repaired within the Vessel's then-current trading pattern or area unless Charterer pre-agrees otherwise in writing. Owner may not, under any circumstances, trade the Vessel for its own account on the voyage to or from the dry dock or repair location.

e Notices

Except in case of emergency, Owner shall give Charterer no less than three months written notice of its intention to dry-dock or repair the Vessel, which notice shall include Owner's estimate of the time required to complete the planned dry-docking or repair. Owner shall also promptly give Charterer written notice if Owner's original estimate of the duration of the dry-docking or repair period changes by more than three days. In any case, Owner shall give no less than ten days written notice of the date for completion of any planned dry-dock or repair, failing which any time thereby lost to Charterer shall be off-hire time.

13 Owner Provides

a Owner's Responsibility

Owner shall provide and pay for all provisions, deck and engine room stores, galley and cabin stores, P&I, hull, and other insurance on the Vessel (except as provided for in Clause 6a and Clause 21d), wages of the Master, officers, and crew, all certificates and other requirements necessary to enable the Vessel to be employed throughout the trading limits herein provided, consular fees pertaining

to the Master, officers, and crew, all fresh water used by the Vessel, and all other expenses connected with the operation, maintenance, and navigation of the Vessel, and customs or import duties arising in connection with any of the foregoing.

b Wages, Provisions and Stores

Any amounts expended for wages, provisions, and stores (insofar as such amounts are in respect of a period when the Vessel is on-hire) shall not be deemed a general average expenditure.

c Lubricants

When, during the Charter Term, Owner plans to purchase lubricants for the Vessel, Owner shall purchase such lubricants from one of Charterer's associated or affiliated companies whenever they are available at competitive prices. In the event lower prices are quoted to Owner by any supplier at the relevant port(s), Owner shall give one of Charterer's associated or affiliated companies the opportunity to meet such quotation

14 Officers' Duties

a Master's Duties

The Master, although appointed by and in the employ of Owner and subject to Owner's direction and control, shall observe the orders of Charterer in connection with Charterer's agencies, arrangements, and employment of the Vessel's services hereunder. The Master shall prosecute all voyages with the utmost dispatch and render all reasonable assistance with the Vessel's crew and equipment, including, without limitation, hoisting, connecting and disconnecting hoses at ports or sea-berths when requested or when such assistance is the normal practice. If a conflict arises between loading or discharge terminal orders and Charterer's orders, Master shall stop cargo operations and promptly request instructions from Charterer by the fastest available means. Nothing in Clause 14, or elsewhere in the Charter, shall be construed as creating a demise of the Vessel to Charterer, nor as vesting Charterer with any control over, or responsibility for, the management, operation, and/or navigation of the Vessel.

b Logs

The Master and the engineers shall timely keep and sign full and correct logs of the voyages, which are to be patent to Charterer and its agents, and true log abstracts or such other paper or electronic forms as Charterer may require are to be sent, as instructed, directly to Charterer from each port of call.

c Conduct

If Charterer shall have reason to be dissatisfied with the conduct of the Master, officers or crew, Owner shall, on receiving particulars of the complaint, investigate it and, if reasonably required, make a change in the appointments.

15 Fuel, Port Charges, Etc.

a Fuel, Port Charges, Dues and Fees

Charterer shall provide and pay for all fuel. Owner, at each fueling, shall arrange for and retain properly sealed and identified samples of each grade of fuel received and shall hold same subject to Charterer's written instructions. Charterer shall also pay for all port charges (including the cost of obtaining a certificate of arrangements for oil recovery boats or devices at Japanese ports),

light dues, dock dues, canal dues, pilotage, consular fees (except those pertaining to Master, officers and crew), tugs necessary for assisting the Vessel in, about, and out of port for the purpose of carrying out the Charter, and Charterer's agencies and commissions incurred for Charterer's account. Owner shall, however, reimburse Charterer for any fuel used or any expenses incurred in making a general average sacrifice or expenditure, and for any fuel consumed during, or related to, dry-docking, repair of the Vessel, or other periods of off-hire and said reimbursement(s) shall in no event be deemed a General Average expenditure. Charterer shall nominate and appoint Vessel's agents at all port(s) and place(s). Such agents shall be paid for by Charterer; however, when such agents are providing assistance or services to the Vessel, Master, crew or Owner, Owner shall instruct such agents who shall represent solely the Owner and Vessel.

b Tugs and Pilots

In engaging pilotage and tug assistance, Charterer is authorized by Owner to engage them on behalf of Owner on the usual terms and conditions for such services then prevailing at the ports or places where such services are engaged, including provisions there prevailing, if any, making pilots, tug captains, or other personnel of any tug the borrowed servants of Owner.

c Charterer's Responsibility

Neither Charterer, nor its agents, nor any associated or affiliated company of Charterer, nor any of their agents, directors, officers, or employees shall be under any responsibility for any loss, damage, or liability arising from any negligence, incompetence, or incapacity of any pilot, tug captain, or other personnel of any tug, or arising from the terms of the contract of employment thereof, or for any unseaworthiness or insufficiency of any tug or tugs, the services of which are arranged by Charterer on behalf of Owner, and Owner agrees to indemnify and hold Charterer, its agents, its associated and affiliated companies, and their agents, directors, officers and employees harmless from and against any and all such consequences.

d Charterer's Tugs or Pilots

Charterer shall have the option of using its own tugs or pilots, or tugs or pilots made available or employed by any associated or affiliated company, to render towage or pilotage services to the Vessel. In this event, the terms and conditions relating to such services prevailing in the port where such services are rendered and applied by independent tugboat owners or pilots shall be applicable, and Charterer, its associated or affiliated company and its pilots shall be entitled to all exemptions from, and limitations of, liability applicable to said independent tugboat owners or pilots and their published tariff terms and conditions.

e Exception

Any and all requirements of the Vessel, whatsoever, during or in connection with periods of off-hire and during loss of time for Owner's account, whether or not Vessel is off-hire, shall be provided and/or paid for by Owner, notwithstanding that such requirements would otherwise be provided for and/or paid for by Charterer under Clause 15.

16 Additional Equipment

Charterer, subject to Owner's approval not to be unreasonably withheld, shall be at liberty to fit any additional pumps and/or gear for loading or discharging cargo or other purposes it may require beyond that which is on board at the commencement of the

Charter, and to make the necessary connections with steam or water pipes or other systems, such work to be done at its expense and time, and such pumps and/or gear so fitted to be considered its property, and Charterer shall be at liberty to remove same at its expense and time during or at the expiry of the Charter; the Vessel to be left in her original condition to Owner's satisfaction, ordinary wear and tear excepted. Owner shall, at its expense, provide appropriate maintenance for any equipment installed by Charterer.

17 Lay-up

Charterer shall have the option of laying-up the Vessel for all or any portion of the Charter Term, in which case hire hereunder shall continue to be paid, but there shall be credited against such hire the whole amount which Owner shall save (or reasonably should save) during such period of lay-up through reduction in expenses, less any extra expenses to which Owner is put as a result of such lay-up. The place of such lay-up shall be subject to Owner's approval, not to be unreasonably withheld. Should Charterer, having exercised the option granted hereunder, desire the Vessel to again be put into service, Owner will, upon receipt of written notice from Charterer to such effect, immediately take steps to restore the Vessel to service as promptly as possible. The option granted to Charterer hereunder may be exercised one or more times during the currency of the Charter or any extension thereof.

18 Requisition of Vessel

a Requisition of Title

In the event that title to the Vessel shall be requisitioned or seized by any government authority (or the Vessel shall be seized by any person, entity, or government under circumstances that are equivalent to requisition of title), the Charter shall terminate automatically as of the effective date of such requisition or seizure.

b Other Requisition

In the event that the Vessel should be requisitioned for use or seized by any government authority or by any person or entity on any basis not involving or not equivalent to requisition of title, it shall be off-hire hereunder during the period of such requisition, and any hire or any other compensation paid in respect of such requisition shall be for Owner's account; provided, however, that if such requisition continues for a period in excess of sixty (60) days, Charterer shall have the option to terminate the Charter upon written notice to Owner. Any periods of off-hire under Clause 18b shall be subject to Charterer's option for off-hire extension set forth in Clause 1c.

19 Redelivery

a Redelivery Conditions

Unless the Charter shall previously have been terminated by loss of the Vessel or as otherwise provided in the Charter or by law, Charterer shall redeliver the Vessel to Owner, free of cargo, at the expiration of the Charter Term upon completion of discharge at a port or place, worldwide, in Charterer's option, and shall give written notice of the date and hour of such redelivery. In addition, Charterer shall give Owner written notice of the estimated date of such redelivery 30, 20, 10 and 5 days in advance of same. At Charterer's option, the Vessel may be redelivered to Owner with tanks in a clean or dirty condition and in no event shall Charterer be required to redeliver the Vessel gas-free.

b Fuel at Redelivery

Owner shall accept and pay for all fuel in the Vessel's bunker tanks when the Charter terminates. Payment for such fuel shall be in accordance with the last documented net price paid by Charterer, excluding any delivery charges.

c Early Redelivery

If the Charter is terminated prior to the expiration of the Charter Term in accordance with any provision of the Charter or by reason of law, Owner shall reimburse Charterer for the value of any hire paid but not earned, the value of fuel in the Vessel's bunker tanks at termination in accordance with Clause 19b, any other sums Charterer is entitled to under the Charter, as well as any damages Charterer may sustain if termination is due to Owner fault or breach of the Charter.

20 Bills of Lading

a Signatures

Bills of Lading shall be signed by the Master as presented, the Master attending daily, if required, at the offices of Charterer or its agents. However, at Charterer's option, Charterer or its agents may sign Bills of Lading on behalf of the Master. All Bills of Lading shall be without prejudice to the Charter, and Charterer shall indemnify Owner against all consequences or liabilities which may arise from any inconsistency between the Charter and any Bills of Lading or other documents signed by Charterer or its agents, or by the Master at their request, or which may arise from an irregularity in papers supplied by Charterer or its agents.

b Carriage of Cargo

Notwithstanding anything in the Charter to the contrary, the carriage of cargo under the Charter and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in Clauses 20b(1) through 20b(6) and such terms shall be incorporated verbatim, or be deemed incorporated by reference, in any such Bill of Lading. In such Clauses and in any Act referred to therein, the word "Carrier" shall include Owner and any chartered owner of the Vessel.

(1) Clause Paramount

This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, except that if this Bill of Lading is issued at a place where any other act, ordinance, or legislation gives statutory effect to:

1) the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels, 15th August 1924 (**"Hague Rules"**), or

2) the Hague Rules as amended by the Protocol signed at Brussels on 23rd February 1968 (**"Hague/Visby Rules"**), or

3) the United Nations Convention on the Carriage of Goods by Sea 1978 (**"Hamburg Rules"**),

then this Bill of Lading shall have effect subject to the provisions of such act, ordinance, or legislation. The applicable act, ordinance, or legislation (**"Act"**) shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the Act. If any term of

this Bill of Lading be repugnant to the Act to any extent, such term shall be void to that extent but no further.

(2) Jason Clause

In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the Carrier is not responsible, by statute, contract or otherwise, the cargo shippers, consignees, or owners of the cargo shall contribute with the Carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or its agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo shippers, consignees or owners of the cargo to the Carrier before delivery.

(3) General Average

General Average shall be adjusted, stated, and settled according to York-Antwerp Rules 2004 (**"Rules"**) and, as to matters not provided for by those Rules, according to the laws and usage at the port of New York; provided that, when there is an actual escape or release of oil or pollutant substances from the Vessel (irrespective of Vessel location), the cost of any measures, continued or undertaken on that account, to prevent or minimize pollution or environmental damage shall not be allowable in General Average; and, provided further, that any payment for pollution damage (as defined in Article I 6.(a) of the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage) shall also not be allowable in General Average. It is understood and agreed, however, that the cost of measures to prevent pollution or environmental damage, undertaken in respect of oil or pollutant substances which have not escaped or been released from the Vessel, shall be included in General Average to the extent permitted by the Rules. If a General Average statement is required, it shall be prepared at such port by an Adjuster from the port of New York appointed by the Carrier and approved by Charterer of the Vessel. Such Adjuster shall attend to the settlement and the collection of the General Average, subject to customary charges. General Average Agreements and/or security shall be furnished by Carrier, and/or Charterer, and/or Owner, and/or Consignee of the cargo, if requested. Any cash deposit being made as security to pay General Average and/or salvage shall be remitted to the Average Adjuster and shall be held by the Adjuster at the Adjuster's risk in a special account in a duly authorized and licensed bank at the place where the General Average statement is prepared.

(4) Both to Blame

If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot, or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder shall indemnify the Carrier against all loss or liability to the other or non-carrying ship or its owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or recovered by the other or non-carrying ship or its owners as part of their claim against the carrying ship or Carrier. The

foregoing provisions shall also apply where the owners, operators, or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact. The provisions in this Clause 20b(4) shall only apply if Owner has exercised due diligence to make the Vessel seaworthy and properly manned, equipped, and supplied, with the burden of proof in this regard resting solely on Owner.

(5) Limitation of Liability

Any provision of the Charter to the contrary notwithstanding, the Carrier shall have the benefits of all limitations of, and exemptions from, liability accorded to the owner or chartered owner of vessels by any statute or rule of law for the time being in effect.

(6) Deviation Clause

Subject to Clause 11, the Vessel shall have liberty to sail with or without pilots, to tow or be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage.

c Bill of Lading Indemnity

If Charterer requests Owner to deliver cargo at a discharge port or place either:

1) Without prior presentation to the Vessel at the discharge port or place of one of the original Bills of Lading issued for the cargo, duly endorsed, and/or

2) At a discharge port or place other than that specifically named in said Bills of Lading,

Owner shall deliver the cargo in accordance with Charterer's request if Charterer first executes and delivers a written indemnity in connection with such delivery in favor of Owner, Vessel, any chartered owner(s) of Vessel, Master, Vessel operators, agents and underwriters and delivers such indemnity to Owner or Owner's designee. The subject indemnity shall meet the requirements of Clause 20d and shall be limited in value to two hundred percent (200%) of the CIF value of the cargo.

d Form of Indemnity

The indemnity referred to in Clause 20c shall be a short form indemnity document incorporating the terms and conditions set forth in Clause 20e. This document (which must be properly filled-in) shall be given to Owner by electronic mail, telex, letter, or facsimile as requested by Owner and be in the exact form quoted below, which document, when transmitted, shall be deemed to have been signed by person acting on behalf of Charterer:

QUOTE

Time Charter of M.T. *[Insert the vessel name]* dated *[Insert the date of the charter party]* between *[Insert the name of Owner]*, as Owner ("Owner") and *[Insert the name of Charterer]*, as Charterer ("Charterer").

Reference is made to the cargo ("Cargo") now laden aboard the above Vessel ("Vessel"). Pursuant to Clause 20c of the above-captioned charter party ("Charter"), the undersigned requests that Owner(s) of the Vessel deliver the Cargo at _____ unto _____ without prior discharge site presentation to the Vessel of all original Bills of Lading issued for the Cargo appropriately endorsed for such delivery and/or at a discharge port or site other than one specifically named in said Bills of Lading.

In consideration of such delivery, the undersigned hereby gives an indemnity containing the terms set forth in Clause 20e of the Charter ("Indemnity Terms and Conditions"). The Indemnity Terms and Conditions are deemed incorporated in and made a part of this document. The term "Indemnifier" in the Indemnity Terms and Conditions shall be deemed to refer to the undersigned. The term "Cargo" and the phrase "Requested Delivery" in the Indemnity Terms and Conditions shall be deemed, respectively, to mean the Cargo and the delivery request set forth in the preceding paragraph of this document. The term "Ship" as used in the Indemnity Terms and Conditions shall be deemed to refer to the Vessel. The following information must be provided:

Name of Charterer: _____

Name of Person Acting on Behalf of Charterer: _____

Authority/Title of Above Person: _____

Date Indemnity Given: _____

UNQUOTE

e Indemnity Terms and Conditions

(1) Nature of Indemnity

Indemnifier shall indemnify and hold harmless the Owner of the Ship, any chartered Owner of the Ship, the Ship operator, the Ship Master, the Ship underwriters and the Ship agents (hereinafter jointly and individually called **"Indemnitees"**) in respect of any liability, loss, damage, costs (including, but not limited to attorney/client costs) and other expense of whatever nature which Indemnitees may sustain or incur by reason of the Requested Delivery.

(2) Funds for Defense

In the event of any legal action or proceedings being commenced against the Indemnitees in connection with the Requested Delivery, Indemnifier shall provide Indemnitees from time to time, on Indemnitees' demand, with sufficient funds to defend the same.

(3) Arrest or Detention

If the Ship or any other vessel or other property belonging to the Indemnitees should be arrested or detained or if the arrest or detention thereof should be threatened for any claim in connection with the Requested Delivery, the Indemnifier shall provide, upon demand of the Indemnitees, such bail or other security as may be required to prevent such arrest(s) or detention(s) or to secure the release of the Ship or such vessel or other property from arrest or detention, and shall indemnify the Indemnitees in respect of any loss, damage, costs (including but not limited to attorney/client costs), and other expense resulting from such arrest or detention or threatened arrest or detention, whether or not the same may be justified, and to pay to the Indemnities, on the Indemnitees' demand, the amount of such loss, damages, costs and/or expense.

(4) Termination of Indemnity

This Indemnity shall automatically become null and void, and Charterer's liability hereunder shall cease, upon presentation of all original Bills of Lading duly endorsed to reflect delivery of Cargo in accordance with the Requested Delivery, or upon the expiration of thirty-six (36) months after completion of discharge, whichever occurs first; provided that no legal proceedings arising from delivery of the Cargo in accordance with the Requested Delivery have

been instituted against the Indemnitees and/or Vessel within such thirty-six (36) month period. Owner shall advise Charterer with reasonable dispatch in writing if any proceedings are instituted.

(5) Governing Law

The within Indemnity shall be governed and construed in accordance with the internal substantive laws of the State of New York, U.S.A. The Indemnitees may, but shall not be obligated to, bring any legal action or proceeding with respect to such Indemnity in the Courts of the State of New York, U.S.A. or in the U.S. Federal Court situated therein and the Indemnifier unconditionally and generally accepts in regard to such legal action or proceeding, for itself and its property, the jurisdiction and venue of the aforesaid courts.

f Arbitration of Bill of Lading Claims

Any claim for loss, damage and/or non delivery of cargo carried pursuant to the Charter, made by any associated or affiliated company of Charterer and asserted to arise under Bill(s) of Lading issued for such cargo, shall be subject to Clause 29 of the Charter, said associated or affiliated company having authorized Charterer to so agree on its behalf. If Clause 20f applies, the terms "Charterer" and "Charter" in Clause 29 shall be taken to mean, respectively, the aforementioned associated or affiliated company and Bill(s) of Lading.

21 War Risks

a Contraband

No contraband of war shall be shipped, but petroleum and/or it products shall not be deemed contraband of war for the purposes of Clause 21.

b War Zones

The Vessel shall not, however, be required, without the consent of Owner, which shall not be unreasonably withheld, to enter any port, place, or zone that is involved in a state of war, warlike operations or hostilities, civil strife, terrorism and other politically motivated activities, or piracy, whether there be a declaration of war or not, where it might reasonably be expected to be subject to capture, seizure or arrest, or to a hostile act by a belligerent power (the term "power" meaning any de jure or de facto authority or any other purported governmental organization maintaining naval, military or air forces or any terrorist group or organization).

c War Risks Insurance

For purposes of Clause 21, it shall be unreasonable for Owner to withhold consent to any voyage, route, or port or place of loading or discharge if insurance against all risks defined in Clause 21b is then available commercially or under a government program in respect to such voyage, route, or port or place of loading or discharge. If such consent is given by Owner, Charterer shall pay any provable additional cost of insuring the Vessel against hull war risks over and above such costs in effect on the date of the Charter, as shown in Schedule B, in an amount equal to the insured value under its ordinary hull policy but not exceeding *[Insert the insured value under the Vessel's hull policy]* U.S. dollars. In addition, Owner may purchase war risk insurance on ancillary risks such as loss of hire, freight disbursements, total loss, etc., if it carries such insurance for ordinary marine hazards. Subject to the just-mentioned total insurance limitation of *[Insert the insured value under the Vessel's hull policy]* U.S. dollars, the provable additional costs of such ancillary insurance over and above the costs in

effect on the date of the Charter shall be for Charterer's account. If such insurance is not obtainable commercially or through a government program, the Vessel shall not be required to enter or remain at any such port, place, or zone. Owner shall obtain from insurers a waiver of any subrogated rights against Charterer and its associated and affiliated companies and their agents, directors, officers and employees in respect of any claims under the war risks insurance arising out of Owner's compliance with Charterer's orders.

d Additional Costs

In the event of the existence of the conditions described in Clause 21b subsequent to the date of the Charter, or while Vessel is on hire under the Charter, Charterer shall, in respect of voyages to any such port, place or zone, assume any provable additional cost of wages and crew war bonus and insurance properly incurred in connection with Master, officers and crew as a consequence of such war, warlike operations or hostilities over and above such costs in effect on the date of the Charter.

e Hostile Areas

Owner shall have the option of adjusting the timing, speed, and routing of the inward and outward passage through areas of hostility depending on the prevailing pattern of hostilities. Owner shall keep Charterer advised of its plans to transit areas of hostilities including any changes while in transit. The voyage instruction procedures for the Vessel to transit a hostile area(s) shall be as follows:

Charterer issues voyage instructions directly to the Vessel, with a copy to Owner.

Charterer's voyage instructions should include:

1) specific ports to load/discharge and sequence of port calls

2) required load/discharge dates

3) cargo grades and quantities

4) bunkering details

5) cargo measurement and documentation requirements, etc.

Charterer's voyage instructions to include advice to the Master that the specific sailing instructions for the passage in and out and through the area of hostilities will be issued by Owner.

Owner, upon receipt of Charterer's voyage instructions, shall determine the level and nature of risk in the hostile area(s) and issue specific cautionary sailing instructions directly to the Vessel with copy to Charterer's office on an urgent basis.

Owner's specific cautionary sailing instructions shall include passage timing, recommended routing, speed in and out and through the area(s) of hostilities, and other specific cautionary instructions.

22 Exceptions

a Loss, Damage, Delay

The Vessel, Master and Owner shall not, unless otherwise expressly provided in the Charter, be responsible for any loss or damage to cargo arising or resulting from: any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless

caused by the personal design or neglect of Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery.

Neither the Vessel, the Master or Owner, nor Charterer, shall, unless otherwise expressly provided in the Charter, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God; act of war; perils of the sea; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion.

b Number of Grades

The Owner warrants the Vessel is constructed and equipped to carry *[Insert number of grades of cargo]* within the Vessel's natural segregations. If for any reason the Vessel, upon arrival at a loading port or place, is unable to load the required number of grades, Charterer will do its utmost to provide a suitable cargo consistent with the Vessel's capabilities, with any delay being for Owner's account. However, if such cargo cannot be provided within a reasonable time the Vessel is to proceed to the nearest repair port in ballast and there make all necessary repairs, any time and expense being for Owner's account.

c Limitation of Exceptions

The exceptions stated in Clause 22a shall not affect Owner's undertakings with respect to the condition, particulars and capabilities of the Vessel, the provisions for payment and cessation of hire, the obligations of the Owner under Clause 20 in respect of the loading, handling, stowage, carriage, custody, care, and discharge of cargo in the Charter, and/or Charterer's option(s) to terminate the Charter in accordance with the Charter terms.

23 Salvage

All salvage moneys earned by the Vessel shall belong to Owner.

24 ITOPF

Owner warrants that it is a member of the International Tanker Owners' Pollution Federation **("ITOPF")** and that Owner will retain such membership during the Charter Term.

25 Clean Seas

Owner agrees to participate in Charterer's program covering oil pollution avoidance **("Program")**. Such Program requires compliance with latest International Maritime Organization (**"IMO"**) and Port State regulations. The Program prohibits discharge overboard of all oil and all oily water, oily ballast or oil in any form unless in compliance with IMO and Port State local regulations or under extreme circumstances whereby the safety of the Vessel, cargo, or life at sea would be imperiled. Owner shall ensure that the Vessel's personnel comply with the following:

a Retention of Residues

Subsequent to the date of delivery, and in the course of the ballast passage before presenting for delivery hereunder, any oily residues remaining in the

Vessel from its previous cargoes shall be retained on board and shall be handled according to Charterer's instructions.

b Tank Washings

During tank washing, the tank washings shall be collected into one cargo compartment and, after maximum separation of free water, such free water shall be discharged overboard to the extent permitted by applicable regulations. Thereafter, Charterer shall be notified promptly by electronic mail, facsimile, or telex of the estimated quantity of the segregated tank washings and the type and source of such washings. If Charterer requires that demulsifiers shall be used for the separation of oil and water, such demulsifiers shall be obtained by Owner and paid for by Charterer. When specifically requested by Charterer (e.g., for third-party re-lets), Owner shall ensure that the Master, on the Vessel's arrival at the loading port(s) or place(s) during the Charter does the following:

1) Arranges for the measurement of the segregated tank washings in conjunction with the cargo supplier(s).

2) Records the quantity of tank washings so measured in the Vessel's ullage record.

3) Issues a Slop Certificate.

4) Arranges that the Slop Certificate and/or Vessel's ullage record be duly signed by the cargo supplier(s) and promptly sent to Charterer.

c Disposition of Residues

The segregated tank washings and any other oily cargo residues on board (**"Residues"**) shall, at Charterer's option, be pumped ashore into slop facilities at the loading port(s) or place(s), commingled with the cargo to be loaded, or segregated from the cargo to be loaded. If Charterer requires the Master to discharge the Residues at facilities at loading port(s) or place(s), the cost of such facilities and the ultimate disposal of the Residues shall be for Charterer's sole account. If Charterer requires Residues to be kept separate from the cargo to be loaded, such Residues shall, at Charterer's option, be discharged at the discharging port(s) or place(s) in accordance with Charterer's instructions.

d Additional Pollution Prevention Measures

1) Owner will also arrange for the Vessel to adhere to Charterer's Program covering oil pollution avoidance during off-hire periods within the Charter Term, including the preparation of cargo tanks for dry-docking and repairs.

2) The Vessel will take all necessary precautions while loading and discharging cargo or bunkers, as well as ballast, to ensure that no oil will escape overboard.

3) Nothing in Charterer's instructions shall be construed as permission to pollute the sea by the discharge of oil or oily water, etc.

4) The Vessel shall have a safe and efficient means of transferring engine room and pump room bilge liquids to designated holding tanks onboard, for disposal in accordance with international, flag state, and port state regulations.

5) Pump room stripping line overboard discharges shall be suitably blanked off before arriving in port. Such blanks are to be installed and retained in the lines throughout the entire period that the Vessel is in coastal waters.

26 Cargo Measurement

a Measurement and Sampling Requirements

All measurement and sampling procedures shall be performed in accordance with the latest published Manual of Petroleum Measurement Standards issued by the American Petroleum Institute or similar standards issued by the American Society of Testing and Materials.

b Loading Requirements

Prior to loading, the Master shall measure the on board quantities of oil, water and sediment residues that are segregated in all holding tanks and slop tanks and those that remain in cargo tanks and, if requested, shall advise supplier(s) and Charterer of such quantities. After loading, the Master shall determine the cargo quantities loaded, expressing these cargo quantities in barrels at standard temperature (60° F) and performing such calculations in accordance with Clause 26a. A written tank-by-tank ullage report containing all measurements of oil, water and sediment residues on board prior to loading and quantities of cargo loaded shall be prepared and promptly submitted by the Master to Charterer.

c Letter of Protest

If the Master's calculations of cargo loaded (oil, water and sediment residues on board excluded), after applying the Vessel's Experience Factor (**"VEF"**), show any deficiency from the Bill of Lading figures, the Master shall, if investigation and recalculation verify such deficiency, issue a Letter of Protest to supplier(s) (which should, if practicable, be acknowledged) and shall immediately advise Charterer of such deficiency by electronic mail, telex or radio and thereafter shall send a copy of the Letter of Protest to Charterer. The Vessel shall have on board sufficient historical information for the calculation of a VEF using the latest edition of the API MPMS. The Master shall calculate and apply the VEF, as so determined, during all loadings.

d Discharging Requirements

Prior to discharging, the Master shall measure the quantity of each grade of cargo on board, expressing these quantities in barrels at standard temperature (60°F), using the same calculation procedures specified in Clause 26a. Before and after discharging, the Master shall cooperate with shore staff to ascertain discharged quantities. The Vessel shall be obliged to discharge all liquid oil and, if ordered by Charterer, any residues of oil, water and sediment. The Vessel's just-mentioned obligation shall not in any way be qualified or limited by any purported "custom of the trade" that is based on a deemed in-transit loss and that, otherwise, could excuse the Vessel from failure to discharge all liquid cargo and residues.

e Inspection

Charterer may employ an inspector, at its expense, to verify the quantities and qualities of cargo and residues on board the Vessel at both loading and discharging port(s) and/or place(s). If the Vessel is equipped with an Inert Gas System, depressurization of tanks to permit ullage measurements shall be allowed in accordance with the provisions of the most recent Inert Gas Systems of Oil Tankers publication issued by the IMO.

27 Insurance Costs and Liability Levels

a Insurance Required

Owner warrants that, throughout Vessel's service under the Charter, Owner shall have full and valid Protection and Indemnity Insurance (**"P&I Insurance"**) for the Vessel, as described in Clause 27b, with the P&I Insurance placed with a Protection and Indemnity Club (**"P&I Club"**) that is a Member of the International Group of P&I Clubs (**"International Group"**). This P&I Insurance shall be at no cost to Charterer except as otherwise provided in Clause 27c and Clause 27e.

b Liability Coverage

The P&I Insurance must include coverage against liability for cargo loss/damage and against liability for pollution (**"Pollution Liability"**) in the maximum coverage amount(s) per incident for each of the foregoing categories of liability as made available by any P&I Club in the International Group at the commencement of each policy year or other applicable period of coverage during the Charter Term (but only US$ 1,000 million (one billion dollars) per incident cover for Pollution Liability is required if such cover is available from a P&I Club). All administrative expenses incurred by Owner in placing and/or changing P&I Insurance coverages in order to comply with Clause 27 shall be for Owner's sole account.

c Surcharge Costs

Charterer shall, except as otherwise provided in Clause 27, reimburse Owner for any documented net surcharges properly due and paid by Owner under the P&I Insurance for U.S. voyages directed under the Charter by Charterer; provided, however, that any reimbursement obligation of Charterer shall be conditioned upon Owner fully meeting the requirements of Clause 4j. Any request by Owner for reimbursement under Clause 27c shall be submitted to Charterer, along with appropriate supporting documentation, on a quarterly basis. The phrase "net surcharges" as used in Clause 27c shall mean the surcharges, as described above, paid by Owner after taking into consideration any and all discounts and/or rebates received or receivable by Owner, or to Owner's credit under the P&I Insurance (**"Net Surcharges"**).

d Increased Costs

US$ 1,000 million (one billion dollars) per incident coverage for Pollution Liability under P&I Insurance (**"Insurance Coverage"**) is currently available in accordance with Clause 27b. Notwithstanding anything to the contrary in the Charter, Charterer's maximum liability for Net Surcharges shall be limited in amount to the highest Net Surcharges cost (**"Maximum Surcharge Cost"**) under the Insurance Coverage paid by Owner in the Charter term during the last availability of such Insurance Coverage to Owner in accordance with Clause 27b. If the amount of the Net Surcharges increases above the Maximum Surcharge Cost, the amount of such increase (**"Increased Surcharge Cost"**) shall be for Owner's sole account, subject, however, to Clause 27e. If Owner is required, under Clause 27b, to obtain coverage for Pollution Liability under P&I Insurance in excess of US$ 1,000 million (one billion dollars) per incident and the net cost to Owner of such coverage — aside from any surcharge cost — is greater than the net cost to Owner that was applicable under the Insurance Coverage in the Charter Term during the last availability of such Insurance Coverage to Owner in accordance with Clause 27b, this additional net cost (**"Additional Non-surcharge Cost"**) shall be borne solely by Owner, subject, however, to Clause 27e.

e Negotiation of Increased Costs

If Owner incurs Increased Surcharge Cost and/or Additional Non surcharge Cost (**"Cost(s)"**) and finds payment thereof burdensome, then Owner may call in writing for negotiations with Charterer with respect to Owner's payment of such Cost(s). In the event Owner so calls for negotiations and there is no agreement reached with respect to such Cost(s) in writing between Owner and Charterer within sixty (60) days after Owner calls for such negotiations, Owner may, upon written notice to Charterer, terminate the Charter effective when the Vessel is cargo free, without liability on either party except for sums, if any, owed by either party under the Charter as of the date of Vessel redelivery; provided, however, that if negotiations are so called for by Owner and agreement is not reached as aforesaid, Charterer shall have the option, at its sole discretion, to either pay the subject Cost(s) or provide a reasonable alternative thereto, in which case Owner shall have no right to terminate the Charter under Clause 27e. Any payment by Charterer, or provision of an alternative to payment with respect to specific Cost(s), shall not be deemed an agreement by Charterer to pay any other, or future, Increased Surcharge Cost and/or Additional Non surcharge Cost.

f Notice to Charterer

Owner shall give Charterer timely written notice of all pertinent details in connection with any renewal or new placement of P&I Insurance required by Clause 27, failing which any reimbursement obligation of Charterer under Clause 27 shall cease.

g Lapse of Coverage(s)

If required by Charterer, Owner shall, as soon as is reasonably possible, furnish to Charterer such evidence of the insurance(s) required under Clause 27 as Charterer may reasonably request. If there is a failure or lapse of such insurance(s) for any reason (**"Non Coverage"**) at any time during the Charter term, Charterer shall have the option on written notice to Owner to terminate the Charter when the Vessel is cargo-free, or to procure replacement insurance(s) with the same or different underwriters and/or P&I Club chosen by Charterer, with all cost to be borne by Owner, which cost may, at Charterer's option, be invoiced to Owner for payment or be deducted from hire or other sums due Owner under the Charter. The Vessel shall be off-hire from the time of the Non Coverage until full reinstatement of the insurance(s) or termination of the Charter by Charterer. A termination or failure to terminate the Charter in accordance with Clause 27g shall be without prejudice to any claims for damages that Charterer may have by reason of Owner's fault for Non Coverage.

h TOPIA / STOPIA 2006

Owner warrants that it is a Participating Owner and that the Vessel is entered in the Tanker Oil Pollution Indemnification Agreement 2006 (TOPIA 2006) and shall so remain during the Charter Term, provided always that: i) the Vessel meets the definition of a "ship" under the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) or any amendment thereto and ii) TOPIA 2006 is not terminated in accordance with cl. IX of that agreement. Additionally, if the Vessel has a gross tonnage of 29,548 or less, Owner warrants that it is a Participating Owner and that the Vessel is entered in the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA 2006) and shall so remain during the Charter Term, provided always that: i) the Vessel meets the definition of a "ship" under the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) or any amendment thereto and ii) STOPIA 2006 is not terminated in accordance with cl. IX of that agreement. As used in this

Clause 27h, the term "Participating Owner" has the definition ascribed to it in TOPIA 2006 and/or STOPIA 2006, as the case may require.

28 Parent Guaranty and Change of Ownership

a Parent Guaranty

If required by Charterer, Owner shall cause its parent company (or companies) to execute and deliver to Charterer a written Guaranty in the form shown at Schedule C. Such executed written Guaranty shall be delivered to Charterer concurrent with Owner's signing of the Charter.

b Restrictions on Transfer

Owner's rights and obligations under the Charter are not transferable by sale or assignment without Charterer's written pre-consent. During the Charter Term, Owner shall not offer the Vessel for sale to a non-affiliated buyer without Charterer's pre-consent. In the event of the Vessel being sold, the Charter being assigned, or the Vessel being offered for sale to a non-affiliated company without such consent, then in addition to its other rights, including, without limitation the right to claim damages, Charterer may, at its absolute discretion, terminate the Charter.

29 Arbitration

Any and all differences and disputes of whatsoever nature arising out of the Charter shall be put to arbitration in the city of New York, pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by Owner, one by Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Until such time as the arbitrators finally close the hearing, either party shall have the right by written notice served on the arbitrators and on the other party to specify further disputes of differences under the Charter for hearing and determination. The arbitrators may grant any relief which they, or a majority of them, deem just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance. Awards, made pursuant to Clause 29 may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any court having jurisdiction in the premises.

30 Assignment and Sublet

Notwithstanding any other provisions of the Charter, Charterer may assign all of its rights and obligations under the Charter to any of Charterer's associated or affiliated companies. Charterer shall also have the right to sublet the vessel but, in the event of a sublet, Charterer shall always remain responsible for the fulfillment of the Charter in all its terms and conditions.

31 Business Policy

Owner agrees to comply with all laws and lawful regulations applicable to any activities carried out in the name, or otherwise on behalf, of Charterer under the provisions of the Charter. Owner agrees that all financial statements, billings and reports rendered by Owner to Charterer, as provided for in the Charter, shall, in reasonable detail, accurately and fairly reflect the facts about all activities and transactions handled for the account of Charterer.

32 Interpretation and Law

The interpretation of the Charter and the rights and obligations of the parties hereto shall be governed by the Federal Maritime Law of the United States and, where applicable, by the Law of the State of New York. The headings of Clauses and paragraphs are for convenience of reference only and shall not affect the interpretation of the Charter. No modification, waiver or discharge of any term of the Charter shall be valid unless in writing and signed by the party to be charged therewith. No provision of the Charter shall be interpreted or construed against a party because that party or its legal representative drafted the provision. Notwithstanding anything in the Charter to the contrary, the Charter shall not be interpreted or applied so as to require Owner or Charterer to do, or to refrain from doing, anything which would constitute a violation of, or result in a loss of economic benefit under, United States anti-boycott or export control laws and regulations. When used in the Charter in relation to Charterer, the terms "associated or affiliated company" or "associated or affiliated companies" shall include Exxon Mobil Corporation, or any division of Exxon Mobil Corporation, or any company (other than Charterer) that is directly or indirectly owned, in whole or in part, by Exxon Mobil Corporation. The term "Clause," when used in the Charter, shall mean a clause of the Charter. The options granted to Charterer to cancel or otherwise terminate the Charter are both individual and cumulative. Charterer's exercise, or failure to exercise, any option to cancel or terminate the Charter shall not affect any other option granted to Charterer to terminate or cancel the Charter; any such cancellation or termination being without prejudice to any other rights and remedies Charterer may have under the circumstances including, without limitation, the right to damages for any breach of the Charter.

IN WITNESS WHEREOF, THE PARTIES HAVE CAUSED THIS CHARTER PARTY TO BE EXECUTED IN DUPLICATE THE DAY AND YEAR HEREIN FIRST ABOVE WRITTEN.

WITNESS ***FOR OWNER***

_____ BY: _____

NAME: _____

TITLE: _____

DATE SIGNED: _____

WITNESS ***FOR CHARTERER***

_____ BY: _____

NAME: _____

TITLE: _____

DATE SIGNED: _____

Schedule A — Warranted Description of Vessel

Section 1 — General Information		
1.1	Name of the Vessel:	
1.2	LR/IMO number:	
1.3	Flag:	
1.4	Call sign	
1.5	INMARSAT number:	
1.6	Facsimile number:	
1.7	Mobile phone number:	
1.8	E-mail address:	
1.9	P & I Club:	
1.10	Type of ship:	
1.11	Type of hull:	
1.12	Meets IMO double-hull requirements:	
1.13	Vessel is inherently stable in all conditions of loading/ballast:	
1.14	Bow thruster fitted:	
Section 2 — Ownership and Operation		
2.1	**Registered Owner**	
2.1.1	Name:	
2.1.2	Address:	
2.1.3	Telephone number:	
2.1.4	Facsimile number:	
2.1.5	E-mail address:	
2.1.6	Contract person:	
2.1.7	Contact person's after-hours telephone:	
2.2	**Technical Manager (Vessel "Operator" holding the ISM Code Document of Compliance)**	
2.2.1	Name:	
2.2.2	Address:	
2.2.3	Telephone number:	
2.2.4	Facsimile number:	
2.2.5	E-mail address:	
2.2.6	Contract ("Designated") person:	
2.2.7	Contact person's after-hours telephone:	
2.2.8	Emergency call-out number:	
2.2.9	Eligible for time charter period of:	
2.3	**Commercial Manager**	
2.3.1	Name:	
2.3.2	Address:	
2.3.3	Telephone number:	
2.3.4	Facsimile number:	
2.3.5	E-mail address:	
2.3.6	Contract person:	
2.3.7	Contact person's after-hours telephone:	
Section 3 — Construction		
3.1	Builder:	
3.2	Date of building contract:	

3.3	Hull number:				
3.4	Date keel laid:				
3.5	Date launched:				
3.6	Date delivered:				
3.7	Classification society:				
3.8	Class notations:				
3.9	Is vessel structure limited to no more than 30% high strength steel?				
3.9.1	If NO, has an advanced structural analysis been performed?				
3.9.2	By whom?				
3.10	If DH, are ballast/double hull spaces fitted with horizontal flats at 4-6 m. increments, or stringers or oversize longitudinals with guard rails, for safe, easy inspections?				
Section 4 — Dimensions					
4.1	Length overall (LOA):				
4.2	Extreme breadth:				
4.3	Moulded depth:				
4.4	Keel to masthead:				
4.5	Distance from bow to front of bridge:				
4.6	Distance from bridge front to mid-point of cargo manifold:				
4.7	Distance from bow to mid-point of cargo manifold:				
4.8	Distance from stern to mid-point of cargo manifold:				
4.9	**Parallel Mid-body ("PMB")**				
4.9.1	Length of PMB at light ship draft:				
4.9.2	Length of PBM forward of mid-point of cargo manifold at light ship draft:				
4.9.3	Length of PBM aft of mid-point of cargo manifold at light ship draft:				
4.9.4	Length of PMB at normal ballast draft:				
4.9.5	Length of PBM forward of mid-point of cargo manifold at normal ballast draft:				
4.9.6	Length of PBM aft of mid-point of cargo manifold at normal ballast draft:				
4.9.7	Length of PMB at summer draft:				
4.9.8	Length of PBM forward of mid-point of cargo manifold at summer draft:				
4.4.9	Length of PBM aft of mid-point of cargo manifold at summer draft:				
4.10	**Register Tonnages**				
4.10.1	Gross Tonnage:				
4.10.2	Net Tonnage:				
4.10.3	Suez Canal Tonnage:				
4.10.4	Panama Canal Tonnage:				
4.11	**Load Line Information**	Freeboard	Draft	Deadweight	Displacement
4.11.1	At summer marks				
4.11.2	At winter marks				

4.11.3	At tropical marks				
4.11.4	In lightship condition				
4.11.5	At normal ballast condition				
4.12	FWA at summer draft:				
4.13	TPC immersion at summer draft:				
4.14	Draft forward in normal ballast condition:				
4.15	Draft aft in normal ballast condition:				
4.16	Minimum height of mast above waterline in departure ballast condition ("air draft"):				
4.17	Maximum freeboard amidships in normal departure ballast condition:				
4.18	Lightship weight:				
Section 5 — Engine Room					
5.1	Main engine maker:				
5.2	Model of main engine:				
5.3	Rated power of main engine:				
5.4	Lowest sustainable speed for lightering:				
5.5	Barred speed ranges (if any):				
5.6	Cruising range at maximum horsepower:				
5.7	Number of ship's service generators:				
5.8	Capacity of ship's service generators:				
5.9	Number of fresh water evaporators:				
5.10	Capacity of each fresh water evaporator:				
5.11	Type of bilge water separator:				
5.12	Capacity of bilge water separator:				
5.13	Other means of bilge water disposal:				
5.14	Number of independent steering motors/pumps:				
5.15	In event of main power failure one steering motor/pump will operate:				
5.16	Does steering system comply with SOLAS II Regulation 29 paragraph 16 or 20 if Vessel built prior to Sept. 1994?				
5.17	Is engine room fitted with high-level bilge alarm?				
5.18	Number of fuel oil tanks:				
5.19	Total capacity of fuel oil tanks:				
5.20	Number of diesel oil tanks:				
5.21	Total capacity of diesel oil tanks:				
5.22	Are bunker tanks fitted with a remote gauging system?				
5.23	Are bunker tanks fitted with high-level alarms on the gauging system?				
5.24	Are bunker tanks fitted with backup independent high-level alarms?				
Section 6 — Cargo and Ballast Tanks					
6.1	Number of center cargo tanks:				
6.2	Number of wing cargo tanks:				
6.3	Total cargo tank capacity (at 100%)				
6.4	Number of slop tanks:				

6.5	Slop tank capacity (at 100%)	
6.6	Are cargo tanks coated?	
6.7	Maker and type of cargo tank coating:	
6.8	Are slop tanks coated?	
6.9	Maker and type of slop tank coating:	
6.10	Are cargo tanks coiled?	
6.11	Material of cargo tank coils:	
6.12	Are slop tanks coiled?	
6.13	Material of slop tank coils:	
6.14	Are cargo heat exchangers fitted?	
6.15	Material of heat exchangers:	
6.16	Can Vessel can raise cargo temperature by 4°C per day to at least 57°C and maintain cargo temperature at 57°C throughout the laden passage and discharge?	
6.17	Can cargo at a temperature of 74°C be loaded?	
6.18	Maximum permissible temperature of cargo loaded:	
6.19	Are cargo and slop tanks are fitted with a remote gauging system?	
6.20	Type of gauging system fitted in cargo and slop tanks:	
6.21	Are cargo and slop tanks are fitted with high-level alarms on the gauging system?	
6.22	Are cargo and slop tanks also fitted with back-up independent high-level alarms?	
6.23	Number and capacity of natural cargo tank groups:	
6.24	Are ballast tanks coated?	
6.25	Type of ballast tank coating:	
6.26	Are aluminum anodes used in cargo or ballast tanks?	
6.27	If yes, are they shielded?	
6.28	Maximum distance above tank bottom:	
6.29	Do anodes contain >0.02% Mg or 0.10% Si?	
6.30	Are the cargo tanks, including heating coils, free of copper, zinc, cadmium and their alloys?	
6.31	Is a cargo tank coating condition record maintained onboard?	
6.32	Is a ballast tank coating condition record maintained onboard?	
6.33	How many incompatible grades can be carried with double valve segregation?	
Section 7 — Pipelines, Pumps and Vent System		
7.1	Is segregated ballast handled by separate pump and line?	
7.2	Are overboard stripping and/or cargo lines fitted with spectacle blanks?	

7.3	If not fitted with blanks, are they provided with double valves with an integrity testing arrangement?	
7.4	Type of tank vent system:	
7.5	Capacity of tank vent system:	
7.6	Do tank vent locations and velocities comply with Chapter 16 of the International Safety Guide for Oil Tankers and Terminals (ISGOTT)?	
7.7	Do tanks have individual high capacity pressure/vacuum breaking devices (with no valve or blind to tank) for cargo loading/discharge?	
7.8	Is there a positive means of preventing tank over/under pressure (e.g., an interlock between isolating valve and tank hatch)?	
7.9	Maximum loading rate accepted:	
7.10	Number and type of cargo pumps:	
7.11	Capacity of each cargo pump:	
7.12	Pressure at manifold at rated pump capacity:	
7.13	If equipped with deepwell pumps, can vessel load without going through the pumps (i.e., independent drop lines)?	
7.14	Are cargo pumps fitted with over-speed trips?	
7.15	Are cargo pumps fitted with high temperature alarms?	
7.16	Are cargo pumps fitted with high temperature trips?	
7.17	Type of cargo stripping equipment:	
7.18	Capacity of cargo stripping equipment:	
7.19	Are main cargo lines equipped with stripping suctions?	
7.20	Are cargo valves at the pump room bulkhead of the gate type?	
7.21	Material of the cargo valves at the pump room bulkhead:	
7.22	Are separate stripping lines fitted?	
7.23	Can ballast and cargo be handled simultaneously with double valve segregation at all times within the pump room and in the cargo tank area?	
7.24	Can the vessel de-ballast in 12 hours?	
7.25	Can the vessel de-ballast in 12 hours if ballast must be pumped ashore?	
7.26	Number and type of ballast pumps:	
7.27	Capacity of each ballast pump:	
7.28	Is vessel equipped with Loadmaster or other equipment to ascertain hull stress during cargo handling?	

7.29	If double hull, does computer also calculate intact stability?	
7.30	Is a warning alarm fitted to the loading computer?	
7.31	Is vessel equipped with a fixed system to continuously monitor for flammable atmospheres?	
7.31.1	In the cargo pump room, if fitted?	
7.31.2	Sensor/sampling points at bottom of pump room?	
7.31.3	At top of pump room?	
7.31.4	In cofferdams?	
7.31.5	Other spaces? (list)	
7.32	Is there an emergency cargo pump shut-down in cargo control room?	
7.32.1	In upper pump room?	
7.32.2	At manifold?	
7.33	Do cargo seachests have double valves?	
7.33.1	Type of Valve(s):	
7.33.2	Material of valves:	
7.34	Do cargo seachest valves have tightness testing arrangement?	
7.35	Is pump room fitted with a high-level bilge alarm?	
7.36	Date of last pressure test of cargo piping and valves:	
Section 8 — Cargo Manifolds		
8.1	Number and size of flanges:	
8.2	Material and standard:	
8.3	Flange distance from rail:	
8.4	Distance between flanges:	
8.5	Flange height above deck:	
8.6	Flange height above drip tray:	
8.7	Type of manifold valves:	
8.8	Material of manifold valves:	
8.9	Number of reducers available:	
8.10	Sizes of reducers available:	
8.11	Standard of flanges:	
8.12	Are manifold pressure gauges fitted outboard of the manifold valves?	
8.13	Are cargo manifolds, bunker connections, and lifting equipment in complete conformity with OCIMF standards including a vapor recovery (fore and aft of manifold) system?	
8.13.1	List exceptions, if any:	
8.14	Capacity of hose handling boom (SWL):	
8.14.1	Location: P / S	
8.14.2	Boom length:	
8.14.3	Reach outboard from deck edge:	

8.15	Are cross connections at manifold between tank groups protected by blinds?	
8.15.1	Double valves?	
8.15.2	A combination of valve and blind?	
Section 9 — Inert Gas and Tank Washing Systems		
9.1	Manufacturer of I.G. system:	
9.2	Deck seal type (wet, semi-dry, dry):	
9.3	Is manual for operation of IGS on board?	
9.4	Number of portable O_2 meters available on board:	
9.5	Does fixed O_2 meter have a recorder?	
9.6	Number MSA Tankscopes (or equivalent) available on board:	
9.7	Is vessel equipped for full tank washing?	
9.8	Type and total number of fixed machines:	
9.9	Can fixed tank washing machines be programmed?	
9.10	Full cycle time for fixed tank washing machines:	
9.11	How many tank washing machines can be operated simultaneously?	
9.12	Is manual for tank washing operations on board?	
9.13	Do vessel personnel have tank washing experience?	
9.14	If double-hull, can ballast spaces be inerted in an emergency?	
9.15	Is a fixed ballast tank inerting system installed?	
9.16	Can ballast spaces be purged with air?	
9.17	Is a fixed ballast tank purging system installed?	
9.18	Is there a topping-off inert gas generator?	
Section 10 — Mooring Equipment		
10.1	Number of self-stowing mooring winches on forecastle:	
10.2	Number of self-stowing mooring winches forward of manifold on main deck:	
10.3	Number of self-stowing mooring winches forward of manifold on main deck port side:	
10.4	Number of self-stowing mooring winches aft of manifold on main deck:	
10.5	Number of self-stowing mooring winches aft of manifold on main deck port side:	
10.6	Number of self-stowing mooring winches on poop deck:	
10.7	Are the winches split drum type?	
10.8	Winch brake holding capacity:	
10.9	Mooring winches heaving capacity:	

10.10	If brake holding capacity exceeds 60% of mooring line breaking strength, can it be adjusted to 60%?	
10.11	Winch brake application method (spring with hydraulic release / hand wheel / other?	
10.12	Is a winch brake testing kit available?	
10.13	Are torque wrenches available to set winch brakes?	
10.14	Number of mooring wires fitted on winch drums:	
10.15	Mooring wire length:	
10.16	Mooring wire diameter:	
10.17	Mooring wire breaking strength:	
10.18	Number of synthetic lines fitted on winch drums:	
10.19	Number of synthetic lines available on station:	
10.20	Synthetic line length:	
10.21	Synthetic line circumference:	
10.22	Synthetic line breaking strength:	
10.23	Does vessel fully comply with OCIMF "Recommendations for Equipment Employed in the Mooring of Ships at Single Point Moorings"?	
10.23.1	List exceptions, if any:	
10.24	Type of SPM mooring fitting installed:	
10.24.1	Number of SPM fittings:	
10.24.2	Holding capacity of SPM fittings:	
10.25	Bow chock dimensions:	
10.26	Are mooring chocks of the closed type?	
10.26.1	Universal (roller) type?	
10.26.2	Panama type?	
10.27	How many bitts forward of the manifold on the port side?	
10.28	If used, do synthetic mooring tails meet OCIMF Guidelines?	
10.28.1	Length of synthetic tails?	
10.28.2	Number of anti-chafing wire tails 11m in length with 1.8m eyes at the working end:	
10.28.3	Vessel has sufficient Mandal or Tonsberg shackles to connect synthetic tails to the mooring wires and wire anti-chafing tails to the synthetic tails:	
10.29	Distance from mid-point of cargo manifold to first spring line forward:	
10.30	Distance from mid-point of cargo manifold to first spring line aft:	
10.31	Does vessel have equipment to rig fire wires?	
10.32	Does vessel have emergency towing per SOLAS Reg. 15-1?	

10.32.1	If NO, when will it be installed?	
10.33	Is a towing bracket provided aft on upper deck?	
10.34	Are fender davits available on the portside fore and aft?	
10.34.1	Safe working load of davits:	
10.35	Anchor holding capacity:	
10.36	Anchor chain size:	
10.37	Anchor chain length:	
10.38	Number of messenger lines:	
10.38.1	Length of messenger lines:	
10.38.2	Diameter of messenger lines:	
10.38.3	Material of messenger lines:	
Section 11 — Navigation Equipment		
11.1	Number of Radars:	
11.2	Number of gyro compasses:	
11.3	Is gyro error record book kept?	
11.4	Is a course recorder fitted?	
11.5	Is an ARPA installed?	
11.6	Are manual radar plotting facilities available?	
11.7	Is vessel equipped with a magnetic compass?	
11.8	Is the deviation card current and posted?	
11.9	Is a magnetic compass off-course alarm fitted?	
11.10	Is vessel equipped with GPS?	
11.11	Is GPS with speed indication and Cross Track Error (XTE) fitted?	
11.12	Is a Navtex receiver fitted?	
11.13	Is a satellite communication system installed?	
11.14	Number of UHF walkie-talkies:	
11.15	Is speed log installed?	
11.16	Two-axis Doppler speed log installed?	
11.17	Is a rate-of-turn indicator fitted?	
11.17.1	Are there bridge wing repeaters for the rate-of-turn indicator?	
11.18	Is a depth finder fitted?	
11.18.1	Does the depth finder have a recorder?	
11.19	Are RPM and Rudder Angle indicators fitted?	
11.19.1	Are RPM and Rudder Angle indicators fitted at the bridge wings?	
11.20	Is a "Bell" logger installed?	
11.21	Are there steering and engine controls on bridge wings?	
11.22	Is the vessel fitted with the following miscellaneous equipment:	
11.22.1	Computer with modem?	
11.22.2	Wind speed and direction indicator?	

11.22.3	Fax?	
11.22.4	Weather fax?	
11.22.5	Three cellular telephones?	
11.23	Is there an established system to ensure the vessel is provided with all necessary nautical publications and charts of suitable scales for the trades intended?	
11.23.1	Are records maintained to verify regular updating and correction of all nautical publications and navigation charts?	
11.23.2	Does the vessel receive regular Notices to Mariners appropriate to the trading areas?	
11.23.3	Is the Vessel fitted with a Bridge Event Recorder?	
Section 12 — Oil Pollution Prevention		
12.1	Height of main deck fish plate (gutter bar) amidships:	
12.1.1	Aft:	
12.1.2	Transverse:	
12.2	Is there a deck dump-valve into the slop tanks?	
12.2.1	If yes, is a loop seal provided to contain pressure?	
12.3	Scupper plugs, type/material:	
12.3.1	If wood, are they cemented?	
12.4	Does vessel operate under an environmental policy covering wastes, garbage, sewage, noxious liquids/vapors and environmentally damaging substances?	
12.5	Is there adequate storage for readily available pollution control equipment:	
12.6	Do deck machinery, bunker manifolds and tank vents have fixed spill containment?	
12.7	Method of removing oil from enclosed area/containment:	
Section 13 — Manuals/Logs/Training/Procedures		
13.1	Are the following manuals/logs available on board:	
13.1.1	Bridge Procedure Manual?	
13.1.2	Deck Log?	
13.1.3	Oil Record Books (Deck and Engine)?	
13.1.4	Fire Fighting Manual?	
13.1.5	Record of Cargo Piping Tests?	
13.1.6	Material Safety Data Sheets?	
13.1.7	International Safety Guide for Oil Tankers and Terminals (ISGOTT), latest edition?	
13.1.8	ICS/OCIMF: Ship to Ship Transfer Guide (Petroleum), latest edition?	
13.1.9	Manual with maximum loading rates, tank venting capacity, maximum tank pressure and vacuum for each tank?	

13.1.10	IMO: Safety of Life at Sea (SOLAS) latest consolidated edition	
13.1.11	IMO: Inert Gas Systems, latest edition?	
13.1.12	ICS: Guide to Helicopter/Ship Operations, latest edition	
13.1.13	ICS: Bridge Procedures Guide, latest edition	
13.1.14	IMO: Recommendations on Basic Principles and Operating Guidance Relating to Navigational Watchkeeping	
13.1.15	IMO: International Convention on Standards of Training, Certification, and Watchkeeping (STCW 1995), latest edition?	
13.1.16	IMO: International Regulations for Preventing Collisions at Sea, 1972, latest edition?	
13.1.17	IMO: Ships Routing, latest edition	
13.1.18	U.K. Dept. of Trade Merchant Shipping Notice No. M.854?	
13.1.19	IMO: MARPOL 73/78 Consolidated Edition (1991) including 1992 Amendments to Annex I and 1994-95 Amendments?	
13.1.20	Ship-specific Oil Transfer procedures (per U.S. Coast Guard requirements)?	
13.1.21	ICS/OCIMF: Prevention of Oil Spillages through Cargo Pump Room Sea Valves, latest edition?	
13.1.22	IMO: Crude Oil Washing Systems, latest edition	
13.1.23	ICS/OCIMF: Clean Seas Guide for Oil Tankers - Retention of Oil Residues On Board, latest edition?	
13.1.24	OCIMF: Mooring Equipment Guidelines, latest edition?	
13.1.25	OCIMF: Recommendations for Equipment Employed in the Mooring of Ships at Single Point Moorings, latest edition	
13.1.26	OCIMF: Effective Mooring, latest edition?	
13.1.27	OCIMF: Guidelines for the Control of Drugs and Alcohol On Board Ships, latest edition?	
13.2	Do all Deck Officers attend radar refresher training?	
13.2.1	How often?	
13.3	List any special training possessed by officers (e.g., ship handling simulator courses, on board training, etc.)	
13.4	Other procedures established and available on board:	
13.4.1	Emergency response?	
13.4.2	Collision?	
13.4.3	Grounding?	

13.4.4	Oil spill?	
13.4.5	Fire?	
13.4.6	Tank Entry Permit Procedure?	
13.4.7	Is it required that the cargo tank and slop tank atmospheres be tested prior to loading or opening cargo tanks?	
13.4.7.1	Are results of these tests entered in a log?	
13.4.8	Mooring?	
13.4.9	Cargo handling?	
13.4.10	Maintenance and testing of equipment and systems?	
Section 14 — Regulatory Requirements		
14.1	Does vessel fully comply with all applicable international conventions, laws, regulations and/or other requirements of the country of the vessel's registry and of the countries and/or ports and/or places to which the vessel may be ordered while in Charterer's service?	
14.2	Date of full compliance with the ISM Code for Operator:	
14.3	Date of full compliance with the ISM Code for Vessel:	
Section 15 — Manning/Licensing		
15.1	Nationality and licenses of officers:	
15.2	Total Number of Deck Officers (Including Master):	
15.3	Total Number of Engineer Officers (Including Chief Engineer):	
15.4	Are Master and any Officer-in-Charge of cargo/bunker operations proficient in conversational English?	
15.5	Does the vessel operate under a Drug and Alcohol Policy that complies with ExxonMobil requirements?	
15.6	Do leave/rotation procedures include provisions for monitoring regular and relief crew competence and experience as well as controlling maximum hours worked and fatigue reduction steps?	
15.7	Do all officers possess valid certificates/licenses appropriate to their rank and/or position on the vessel and the intended trade, including Dangerous Cargo Endorsements per STCW?	
Section 16 — Cargo Measurement and Sampling		
16.1	Are vapor locks fitted?	
16.2	Are vapor locks calibrated for ullage measurement?	
16.3	Are vapor locks calibrated for innage measurement?	

16.4	Are vapor locks calibrated for wedge tables?	
16.5	Have the vapor lock calibrations been certified by a Classification Society or other recognized organization?	
16.5.1	If Yes, name of certifying body:	
16.6	Are sonic ullage tapes available?	
16.6.1	How many sonic ullage tapes are on board?	
16.6.2	Can sonic tapes measure ullage?	
16.6.3	Can sonic tapes measure temperature?	
16.6.3	Can sonic tapes measure oil/water interface layer?	
16.7	Are sampling devices available for use through vapor locks?	
16.8	Number of vapor lock sampling containers:	
16.8.1	Size of sample containers:	
16.9	Number of certified reference standard thermometers:	
16.10	Number of Explosimeters:	
16.11	Number of toxic gas detectors:	
16.11.1	Are they certified to detect H_2S accurately in both air and inert gas environment?	
16.12	Do sounding pipes extend full depth of tanks?	
16.13	Are precautions against electrostatic ignitions (per ISGOTT) followed?	
Section 17 — Navigation		
17.1	Owner warrants that it will maintain a navigation and bridge procedures policy/manual conforming to ICS/IMO STCW standards:	
Section 18 — Classification Society Surveys		
18.1	Date of last dry-dock/repairs and shipyard name	
18.2	Was last special survey conducted under an Enhanced Survey Program?	
18.3	Date of last special survey:	
18.4	Are the following on board:	
18.4.1	Survey Planning Document?	
18.4.2	Hull Structural Survey Report?	
18.4.3	Executive Hull Summary?	
18.5	Date of next special survey:	

ExxonMobil Time 2005

Schedule B — Base War Risks Premia

Exclusion Area	Call (hrs.)	Stay (days)	H&M %	War Crew Liability

Schedule C — Form of Parent Guaranty

Guaranty

In consideration of the sum of One U.S. Dollar and No Cents (US$ 1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, and in further consideration of *[insert Charterer name]* entering into a time charter of the M.T. *[insert vessel identification]* ("Charter") with the undersigned's affiliated company *[insert Owner name]*, we the undersigned, *[insert Parent Company name]* unconditionally and without requirement of any recourse against *[insert Owner name]* do hereby guarantee to *[insert Charterer name]* its successors and assigns full and complete performance by *[insert Owner name]* of all the terms and conditions of the Charter and full and complete payment of all indebtedness of *[insert Owner name]* to *[insert Charterer name]* under the Charter and, further, do hereby waive notice of default of *[insert Owner name]* under the Charter and notice of acceptance of the within Guaranty and unconditionally consent, without requirement of any notice to *[insert Parent Company name]*, to any modification of the Charter agreed to *[insert Charterer name]* and *[insert Owner name]* and to any extension of time that may be given by *[insert Charterer name]* to *[insert Owner name]* in respect of payment and/or any other performance under the Charter.

The term "Charter" herein shall mean the Charter as it exists as of the date of its execution and as it may thereafter be changed by written addendum or addenda mutually executed by *[insert Charterer name]* and *[insert Owner name]*.

The within Guaranty is not limited to any particular period of time but shall continue until all the terms and conditions of the Charter have been performed by *[insert Owner name]* or otherwise discharged in full.

[insert Charterer name] may, but shall not be obligated to, bring any legal action or proceeding with respect to the within Guaranty in the Courts of the State of New York, USA, or in the Federal Courts situated therein and the undersigned hereby unconditionally and generally accepts in regard to such legal proceedings, for itself and in respect of its property, the jurisdiction and venue of the aforesaid Courts. The undersigned further consents and agrees that service of any process, necessary or helpful in connection with any legal action or proceeding as just described, may be made upon the undersigned by registered mail, postage prepaid, to the address shown below, which service of process shall be as fully effective in all respects as service upon the undersigned lawfully made within the State of New York. The foregoing shall be without prejudice to any service of process that might otherwise be allowed by relevant law.

Company: *[insert Parent Company name]*

Address: *[insert Parent Company address]*

IN WITNESS WHEREOF, *[insert Parent Company name]* of *[insert Parent Company domicile]* has caused this Guaranty to be executed by its duly authorized representative this _____ day of _____, 20__ and attested in the City of _____ State of _____.

By: _____

Name: _____

Title: _____

Attest: _____

Schedule D — TMSA Element Levels

Element	Stage
1: Management, leadership and accountability	
1A: Management, leadership and accountability	
2: Recruitment and management of shore-based personnel	
3: Recruitment and management of vessel personnel	
3A: Recruitment and management of vessel personnel	
4: Reliability and maintenance standards	
4A: Reliability and maintenance standards (critical equipment)	
4B: Reliability and maintenance standards (close-out performance)	
5: Navigational safety	
6: Cargo and ballast operations	
6A: Mooring operations	
7: Management of change	
7A: Management of change	
8: Incident investigation and analysis	
8A: Incident investigation and analysis – training	
9: Safety management – shore-based monitoring	
9A: Safety management – fleet monitoring	
10: Environmental management	
10A: Environmental management	
11: Emergency preparedness and contingency planning	
11A: Emergency preparedness and contingency planning	
12: Measurement, analysis and improvement	
12A: Measurement, analysis and improvement	

APPENDIX A

Harter Act 1893
U.S. Carriage of Goods by Sea Act 1936

Title 46 of the United States Code, which contains *inter alia* the Harter Act and Carriage of Goods by Sea Act ("COGSA"), was recodified in 2006. The Harter Act, previously found at 46 U.S.C. § 190 *et seq.*, was recodified to 46 U.S.C. § 30701 *et seq.* COGSA no longer has its own statutory code reference and is now found in the "note" to 46 U.S.C. § 30701. According to the notes to § 30701, in this recodification "[c]hanges are made to simplify, clarify, and modernize the language and style, but the intent is that these changes should not result in changes in substance."

Appendix A.1

THE HARTER ACT 1893

§30701. Definition

In this chapter, the term "carrier" means the owner, manager, charterer, agent, or master of a vessel.

§30702. Application

(a) In General.—Except as otherwise provided, this chapter applies to a carrier engaged in the carriage of goods to or from any port in the United States.

(b) Live Animals.—Sections 30703 and 30704 of this title do not apply to the carriage of live animals.

§30703. Bills of lading

(a) Issuance.—On demand of a shipper, the carrier shall issue a bill of lading or shipping document.

(b) Contents.—The bill of lading or shipping document shall include a statement of—

(1) the marks necessary to identify the goods;

(2) the number of packages, or the quantity or weight, and whether it is carrier's or shipper's weight; and

(3) the apparent condition of the goods.

(c) Prima Facie Evidence of Receipt.—A bill of lading or shipping document issued under this section is prima facie evidence of receipt of the goods described.

§30704. Loading, stowage, custody, care, and delivery

A carrier may not insert in a bill of lading or shipping document a provision avoiding its liability for loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery. Any such provision is void.

§30705. Seaworthiness

(a) Prohibition.—A carrier may not insert in a bill of lading or shipping document a provision lessening or avoiding its obligation to exercise due diligence to—

(1) make the vessel seaworthy; and

(2) properly man, equip, and supply the vessel.

(b) Voidness.—A provision described in subsection (a) is void.

§30706. Defenses

(a) Due Diligence.—If a carrier has exercised due diligence to make the vessel in all respects seaworthy and to properly man, equip, and supply the vessel, the carrier and the vessel are not liable for loss or damage arising from an error in the navigation or management of the vessel.

(b) Other Defenses.—A carrier and the vessel are not liable for loss or damage arising from—

(1) dangers of the sea or other navigable waters;

(2) acts of God;

(3) public enemies;

(4) seizure under legal process;

(5) inherent defect, quality, or vice of the goods;

(6) insufficiency of package;

(7) act or omission of the shipper or owner of the goods or their agent; or

(8) saving or attempting to save life or property at sea, including a deviation in rendering such a service.

§30707. Criminal penalty

(a) In General.—A carrier that violates this chapter shall be fined under title 18.

(b) Lien.—The amount of the fine and costs for the violation constitute a lien on the vessel engaged in the carriage. A civil action in rem to enforce the lien may be brought in the district court of the United States for any district in which the vessel is found.

(c) Disposition of Fine.—Half of the fine shall go to the person injured by the violation and half to the United States Government.

Appendix A.2

THE UNITED STATES CARRIAGE OF GOODS BY SEA ACT 1936

Cited as 46 U.S.C. § 30701 Note (formerly 46 U.S.C. § 1300 *et seq.*).

Act Apr. 16, 1936, ch. 229, 49 Stat. 1207, as amended by Pub. L. 97–31, §12(146), Aug. 6, 1981, 95 Stat. 166, provided:

That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

TITLE I

Section 1. When used in this Act—

(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term 'ship' means any vessel used for the carriage of goods by sea.

(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

RISKS

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

RESPONSIBILITIES AND LIABILITIES

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in

writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled 'An Act relating to bills of lading in interstate and foreign commerce', approved August 29, 1916 (U.S.C., title 49, secs. 81–124), commonly known as the 'Pomerene Bills of Lading Act' [now chapter 801 of Title 49, Transportation].

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a 'shipped' bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

RIGHTS AND IMMUNITIES

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(*l*) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(*o*) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of

carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

SPECIAL CONDITIONS

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

[AGREEMENT AS TO RESPONSIBILITY AND LIABILITY BEFORE LOADING OR AFTER DISCHARGE]

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

[RIGHTS AND LIABILITIES UNDER OTHER OBLIGATIONS]

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [former 46 U.S.C. App. 801 *et seq.*, see Disposition Table preceding section 101 of this title], or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States [see chapter 305 of this title] or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

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APPENDIX B

The Hague-Visby Rules

(THE HAGUE RULES AS AMENDED BY THE BRUSSELS PROTOCOL 1968)

Article I

In these Rules the following words are employed, with the meanings set out below:—

(*a*) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(*b*) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(*c*) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(*d*) "Ship" means any vessel used for the carriage of goods by sea.

(*e*) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Article II

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Article III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—

(*a*) Make the ship seaworthy.

(*b*) Properly man, equip and supply the ship.

(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such

goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(*b*) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(*c*) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(*a*), (*b*) and (*c*). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

Subject to paragraph 6*bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

6*bis*. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship

seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(*b*) Fire, unless caused by the actual fault or privity of the carrier.

(*c*) Perils, dangers and accidents of the sea or other navigable waters.

(*d*) Act of God.

(*e*) Act of war.

(*f*) Act of public enemies.

(*g*) Arrest or restraint of princes, rulers or people, or seizure under legal process.

(*h*) Quarantine restrictions.

(*i*) Act or omission of the shipper or owner of the goods, his agent or representative.

(*j*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(*k*) Riots and civil commotions.

(*l*) Saving or attempting to save life or property at sea.

(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(*n*) Insufficiency of packing.

(*o*) Insufficiency or inadequacy of marks.

(*p*) Latent defects not discoverable by due diligence.

(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. (*a*) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(*b*) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(*c*) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these

packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(*d*) A franc means a unit consisting of 65·5 milligrams of gold of millesimal fineness 900. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

(*e*) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(*f*) The declaration mentioned in sub-paragraph (*a*) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(*g*) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (*a*) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

(*h*) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

Note: By the 1979 Brussels Protocol, the provisions relating to "Poincaré Francs" in Article IV, Rule 5(a) and 5(d), were replaced by units of account defined in terms of the Special Drawing Right of member States of the International Monetary Fund.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Article IV bis

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article V

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party

they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Article VI

Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care of diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Article VII

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

Article VIII

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

Article IX

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

Article X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

(*a*) the bill of lading is issued in a contracting State, or

(*b*) the carriage is from a port in a contracting State, or

(*c*) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

[*The last two paragraphs of this article are not reproduced. They require contracting States to apply the Rules to bills of lading mentioned in the article and authorise them to apply the Rules to other bills of lading.*]

[*Articles 11 to 16 of the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924 are not reproduced. They deal with the coming into force of the Convention, procedure for ratification, accession and denunciation, and the right to call for a fresh conference to consider amendments to the Rules contained in the Convention.*]

Note: The 1968 Brussels Protocol was enacted in the United Kingdom by the Carriage of Goods by Sea Act 1971. The 1979 Brussels Protocol, replacing "Poincaré Francs" by units of account defined in terms of the Special Drawing Right of member States of the International Monetary Fund, was enacted in the United Kingdom by Section 2 of the Merchant Shipping Act 1981. Section 3 of the latter Act contains detailed provisions regarding the calculation of Sterling equivalents.

APPENDIX C

The Inter-Club Agreement

Appendix C.1

Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011)

This Agreement, the Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011) (the Agreement), made on 1st September 2011 between the P&I Clubs being members of The International Group of P&I Associations listed below (hereafter referred to as "the Clubs"), amends the Inter-Club New York Produce Exchange Agreement 1996 in respect of all charterparties specified in clause (1) hereof and shall continue in force until varied or terminated. Any variation to be effective must be approved in writing by all the Clubs but it is open to any Club to withdraw from the Agreement on giving to all the other Clubs not less than three months' written notice thereof, such withdrawal to take effect at the expiration of that period. After the expiry of such notice the Agreement shall nevertheless continue as between all the Clubs, other than the Club giving such notice who shall remain bound by and be entitled to the benefit of this Agreement in respect of all Cargo Claims arising out of charterparties commenced prior to the expiration of such notice.

The Clubs will recommend to their Members without qualification that their Members adopt this Agreement for the purpose of apportioning liability for claims in respect of cargo which arise under, out of or in connection with all charterparties on the New York Produce Exchange Form 1946 or 1993 or Asbatime Form 1981 (or any subsequent amendment of such Forms), whether or not this Agreement has been incorporated into such charterparties.

Scope of application

(1) This Agreement applies to any charterparty which is entered into after the date hereof on the New York Produce Exchange Form 1946 or 1993 or Asbatime Form 1981 (or any subsequent amendment of such Forms).

(2) The terms of this Agreement shall apply notwithstanding anything to the contrary in any other provision of the charterparty; in particular the provisions of clause (6) (time bar) shall apply notwithstanding any provision of the charterparty or rule of law to the contrary.

(3) For the purposes of this Agreement, Cargo Claim(s) mean claims for loss, damage, shortage (including slackage, ullage or pilferage), overcarriage of or delay to cargo including customs dues or fines in respect of such loss, damage, shortage, overcarriage or delay and include:

(a) any legal costs claimed by the original person making any such claim;
(b) any interest claimed by the original person making any such claim;
(c) all legal, Club correspondents' and experts' costs reasonably incurred in the defence of or in the settlement of the claim made by the original person, but shall not include any costs of whatsoever nature incurred in making a claim under this Agreement or in seeking an indemnity under the charterparty.

(4) Apportionment under this Agreement shall only be applied to Cargo Claims where:

(a) the claim was made under a contract of carriage, whatever its form,
(i) which was authorised under the charterparty;
or
(ii) which would have been authorised under the charterparty but for the inclusion in that contract of carriage of Through Transport or Combined Transport provisions, provided that
(iii) in the case of contracts of carriage containing Through Transport or Combined Transport provisions (whether falling within (i) or (ii) above) the loss, damage, shortage, overcarriage or delay occurred after commencement of the loading of the cargo on to the chartered vessel and prior to completion of its discharge from that vessel (the burden of proof being on the Charterer to establish that the loss, damage, shortage, overcarriage or delay did or did not so occur); and
(iv) the contract of carriage (or that part of the transit that comprised carriage on the chartered vessel) incorporated terms no less favourable to the carrier than the Hague or Hague Visby Rules, or, when compulsorily applicable by operation of law to the contract of carriage, the Hamburg Rules or any national law giving effect thereto;
and
(b) the cargo responsibility clauses in the charterparty have not been materially amended. A material amendment is one which makes the liability, as between Owners and Charterers, for Cargo Claims clear. In particular, it is agreed solely for the purposes of this Agreement:
(i) that the addition of the words "and responsibility" in clause 8 of the New York Produce Exchange Form 1946 or 1993 or clause 8 of the Asbatime Form 1981, or any similar amendment of the charterparty making the Master responsible for cargo handling, is not a material amendment; and
(ii) that if the words "cargo claims" are added to the second sentence of clause 26 of the New York Produce Exchange Form 1946 or 1993 or clause 25 of the Asbatime Form 1981, apportionment under this Agreement shall not be applied under any circumstances even if the charterparty is made subject to the terms of this Agreement; and
(c) the claim has been properly settled or compromised and paid.

(5) This Agreement applies regardless of legal forum or place of arbitration specified in the charterparty and regardless of any incorporation of the Hague, Hague Visby Rules or Hamburg Rules therein.

Time Bar

(6) Recovery under this Agreement by an Owner or Charterer shall be deemed to be waived and absolutely barred unless written notification of the Cargo Claim has been given to the other

party to the charterparty within 24 months of the date of delivery of the cargo or the date the cargo should have been delivered, save that, where the Hamburg Rules or any national legislation giving effect thereto are compulsorily applicable by operation of law to the contract of carriage or to that part of the transit that comprised carriage on the chartered vessel, the period shall be 36 months. Such notification shall if possible include details of the contract of carriage, the nature of the claim and the amount claimed.

The apportionment

(7) The amount of any Cargo Claim to be apportioned under this Agreement shall be the amount in fact borne by the party to the charterparty seeking apportionment, regardless of whether that claim may be or has been apportioned by application of this Agreement to another charterparty.

(8) Cargo Claims shall be apportioned as follows:

(a) Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel:

100% Owners

save where the Owner proves that the unseaworthiness was caused by the loading, stowage, lashing, discharge or other handling of the cargo, in which case the claim shall be apportioned under sub-clause (b).

(b) Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo:

100% Charterers

unless the words "and responsibility" are added in clause 8 or there is a similar amendment making the Master responsible for cargo handling in which case:

50% Charterers
50% Owners

save where the Charterer proves that the failure properly to load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel in which case:

100% Owners

(c) Subject to (a) and (b) above, claims for shortage or overcarriage:

50% Charterers
50% Owners

unless there is clear and irrefutable evidence that the claim arose out of pilferage or act or neglect by one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim.

(d) All other cargo claims whatsoever (including claims for delay to cargo):

50% Charterers
50% Owners

unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim.

Security

(9) If a party to the charterparty provides security to a person making a Cargo Claim, that party shall be entitled upon demand to acceptable security for an equivalent amount in respect of that

Cargo Claim from the other party to the charterparty, regardless of whether a right to apportionment between the parties to the charterparty has arisen under this Agreement provided that:

(a) written notification of the Cargo Claim has been given by the party demanding security to the other party to the charterparty within the relevant period specified in clause (6); and

(b) the party demanding such security reciprocates by providing acceptable security for an equivalent amount to the other party to the charterparty in respect of the Cargo Claim if requested to do so.

Governing Law

(10) This Agreement shall be subject to English Law and the exclusive Jurisdiction of the English Courts, unless it is incorporated into the charterparty (or the settlement of claims in respect of cargo under the charterparty is made subject to this Agreement), in which case it shall be subject to the law and jurisdiction provisions governing the charterparty.

American Steamship Owners Mutual Protection & Indemnity Association, Inc.
Assuranceforeningen Gard
Gard P&I (Bermuda) Ltd
Assuranceforeningen Skuld
The Britannia Steam Ship Insurance Association Ltd.
The Japan Ship Owners' Mutual Protection and Indemnity Association
The London Steam-Ship Owners' Mutual Insurance Association Ltd.
The North of England Protecting and Indemnity Association Ltd.
The Shipowners' Mutual Protection and indemnity Association (Luxembourg)
Skuld Mutual Protection and Indemnity Association (Bermuda) Ltd.
The Standard Steamship Owners' Protection and Indemnity Association (Asia) Ltd
The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Ltd.
The Standard Steamship Owners' Protection and Indemnity Association (Europe) Ltd
The Standard Steamship Owners' Protection and Indemnity Association (London) Ltd
The Steamship Mutual Underwriting Association Ltd
The Steamship Mutual Underwriting Association (Bermuda) Ltd.
Sveriges Angfartygs Assurans Forening (The Swedish Club)
The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.
United Kingdom Mutual Steam Ship Assurance Association (Europe) Ltd
The West of England Ship Owners Mutual Insurance Association (Luxembourg)

Appendix C.2

INTER-CLUB NEW YORK PRODUCE EXCHANGE AGREEMENT

(As amended May, 1984)

PREAMBLE:

Memorandum of Agreement (hereinafter referred to as "the Agreement") as to the apportionment of liability for cargo claims arising under the New York Produce Exchange Charter between Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association Limited, The Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam-Ship Owners' Mutual Insurance Association Limited, Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, The Sunderland Steamship Protecting & Indemnity Association, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited and The West of England Ship Owners' Mutual Protection and Indemnity Association (Luxembourg) (hereinafter together referred to as "the parties").

(1) *APPLICATION AND INTERPRETATION OF THE AGREEMENT.*

Subject to the undermentioned conditions the formula as set forth in Clause 2 shall apply in respect of Charters on the New York Produce Exchange form entered into after the 1st June 1984.

(i) It shall be a condition precedent to settlement under the Agreement that the cargo claim, including any legal costs incurred thereon, shall have been properly settled or compromised and the cargo carried under a bill or bills of lading incorporating the Hague or Hague-Visby Rules or containing terms no less favourable. Ex gratia settlements made for business or other reasons where there is no legal liability to pay the claim shall be borne in full by the party by whom the payment is made and for the purpose of this Agreement no regard shall be had to such payments.

(ii) (a) For the Agreement to apply, the cargo responsibility clauses in the New York Produce Exchange Charter must not be materially amended. A material amendment is one which makes the liability for cargo claims, as between Owners and Charterers, clear. In particular the addition of the words "and discharge" in Clause 8 shall not be deemed to be a material amendment.

(b) However the addition of the words "and responsibility" with reference to the words "under the supervision" in Clause 8 together with the addition of the words "cargo claims" in the second sentence of Clause 26 shall render the Agreement inoperative. The addition of these two amendments, or the addition

only of the words "cargo claims" in Clause 26, without any other material provision in the Charter shall mean that Owners shall bear all cargo claims subject to Charterers' contribution under the Berth Standard of Average Clause/Charterers' Contribution Clause (1971), if applicable.

(c) If the only material amendment is the addition of the words "and responsibility" with reference to the words "under the supervision" in Clause 8, it is agreed by the parties hereto that it shall mean that the apportionment of cargo claims as set out in Clause 2 shall be varied in the following manner:—

Claims for loss of or damage to cargo due to unseaworthiness and claims for condensation damage resulting solely from improper ventilation	100% Owners
Claims for damage (including slackage/ullage) due to bad stowage or handling, and claims for condensation damage resulting otherwise than from improper ventilation	50% Owners 50% Charterers
Except as provided in the second paragraph of Clause (2), short delivery claims (including pilferage) and claims for overcarriage ...	50% Owners 50% Charterers

(iii) The Agreement shall apply regardless of the place of Arbitration or the legal forum and whether or not the Charter contains a Clause Paramount incorporating therein the Hague or Hague-Visby Rules and/or the Berth Standard of Average Clause (otherwise known as the General Standard of Claim Clause)/Charterers' Contribution Clause (1971).

(iv) Any claims pursued under this Agreement by or on behalf of either Charterers or Owners should be notified to the other party in writing as soon as possible but in any event within two years from the date of discharge or the date when the goods should have been discharged, failing which any recovery shall be deemed to be waived and time barred. Such notification should record bill of lading details and the nature and amount of the claim.

(v) Where the Charter contains the Berth Standard of Average Clause/Charterers' Contribution Clause (1971), such clause is to be applied after liability has been apportioned in accordance with Clause (2) or Clause (1)(ii)(c) as the case may be and Charterers' contribution under such clause shall be per cargo voyage and not per bill of lading or parcel of cargo notwithstanding anything to the contrary contained therein.

(vi) Where Sub-Charters are involved the Agreement, unless the parties hereto otherwise agree in any specific case, shall be applied in stages starting with the party who first settles the cargo claims. For example in the case of a single sub-charter, if the cargo claims are settled by the Sub-Charterers, the said claims shall first be apportioned between the Sub-Charterers and the Charterers in accordance with the Agreement, the

Charterers being treated for the purpose as if they were the "Owners", the balance falling to Charterers' account thereafter being apportioned between the Charterers and Owners in accordance with the Agreement.

(vii) The Agreement is not binding on Members but in all cases the parties will recommend without qualification its acceptance to Members.

(2) *APPORTIONMENT OF CARGO CLAIMS.*

In all cases where the Agreement applies cargo claims shall be apportioned as hereunder: —

Claims for loss of or damage to cargo due to unseaworthiness ...	100% Owners
Claims for damage (including slackage/ullage) due to bad stowage or handling	100% Charterers
Except as provided in the succeeding paragraphs of this clause, short delivery claims (including pilferage), claims for overcarriage, and claims for condensation damage	50% Owners 50% Charterers

As regards short delivery and overcarriage claims, where there is clear and irrefutable evidence that the shortage or overcarriage, as the case may be, was due to act, neglect or default on the part of Owners' or Charterers' servants or agents, then the party whose servants or agents were at fault shall bear the claim in full. Thus if there is corroborated eyewitness evidence that the shortage was due to pilferage by a stevedore, the claim will fall 100% to the account of Charterers, but if by a crewmember, then 100% to Owners, subject in the latter case to Charterers' contribution under the Berth Standard of Average Clause/Charterers' Contribution Clause (1971).

Claims for condensation damage shall be apportioned as provided in the first paragraph of this clause, except where there is clear evidence that the damage was due solely to bad stowage in which event such claims shall fall 100% to Charterers' account but where there is clear evidence that the damage resulted solely from improper ventilation, such claims shall be borne 100% by Owners.

(3) *EXTENSION OF AGREEMENT*

It shall be open to the parties to apply in whole or in part the Agreement if they so desire notwithstanding that it is not strictly applicable by reason of any of the matters set forth in Clause 1.

(4) *DURATION.*

The Agreement shall continue in force until varied or terminated. Any variation to be effective must be approved in writing by all the parties but it is open to any Association to withdraw from the Agreement on giving to all the other parties not less than three months' written notice thereof, such withdrawal to take effect at the expiration of that period. After the expiry of such notice the Agreement shall nevertheless continue as between all the parties, other than the party giving such notice who shall remain bound by and be entitled to the benefit of this Agreement in respect of all cargo claims arising out of charters commenced prior to the expiration of such notice.

For example if the Standard Association gave written notice of withdrawal from the Agreement on the 1st of January 1985, it would be bound to apply the Agreement in respect of cargo claims arising out of charters commenced at any time on or before the 31st March 1985.

(5) *OPERATION.*

Nothing herein contained shall affect any settlement already concluded between the parties to this Agreement.

John Adams (Printers) Ltd., London, SE1 3UD

APPENDIX D

United States Arbitration Act New York Convention

Appendix D.1

UNITED STATES ARBITRATION ACT

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising

out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

[Not material]

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Appendix D.2

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:
(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;
(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;
(b) Accessions in accordance with article IX;
(c) Declarations and notifications under articles I, X and XI;
(d) The date upon which this Convention enters into force in accordance with article XII;
(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Done at New York June 10, 1958.

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