CHAPTER NINE

Time Charter-parties

Certain legal issues are germane to both voyage and time charter parties though sometimes with subtle variations. Thus, seaworthiness is common to all charter parties. The duty not to deviate may affect both, in particular where a cargo owner not party to a charter party is concerned. Deviation is less relevant to time charter parties since the charterer normally chooses the voyage and routs and gives directions to the master, so any deviation is likely to be done with the knowledge and consent of the charterer.

The issues specifically relating to time charter parties are inevitably different to those issues regarding voyage charters. In particular it is necessary discuss problems relating to the payment of hire; employment and indemnity; safe ports and war clauses; redelivery of the vessel and the duration of the charter party. The voyage charter party does not involve these issues since there is a variable charge based on the capacity of the vessel for the voyage and the master is generally in charge of the vessel on behalf of the ship owner. The port of discharge is normally determined in the charter party and accepted by the ship owner.

The Payment of Hire

Standard Form Contracts. The charter party usually states the amount of hire which must be paid, for example *"The charterers to pay as hire the rate stated in Box 19 per 30 days commencing in accordance with Clause 1 until her redelivery to the owners."* as in Baltime 1939 charter party standard form, clause 6.

Guarantors of hire payments. A guarantor is a person who steps in and guarantees that there is a ready able and willing paymaster who will cover hire and other costs if the charterer defaults. This role is often fulfilled by merchant banks, where the charterer is unknown to the ship owner, or is of dubious reputation, or lives abroad. The triggering factor for payment by the guarantor is default by the charterer. What is the position of a guarantor of payment of hire if the ship owner defaults or is alleged to have defaulted by the charterer? The ship owner should not have immediate recourse to a guarantor where a charterer is in dispute with the ship owner over the amount of hire, if any, due to the ship owner. A guarantor's duty is to pay on demand, in the event of default by the charterer, at the behest of the ship owner. The guarantor then seeks repayment from the charterer. If the ship owner had no right to hire, for example because the vessel was in fact off hire, the charterer will then take an action against the ship owner and will receive damages and expenses. Therefore the mere existence of a guarantor should not be seen as a short cut for the ship owner in default to obtain payment for hire, which is not due.

If the charterer and ship owner are in dispute and the ship owner demands payment from the guarantor, can the guarantor avail himself of the same exceptions from payment that the charterer who he is guaranteeing would otherwise be permitted to rely on? In **The Queen Frederica** [1] the controller of the charterers gave a guarantee to pay hire and incidental dues under the charter party when they became due. The terms of the guarantee stated that the guarantor must pay within 48 hours of a demand unless there were outstanding matters awaiting settlement. The guarantor had an outstanding dispute and resisted payment. The court said only charterer / ship owner disputes were covered by the clause.

The Aliakmon Progress [2] discussed whether or not a guarantor in such situations can benefit from set off and equitable set off. In the event the charterer's were not entitled to damages since loss of cargo was due to a collision and the Hague Visby Rules excluded liability for negligent navigation so no monies could be set off on this account. However the vessel off hire for repairs and set off was available on that account.

Similarly in **The Maistros** [3] a charter party was backed up by a letter of undertaking from the charterer's bank to the effect that the bank would pay the hire if the owners stated to it that the hire is due and unpaid. There was a dispute between the ship owner regarding the final month's hire. The bank claimed $30,000 outstanding. The charterers and bank claimed a set off in respect of returned bunkers. In the event the court agreed with the charterers and the bank but held that $4,600 was still outstanding to cover the cost of cleaning the vessel because it was not in a fit state when returned.

1 **The Queen Frederica** [1978] 2 Lloyds Rep 164.
2 **The Aliakmon Progress** [1978] 2 Lloyds Rep 499.
3 **The Maistros** [1984] 1 Lloyds Rep 646.

Ship owner finance.

Difficulties can arise where a ship owner borrows money and then arranges for hire to be paid by a charterer direct to the moneylender. In **Pan Ocean SS v Credit Corp** [4] the House of Lords held that where a right to receive payment was assigned as part of a financial arrangement, to a third party, the assignee was not obliged to repay an advance payment because of the non-performance of an event of which the assignee had no responsibility, dismissing an appeal by charterers from the CA decision which had allowed an appeal by the assignees, Creditcorp from the ruling of Diamond J in high court that the charterer was entitled to recover from the assignees advance payment of hire under a charter party because the hire was not subsequently earned.

The charterer sought to recover an instalment of time charter hire paid by them to Creditcorp as assignees from the owners of a vessel. The assignment had been part of an arrangement under which Creditcorp made finance available to the owners. The charterers sought to recover the money from the assignees on the ground of total failure of consideration, since the vessel had been off-hire for the entire period for which the relevant hire instalment had been paid. Woolf L remarked that there was no reason why the charterers should have two alternative parties to whom to look for a repayment, merely because the owners, as part of their financial arrangements had assigned their rights to receive payment to a third party, the assignees. The charterer had a right of action against the shipowner for money had and received. There is no right however to trace moneys paid to an assignee. It would be wrong to make the assignee, who never intended to be under any obligation to the charterer, liable to the charterer to make repayment or supply consideration.

What hire is due if it is not agreed in advance?

Sometimes the rate of hire is calculated according to a standard scale such as the International Tanker Nominal Freight Scale. It is unusual for some formula for establishing the rate of hire to be omitted from the charter party. However, even presuming the courts will establish a quantum meruit the question still remains as to what other terms if any the court might be prepared to find are implied into the contract to protect one or both parties.

The correct course to take where the rate of hire has not been agreed was considered in **The Good Helmsman.**[5] A charter party commenced with an agreement that hire be established at a later date. Sometime later the ship owners needed to provide their bank with some figures and the charterers therefore provided a letter to the effect that hire was $4,600 US a day. The vessel was delayed in Port Sudan by congestion and because the authorities would not let her sail until a crewmember, who went off on a pilgrimage to Mecca had returned to the vessel. The charterer claimed the vessel was off hire and the owners sued for non-payment of hire. The court held that the letter was not an agreement to pay hire. It was a sham to fool the banks and established hire payable at the market rate.

Clauses allowing for adjustment of the rate of hire.

In times of economic uncertainty where inflation is rampant, or the demand for shipping is in flux and especially if the charter party is for a long period of time neither party may be willing to commit itself to a fixed rate of hire for the entire charter party. In such cases a formula may be included in the charter party to adjust the rate of hire. **The Brunsrode** [6] involved a clause in a charter party which provided that the hire could be increased or decreased if there is an alteration in the wages paid to the crew. In the event the court held that hire would be determined on the basis of the current rate of pay at the start of the month

There may be a clause to the effect that hire will be reduced if the vessel cannot accommodate all the goods intended to be shipped as demonstrated by **The Libyaville**.[7] In this case the daily hire of a roll on roll off ferry could be reduced by 1 1/2 % if the ferry could only carry 16 instead of 17 trailers. The charterer had underpaid on hire correctly making the 1~% deduction for the current but invalidly deducting previous months hire which he had lost the right to because of the notion of implied waiver since he had not protested at the time. The ship owner sought to withdraw the vessel but it was held he could not do so since

4 **Pan Ocean SS v Credit Corp** p36 Times 1.2.94.

5 **The Good Helmsman** [19811 1 Lloyds Rep 377. Per Waller L.J. at 409 and Watkins L.J. at 418.

6 **The Brunsrode** [1976] 1 Lloyds Rep 501

7 **The Libyaville** [1975] 1 Lloyds Rep 537.

there was an anti-technicality clause. He had to give 48 hours notice and give the charterer the opportunity to make good the shortfall.

A clause may provide that the amount of hire is to be adjusted if the vessel falls below or exceeds the performance guaranteed in respect of her speed or bunker consumption stated in the charter party as demonstrated by **The Larissa**.[8] The vessel was chartered under a Shell Time 3 charter party. The court held that the provisions were valid and sent a dispute about hire back to the arbitrator for fresh consideration. The vessel used less fuel so more hire was payable on that account, but did not go fast enough indicating a reduction in hire, so the arbitrator was asked to settle the matter.

It was held in **The Teno**[9] that where the charter party states that payment of hire is to be made without discount this means that there is to be no discount for early payment. Regarding other claims the charterer was entitled to a set off for off hire period and loss of freight when the master tried to make the charterers pay hire whilst the vessel underwent repairs to enable the vessel to load cargo. The charterers refused so the master set sail without loading the cargo. The charterer was entitled to a set off for damages for lost freight. However, the charterer had to pay the ship owner some outstanding disbursements.

Where hire is payable by reference to a table the details needed to calculate the hire must be provided to the charterer. Thus in **Kawasaki Kisen Kaisha v Bantham SS** [10]where the hire was payable in advance at so much per ton on the dead weight capacity of the vessel, there was an implied obligation on the ship owner to inform the charterer correctly as to the dead weight capacity. The charterer paid the first month's hire late because the ship owner did not provide him with the necessary details till two days after delivery. The charterer paid by cheque but the ship owner rejected the cheque and withdrew the vessel. The court held that the ship owner had no right to withdraw and was in breach of contract.

It was held in **The Lutetian** [11] that if on the due date for payment the vessel is off hire, the charterers obligation to make payment of the next monthly instalment of hire is suspended until immediately before the vessel is again at his service. The charter party provided that hire ceased to be payable if the vessel was dry-docked. The vessel was in dock from the 8th to 22nd of the month. The ship owner gave notice of return to service on the 18th. Funds placed at owner's disposal on the 21st. The owner withdrew the vessel on the 24th. The court held that notice of withdrawal could not be given till the 22nd and withdrawal not permitted till 24th. The ship owners also disputed the amount of deductions made but had not made this clear at the time of giving notice. Ship owners in default.

Calculation of estimates and deductions for interim awards by arbiters is discussed in **The Kostas Melas**.[12] Where a charter party confers on the charterers an express right to deduct certain items from the hire, for example, in respect of the value of bunkers remaining on board at redelivery or in respect of disbursements incurred by the charterers for the ship owner's account, the amount to be deducted can only be an estimated sum. An estimate can, of course only be justified, if it can be shown to have been made in good faith and on reasonable grounds. Also, by virtue of the principle of equitable set off a charterer may set off certain claims against hire, even where the contract does not expressly give him the right to do so. In the event the court upheld the arbiters interim award of $100~000 which had been deducted from sub-freight by the ship owners. There was nothing to indicate that the arbiters had acted unfairly since the terms of appointment of the arbiters permitted an unreasoned award. This award was therefore final and binding.

The right of set off does not apply to all claims by a charterer against the ship owner. In **The Nanfri. Benfri & Lorfri** [13] the court confirmed that were a ship owner wrongly and in breach of the contract deprives the charterer for a time of the use of the vessel, the charterer can deduct a sum equivalent to the hire for the time so lost. However, this right to deduct does not extend to other breaches or default of the ship owner such as damage to cargo arising from the negligence of the crew. The charter of the three vessels gave the ship

8 **The Larissa** [1983] 2 Lloyds Rep 325.
9 **The Teno** [1977] 2 Lloyds Rep 289.
10 **Kawasaki Kisen Kaisha v Bantham SS** (1938) 2 K.B. 790.
11 **The Lutetian** [1982] 2 Lloyds Rep 140.
12 **The Kostas Melas** [1981] 1 Lloyds Rep 140.
13 **The Nanfri. Benfri & Lorfri** [1978] 2 Lloyds Rep 132.

owner the right to a lien over cargo for unpaid hire. It also provided for off hire and deductions from advance monthly hire payments for defective machinery and loss of speed. The charterer made deductions, which the owners disputed, and these were referred for arbitration. The owner then instructed the master not to accept pre-paid bills of lading. This was not acceptable to sub-charterers and so the charterer treated the orders as a repudiatory breach, returned the vessels and made deductions on hire for early delivery. The court confirmed that the charterer was entitled to end the charters and to make and equitable set off.

A charterparty can provide for interest on late payment of hire. However, as indicated by **The President of India v La Pintada Navigation** [14] in the absence of agreement between the ship owner and the charterer, no interest is payable except by order of the court following judgement. If the hire is paid late but without court proceedings no interest is normally payable, but the ship owner may be entitled to special damages if he can show that he has had to pay interest on an overdraft as a result of the charterer's late payment of hire even though the amount is paid before the commencement of proceedings for its recovery.

The Mareva Injunction [15] was established in equity in **Mareva Compania v International Bulkcarriers**.[16] Where hire remains unpaid, the court may grant an ex parte application by the ship owners for an interim injunction to restrain the charterers from removing any of their assets out of the jurisdiction.

In **The Pina** [17] a ship owner and charterer had carried out business for some time. A broker renegotiated terms of a charter party and sent them to the ship owner for signing but he never signed them. The ship owner latter claimed additional hire charges on the basis of the new terms because the vessel over performed. The court held that an agreement to agree is not a contract. The parties had continued their business relations on the basis of a series of negotiations which did not include an adjustment of hire clause which could not therefore be subsequently imported into the contract.

The Trident Beauty.[18] A charterer cannot reclaim unearned hire back from an assignee of the ship owner. The charterer's sole claim lies against the ship owner himself. Money cannot be traced.

The Payment of hire.

The standard payment of hire (sometimes called freight) clauses contains provisions such the following : Payment *"In cash ... every 30 days in advance ... and in default of payment the ship owners have the right to withdraw the vessel from the charterer's service."*

The Anti-technicality Clause.

Baltime Clause 1939. *"If hire is not received when due - the owner is to give the charterers 48 hours notice in order to rectify the cause for delay before exercising their right to withdraw."*

The Meaning of Cash.

The word cash does not mean coins and notes. It refers rather to the immediate use of money by the shipowner and can be achieved by payment by cheque provided the cheque clears by the given date of payment[1] electronic transfers of funds, direct debits, standing orders and credit transfers.

The meaning of cash was considered in **The Chikuma.**[19]

21st Jan Charterer instructed bank to pay the ship owner.

22nd Jan The Hire was due for payment. The bank credited the sum due to the ship owner's account by irrevocable credit.

23rd Jan Owner instructed bank not to accept the funds because banking practice would deprive the owner of interest on the money until the

26th Jan Money returned to issuing bank.

24th Jan The ship owners withdrew the vessel.

26th Jan The issue revolved around standard banking practice and the time required to clear the cheque through the account.

14 **The President of India v La Pintada Navigation** [1984] 3 All E.R. 773

15 now called "a freezing order" by the Civil Procedure Rules 1998

16 **Mareva Compania v International Bulkcarriers** [1975] 2 Lloyds Rep 509.

17 **The Pina** [1992] 2 Lloyds Rep 103

18 **The Trident Beauty Pan Ocean v Creditcorp** [1993] 1 Lloyds Rep 443.

19 **The Chikuma** [1981] 1 Lloyd's Rep 371 H.L.

The Charterers claimed damages for wrongful withdrawal. The House of Lords held that the ship owner had the right to withdraw, since the payment was not liquid on the 22nd and did not provide interest. Payment must be in cash or its equivalent. The contract required that the ship owner "Must have unconditional right to the immediate use of the funds the charterer's claim failed.

Compare this with the situation where there has been a history of payments by cheque. **The Tanker Express**[20] shows that in such situations, one cannot immediately withdraw the vessel without first giving notice of on intention to do so unless a cash or equivalent is tendered, thus making it clear that the prior tolerance of payment by cheque is to come to an end. Effectively, this is a form of estoppel.

Similarly in **The Effy** [21] due to bank irregularities payment was habitually made several days late. The ship owner warned the charterer that this would no longer be tolerated and the charterer in turn warned his bank not to make any more mistakes. The bank made yet another late payment and the owner gave notice of withdrawal. The court had to decide whether or not the variation of contract to permit late payment had taken place and whether or not that variation had been revoked.

The Right of Withdrawral

In appropriate circumstances a ship owner can withdraw a vessel from service and escape the charter party if the hire is not paid on time by the charterer. This is an important topic since it has wide ranging effects on the parties.

Exercise of the right to withdraw the vessel by the ship owner will depend normally on economic issues. The shipping industry is a very volatile market and can go from extremes of depression to high demand in a very short time. During a trade slump when large numbers of vessels are tied up idle at the quays vessels can be hired at very low rates since while a vessel is at sea the ship owner does not have to pay any dock charges. If the demand for shipping rises the ship owner will use any excuse to escape from a charter party that has been negotiated during the slump period. **The Laconia** [22] is the leading case on this topic.

The courts have gradually developed the law in this area. An important case used to be **The Georgios C** [23] but it has now been overruled.

3rd Oct	Payment was due but the banks were shut. It was a Saturday. The ship owner ordered the bank not to accept late payment.
5th Oct	The charterer's attempted to pay at 2:50 pm.
5th Oct	At 5:45 p.m. the ship owners withdrew the vessel.
13th Oct	The ship owners rechartered the vessel to a 3rd party

The Charterers applied for an injunction to prevent the vessel being rechartered. The questions therefore were *'Did the ship owner have a right to withdraw?'* and *'Were the charterers in default of payment?'* The court held that the hire was not paid by the 3rd and thus the charterer was in default and so long as the default continued the ship owner was permitted to withdraw. However, the charterer had tendered payment on the 5th October and thus the default had been remedied. Therefore the withdrawal was too late. It must be stressed that this case has since been overruled by **The Laconia**.

The Brimness.[24] The hire clause in the charter party read as follows 'Failing the punctual and regular payment of hire the ship owner will be entitled to withdraw'. The court held that the right to withdraw the vessel for failing the punctual and regular payment cannot be defeated by a late tender of hire. Note that the decision turned on the strict wording of the clause.

The Laconia.

12th April	Sunday : The Hire was due for payment.
13th April	Monday : The charterers paid the hire.
14th April	The ship owner directed the bank to return the money and at 18:55 p.m. The ship owner informed the charterers of withdrawal.

20 **The Tanker Express** [1949] A.C. 76
21 **Zim Israel : The Effy** [1972] 1 Lloyds Rep 18
22 **The Laconia** [1977] 1 Lloyds Rep 315 H.L.
23 **The Georgios C** [1971] 1 Lloyds Rep 7. C.A.
24 **The Brimness** [1972] 2 Lloyds Rep 465.

The court held that once a punctual payment of an instalment has not been made a right of withdrawal accrued to the owners. The clause required 'Payment of hire, in advance, and failing punctual and regular payment the ship owner can withdraw."

Wilberforce: The word advance is important, and thus it should have been paid by Friday the 10th. The requirement of punctuality is strict.

Fraser: The ship owner cannot be deprived of the right of withdrawal by the tender of an unpunctual payment. Once the charterer had failed to pay in advance nothing could be done to remedy the breach : p320 ibid.

Much play was made in **The Laconia** of the differing language used by the clauses in earlier cases. Thus in **The Georgios** the hire clause used the words 'in default of payment'. **The Brimness** talked of 'Punctual and regular payment'. The Laconia used the words 'In advance and punctual and regular payment'. Salmon J however stated that the words made no difference. **The Georgios C** was wrong. Was this statement obiter dicta? [25] The question therefore *is 'If a **Georgios C** type case occurs again what would the result be?'*

The Mihalios Xilas.[26] Clause 39 regarding the payment of hire stated that each month's hire should be paid in advance except for the final month's hire when items of the owners liability could be deducted up to the expected redelivery time. On the 13th March the 9th month's hire was due for payment within 7 working days, that is to say the 21st March. The Charterers deducted $31,000, which represented an underpayment, and on the 26th March the Ship owner withdrew the vessel.

The Off Hire Clause

In a time charter party the period of time when the vessel is effectively at the disposal of the charterer is of the essence since he is paying a specific period of time as opposed to a purpose such as a voyage. If, for some reason or another under the control or responsibility of the ship owner, the vessel is not available for use the time charterer does not have to pay hire. The usual practice is not, as in a football match, to have 'injury time' when the clock stops running, but rather to exempt the time charterer from payment of hire. The ship owner will often have negotiated the next charter party. If he does not deliver up the vessel to the next charterer he looses money and is liable for breach of contract. He is better off loosing a bit of money in hire than in extending the period of the charter party to make up for the time lost when the vessel is 'Off Hire'.

The General Rule is that Hire is payable unless it falls within one of the following situations.

1). It is covered by an 'Off Hire' Clause
2). The charter party has been frustrated or
3). There has been a breach by the ship owner of his contractual duties. In any of these cases no hire is payable.

In a standard form charter party, the 'Off Hire Clause' will enumerate the circumstances when hire is not payable, for example the New York Product Exchange (N.Y.P.E.) Form.

The question arises, *'In what circumstances will the vessel be Off Hire?'* The following topics have received judicial attention as to what is covered by the 'Off Hire Clause'

"Deficiency of men"

Beatson v Schank.[27] The Ship was unable to proceed. There had been a Small pox epidemic and the ship owner couldn't replace the crew resulting in a deficiency of men.

Radcliffe v Compania General [1918] Com Cas 40 35 T.L.R. 65 During the 1st world war the navy detained the ship until she was fitted with guns and provided with gunners to fire them. It was held that sufficiency of crew did not extend to the provision of military escorts. The vessel was not deficient of crew and no deduction could be made under off hire provisions for the time lost waiting for the military to arrive.

25 see page 323.
26 **The Mihalios Xilas** [1979] 2 Lloyds Rep 303.
27 **Beatson v Schank** (1803) East 233. 102 E.R. 567.

The Llissos.[28] The crew went on strike. This resulted in a numerical deficiency of men prepared to carry out their duties, not in an actual deficiency of men, and so hire was still payable but compare this with the situation where crew members go absent without leave (A.W.O.L.) or desert which creates an actual deficiency of men.

"Breakdown of machinery"

Giertsen v Turnbull.[29] The vessel suffered mechanical problems on the 14th of Nov but up to the 1st Dec she was still able to proceed. However by the 1st of December the problems got so bad that the vessel unable to continue. It was held that *'Break down of machinery'* equals a ***'patent breakdown'*** only and so the charterer was only exempt from paying hire from the 1st Dec.

"Or Other Accident" : The Eiusdem Generis Rule.

Cosmos Bulk Transport v China.[30] The bottom of the ship was covered in barnicles and so the vessel's speed was reduced. Was hire payable ? The court held that this fell into the category of *"other accidents"*. The phrase 'other accidents' was not subject to the ejusdem generis rule covering lists of things of a like kind. The relevant occurrences covered by the phrase do not have to be same sort of mechanical breakdown.

Adelaide S.S.Co v R [31] "*or other cause*." This is covered by the Ejusdem generis. However, the collision was covered by *'machinery, deficiency, and damage to hull'* in anycase.

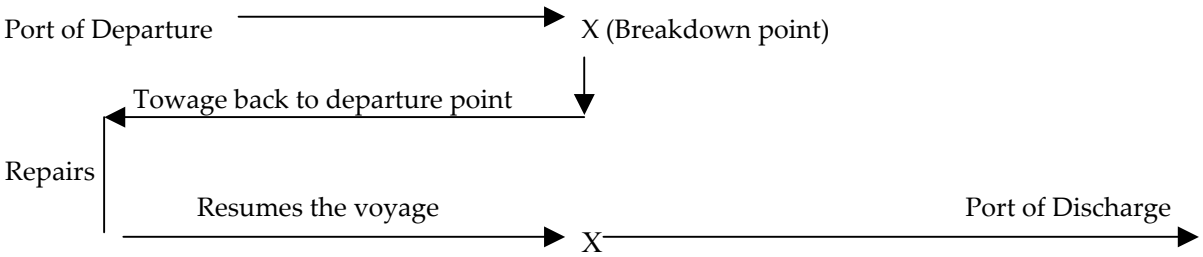
The Apollo.[32] "*or any other cause whatsoever preventing the full working of the vessel"*. The Port authorities declared a typhus epidemic. The Ship was refused a clean bill of health by harbour authorities thus causing delay. It was held that no hire was due. The term *'Whatsoever'* excluded the ejusdem generis rule. Compare the use of the word *'whatever'* with the use of *'whatsoever'* in the deviation cases, which takes on board the concept of commercial considerations.

Preventing the working of the vessel.

Hogarth v Miller.[33] Hire ceases although only a partial interference with the working of the vessel occurs which amounted to a mere hinderance.

Tynesdale SS v Anglo-Soviet SS. [34] The vessel was only partially off hire.

Vogemann v Zanzibar S.S. [35] The charter party stated that the Vessel was to be regarded as off hire 'until she be again in an efficient state to resume her service. When did hire recommence ? The charterer claims the relevant time is on the return to breakdown point Y where as the ship owner claims the relevant time is from the time of repair at X : The court held that the ship owner's view prevailed.



Macmillan.[36] One can have any type of 'Off hire clause' : In the event of a break down of "Munck" cranes by reason of disablement hire to be reduced pro rata for the period of such inefficiency. Munck cranes are small cranes fitted to a vessel for loading and discharging its cargo.

28 **Royal Greek Government Nol v Ministry of Transport : The Llissos** [1949] 1 K.B. 525..
29 **Giertsen v Turnbull** [1908] 16 S.L.T. 250 C.1800.
30 **Cosmos Bulk Transport v China** [1978] 1 Lloyds Rep 52.
31 **Adelaide S.S.Co v R** [1923] 29 Corn Cas 165/169 : A.C. 292.
32 **The Apollo** [1978] 1 Lloyds Rep 206.
33 **Hogarth v Miller** [1891] A.C.48.
34 **Tynesdale SS v Anglo-Soviet SS**. [1936] 41 Corn Cas 206 1 All E.R. 389 54 Lloyds Rep 341.
35 **Vogemann v Zanzibar S.S. [**1902] 6 Corn Cas 253 : 7 Corn Cas 254.
36 **Macmillan : Canadian Pacific** [1974] 1 Lloyds Rep 311.

Smailes v Evans.[37] Cessation of hire clause till vessel resumes efficient working. The vessel loaded a portion of her cargo. While going from one loading station to another the vessel grounded. Part of cargo was unloaded and vessel freed. The vessel was seriously damaged. The rest of cargo had to be unloaded and ship went to a port of refuge for repairs. The repairs were completed on the 18th October. By the 30th October all the portions of cargo had been reloaded. The charterer claimed hire ceased till the 30th October. The court held that hire ceased only till the vessel became efficient again, that is to say the 18th October.

The Houda.[38] The vessel was operating in the Gulf under charter to a Kuwaiti company. Following the Iraqi invasion the charterers moved their operation to London offices and issued orders for employment of The Houda from London. The ship owner was not prepared initially to accept that the charterer had authority from his London office to give such orders and refused to comply with the orders for 36 days. The charterer eventually sought an injunction to force the ship owner to comply. The court held that the vessel was off hire during period of refusal and further held that damages were payable by the ship owner to the charterer for refusal to obey lawful orders.

The Maria [39] involved a Hire Claim by the ship owner against the charterer for non payment of hire. The charterer made a sealed offer of $15k to an arbitrator but the ship owner rejected the offer : The ship owner was awarded $16.2K but ordered to pay post offer costs. The court held that a sealed offer is the equivalent to a payment into court. If the ship owner had been awarded $15k or less then he would have been liable for all costs - since the ship owner was awarded substantially more costs followed the successful claim and the charterer liable for all costs.

Aditya Vaibhav [40] concerned the Shelltime 3 off hire. Clause 10 required the master to render all reasonable assistance with crew & equipment. Clause 21 stated that off hire provisions included time lost due to breach of orders or neglect of duty by mast or crew or inefficiency of vessel. Clause 53 stated that in respect of cleaning by the crew the charterer was to supply and pay for chemicals.

On the first voyage the vessel loaded palmoline. The vessel was due to load lube oil for the second voyage. However, the cargo's shippers rejected the vessel claiming the vessel uncargoworthy in that it had been improperly cleaned and traces of the last cargo had been left behind. The sub-charterer revoked the sub-charter party. The vessel embarked on fresh voyage from a different port with caustic soda

The charterer claimed the vessel was off hire till the soda was loaded since there had been a failure of crew to co-operate to clean vessel : the cleaning machine was inefficient and this had rendered the vessel uncargoworthy The court held that there had been a failure on the facts to establish that the vessel was uncargoworthy since the hard coating left on the hull could not be removed by ordinary cleaning and represented no danger to the new cargo. Hence, the vessel was always on hire.

The Berge Sund [41] discusses an off hire clause in respect of events *'.. preventing efficient working of vessel for more than 24 consecutive hours ..'* The hold of the vessel had to be cleaned. This took from 20 Dec to 9 Jan. The ship owner claimed this was due to an order of the charterer to load a particular cargo and by virtue of the Employment and Indemnity Clause the charterer had to reimburse the ship owner for all consequences of following charterer's orders The court held that ten months of similar cargoes had not caused a need to clean hull, so the cleaning was not a consequence of carrying a particular cargo and not therefore an order of the charterer. A vessel that cannot carry cargo because hold needs cleaning is not in efficient state : Therefore the vessel was off hire whilst being cleaned.

37 **Smailes v Evans** [1917] 2 K.B. 54. Confirmed the rule in **The Voguemann**.
38 **The Houda** [1993] 1 Lloyds Rep 333.
39 **The Maria** [1993] 2 Lloyds Rep 168
40 **Aditya Vaibhav** [1993] 1 Lloyds Rep 63
41 **The Berge Sund** (1992) 1 LR 460

CHAPTER NINE

Employment and Indemnity Clauses

There are two types of E & I Clauses : Express & Implied.

Express Employment & Indemnity Clauses.

The E & I Clause is a method of protecting the ship owner from certain types of loss which he might suffer when his vessel is on hire to a charterer under a charter party. The E & I Clause is an indemnity clause so that the charterer promises to indemnify the ship owner for certain types of loss.

The Standard Form E & I Clause : The *"Captain, though appointed by the owner, shall be under the orders and directions of the charterer as regards employment, agency and other arrangements and the charterer hearby agrees to indemnify the owners for all the consequences or liabilities that may arise from the master signing bills by the orders of the charterer or his agents or otherwise complying with such orders or directions."*

Two main issues arise under E & I Clauses

1). The signing of bills of lading by order of the Charterer.

2). It only covers orders relating to employment & agency and other allied arrangements but does not encompass every order so issued. When a bill of lading is signed the ship owner is the principal person to whom liability attaches and so he needs to be able to reclaim any monies paid out, for claims that result from such signing of a Bill of Lading, from the Charterer.

Signing Bills of Lading.

Milburn v Jamaica Fruit.[42] The Ship's Master signed a Bill of Lading. A clause was missing. There should have been a clause exempting the ship owner from liability for negligence of the crew. An E & I clause in the charter party stated that the clause should have been inserted in the Bill of Lading by the Charterer. Thus, the ship owner was liable to the seller / shipper since the omission of the exclusion clause meant that he could not avoid the liability. The court held that the charterer must indemnify the ship owner.

Employment of the ship.

These are concerned with orders relating to the navigation of the ship. Cross reference this topic with later notes on safe ports.

Limerick v Stott.[43] Clause 9 in the charter party was the usual Employment and Indemnity Clause. Clause 16 was a Safe Port Clause and stated that the steamer should not be ordered to any ice bound port. The charterer ordered the ship to Abo in Finland. The port was normally kept open by ice breakers. The vessel was delayed and damaged by ice and later had to be released by an icebreaker. The captain had tried to force the ice with his own vessel. The ship owner sued the charterer for breach of the charter party in that he had ordered the ship to an ice bound port where she had to force ice. The C.A. found as a fact that Abo was not an ice bound port. It was in reality a safe port. The ship was not 'obliged' to force the ice. All the captain had had to do was to wait for the arrival of an ice breaker and to follow the icebreaker into port. The charterer was not liable under the E & I Clause.

Larrinaga v R.[44] The term *'Employment'* means *'Employment of the ship'*. The Master was asked by the charterer to sail as soon as the cargo had been unloaded. There was a lot of bad weather about so the master protested that it was unsafe to sail but never the less sailed as per instruction. The vessel was stranded. Porter L stated that "An order to sail from Port A to Port B is in common parlance an order as to employment - but an order that a ship set sail at a particular time is not."

The Anastasia.[45] The charter party stated that *' ... The Captain .... shall be under the orders and directions of the charterers as regards employment and agency ... '* The charterers complained that the master had not complied with their instructions immediately on receipt and argued that this was a breach of the charter party obligation. On the 12th after sailing the Master was ordered to return to the port from which he had just sailed. Initially the master refused to follow the order deeming that it came such a long time after sailing that it would be unwise to turn around and return to the port. The order was repeated on the 13th day and

42 **Milburn v Jamaica Fruit** (1900) 2 Q.B. 540. C.A.

43 **Limerick v Stott** (1921) 2 K.B. 613.

44 **Larrinaga v R** (1945) A.C. 246 H.L.

45 **The Anastasia : Mid-West SS v Henry** (1971) 1 Lloyds Rep 375 Q.B.D. C.678.

each day thereafter until on the 19th the master relented and turned back. The question that had to be answered by the court was *'Did the master act reasonably in disregarding the earlier instructions ?'* The court held that the master was a man of experience. He is his own man. He must not be brow beaten by charterers. The ship's master is *"a man not a mouse."*

Causal Connection and E & I

The ship owner must establish a causal connection before he can rely on an E & I Clause and so pass liability on to the charterer for loss. The ship owner must show that the loss which he wants to pass on to the charterer resulted from obedience to an order given to the master by the charterer.

The White Rose.[46] A Ship was ordered to load a cargo at Duluth in Minnesota. The charter party contained the usual Employment and Indemnity Clause. A stevedore fell through a hatch. Ship owner sought to avail himself of the E & I clause. The court held that there was no causal connection. The accident was not caused by the ship owners complying with the orders of the charterer and so the Employment and Indemnity clause did not protect the ship owner.

Royal Greek Government v Ministry of Transport No2.[47] Ship ordered by charterer to load a cargo of coal. Coal Gas escaped from the coal into the hold. A spark from a crewman carrying out welding repairs caused an explosion. The court held that the loss was not proximate to the charterer's act of ordering the loading of the coal. It was caused by the blow torch. There was no causal connection. The charterer was not therefore liable under the P & I Clause.

Implied Terms in respect of orders of Employment of the Vessel

Indemnity may be implied in certain circumstances by the common law in the absence of an express E & I Clause.[48] In a time charter party there is an implied indemnity clause to protect the ship owner in circumstances where the charterer instructs the master to give cargo to a 3rd party without a bill of lading. The Ship owner had to compensate the owner of the bill of lading for the loss of his goods. The court held that the charterer had to indemnify the shipowner since the master had followed the charterer's instructions.

Kruger v Model Tryvan Ship Co.[49] A charter party clause required the master to sign clean bills of lading for his cargo at any rate of freight without prejudice to the charter party's terms and conditions. It was held that this did not entitle the charterers to require the master to sign a bill of lading, which did not incorporate the negligence clause contained in the charter party.

However, if the charterer does give such an instruction and the master follows that instruction then the master exceeds his actual authority. Nonetheless, the ship owners, are bound by such terms of the bill of lading irrespective of the terms of the charter party. Owing to the negligence of the master the ship & cargo were lost. The court held that the charterers were liable to indemnify the ship owner for liability on the bill of lading since the charterer's were in breach of the charter party agreement. [50]

Elder Dempster v Dunn.[51] This concerned a cargo of cotton bales. The mate tallied the number of bales, but kept no tally of the identification marks on the bales. The Bill of Lading stated the correct number of bales on it but incorrectly stated the identification marks of the bales. Under French Law the Bill of Lading is treated as conclusive evidence as to the number and identification of bales and consequently on unloading in France the indorsee of the Bill of Lading would only accept the bales with the correct identification marks. Thus there was a short fall in the number of bales delivered on presentation of the Bill of Lading. The indorsee successfully claimed off the ship owner for short delivery. The Court of Appeal held that the charterer must indemnify the ship owner. The House of Lords affirmed the C.A's decision on the basis that under the charter party the charterers were responsible for loading and checking marks.

46 **The White Rose**. (1969) 2 Lloyds Rep 52

47 **Royal Greek Government v Ministry of Transport No2** [19491 66 T.L.R. 504 : 83 Lloyds Rep 228.

48 See **Strathlorne SS v Weir** (1935) 40 Corn Cas 168.

49 **Kruger v Model Tryvan Ship Co** [1907] A.C. 272.

50 Similarly see **Milburn v Jamaica** (1900) 2 0.B. 540.

51 **Elder Dempster v Dunn [1909]** 15 Corn Cas 49. H.L.

CHAPTER NINE

The Safe Ports E & I Clause.

A Safe Port clause is a clause requiring that any port nominated by the charterer must provide a safe haven for the vessel and not expose it to dangers from wind, weather, war, ice, etc and must be large enough for the vessel to approach and depart from in safety. If the port is not safe and the vessel incurs damage then the charterer must indemnify the ship owner for any resultant losses.

The traditional Safe Port Clause is exemplified by Clause 2 in the Baltime Standard Form Charter party. *"The vessel to be employed between good and safe ports and places where she can safely lye always afloat."*

Some Charter parties nominate the port itself but in the absence of a nominated port a good safe port is always implied by common law.

One should bear in mind whenever discussing Safe Port Clauses that this is a two stage process. First one must establish

a). Is there a breach of the implied condition that the charterer must nominate a safe clause ? and then discuss

b) the effects of the breach of the safe port clause, the causation issue, that is to say damages for the consequences of sailing to an unsafe port and the master's right to refuse to enter an unsafe port.

There are three types of safety – with an additional rider to consider

i). Meteorologically safe ports.

ii). Physically safe ports.

iii). Politically safe ports. Plus one must also discuss an added element , namely

iv). What if the danger is only temporary?

Issues regarding safe ports

1). Meaning of safe port.

2). When must the port be safe ?

   a). Primary obligations.

   b). Secondary obligations.

3). Effect of ordering a ship to an unsafe port.

4). Effect of the clause "or so near there to as she can safely get."

Meaning of safe port.

The General Rule is that the vessel must be able to reach the port, use the port and return from the port without being exposed to danger.

Meteorologically safe.

What does it mean to say that the port must be meteorologically safe ?

The Dagmar.[52] The Ship Owner claimed that his vessel was damage when wind & swell increased while the vessel was at the port nominated by the charterer. The Port was physically safe for the vessel but the pier gave no protection against Northerly winds. There were no means of communications to warn of approach of bad weather and therefore captain not warned of the impending change in the weather and so could not take evasive action. The court held that The Dagmar was unsafe unless the captain could be warned. Per Mocatta J : The hazard lay in the weather forecasting system.

The meaning of Physically safe

This refers to the safety of the vessel on entering and leaving port. Entering includes dangers en route to the port from wrecks and ice and other hidden dangers such as narrow channels, shifting mud banks etc.

In **The Carnival** [53] the vessel was damaged by a fender on the side of dock due to the swell of a passing vessel at Ravenna. The port was unsafe and the charterer had to pay damages. How serious must an obstruction to a port be to render the port unsafe ? If an obstruction to the entry to a port caused delay to the extent that the mercantile adventure is frustrated then the port is regarded as being unsafe. However, if the delay is merely commercially unacceptable then the port is not to be regarded as unsafe. [54]

52 **The Dagmar : Tage v Montoro SS.** [1968] 2 Lloyds Rep 563.

53 **The Carnival** [1992] 1 Lloyds Rep 449 :

54 **The Hermine : Unitramp v Garnac** [1979] 1 Lloyds Rep 212 C.A.

The port must be such as to enable the vessel to remain afloat at all times and the vessel must be able to leave the port without requiring modifications to its structure. **Limerick v Stott (No 1).**[55] The nominated port was an ice bound port. The Ship's masts had to be cut off to allow the ship to enter a canal off the Elbe. The court held that the port was not safe for that particular vessel.

The Eastern City.[56] This concerned a voyage charter party. Note that where under a voyage charter party the charterer has the right to nominate ports during the course of the charter party, rather than at the outset, the duty to nominate a safe port is exactly the same as that under a time charter party. The court held that Mogador, in Morocco, was an unsafe port for loading on account of the lack of reliable holding ground in the anchorage area. The anchorage area is a section of the sea some distance from the port where vessels cast anchor until it is time to enter the port. The holding area refers to an area of the anchorage where an anchor can take sufficient grip on the seabed to prevent the ship being swept away by wind and currents. A rocky sea bed rather than a sandy sea bed is required to provide a good holding ground. The lack of shelter at Mogador and the liability of the area to the sudden onset of high wind which could not be predicted and which might quickly cause an anchor to drag endangered the ship because of the close proximity to rocks and shallows. Seller LJ.stated that *"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."*

Causation - Novus Actus Interveniens (intervening act) and obedience to improper orders.
As was seen in **The Anastasia,** the captain is a man not a mouse. He not only has the power to, but indeed must ignore orders of the charterer to go to a obviously unsafe port which would clearly endanger the vessel. Obedience to an order which does not obviously threaten the vessel are permitted. If the vessel is ordered to a port which could reasonably be presumed to be safe by the master then if the port turns out to be unsafe the shipowner can rely on the Implied Indemnity Clause. However, if it was clear that the port was unsafe and the master still obeyed the order then this would amount to a Novus Actus Interveniens by the master and the shipowner could not rely on the clause.

Grace v General S.N. Co.[57] The Time Charter party contained a Safe ports clause for the vessel to visit the Elbe, the U.K. and Brest. The vessel was ordered to Hamburg and had to sail up the Elbe to reach it. The Elbe was obstructed by ice but the Master complied with the order. The Ship was damaged by ice. It was held by Devlin J that the Port was not safe. There was a breach of the charter party by the charterer in sending her there. The charterer was liable unless the act of the master amounted to a novus actus interveniens. In this case the obedience to the order was reasonable. The captain did nothing blameworthy and so the charterer was liable.

The Hermine. What is the test to establish whether or not a port is safe for leaving ? The court held that the port is not unsafe for leaving even though the port cannot be left without unreasonable delay unless that delay is sufficient to frustrate the contract. The same test applies to ports of loading and ports of discharge and also to entry to and from such ports. The case involved a Baltime Charter party. The Hermine was required to proceed to safe berths in the U.S. Gulf port of Destrehan at the Ama Myrtle Grove Reserve1 New Orleans. The Port was nominated on December 27th 1973. Destrehan lies 140 miles up the Mississippi and involves a voyage up the Southwest Pass a scoured & dredged river channel. The normal sailing time was between 10 - 12 hours. The Hermine was delayed from the 27th 3anuary 1974 - 5th March because of fog and congestion in the channel due to the grounding of another vessel blocking the channel. The Hermine not damaged. The Baltic Arbiters found that Destrehan was a safe port. The ship owners appealed. Roskill LJ said *"Now it was common ground before the arbiters in the present case that there was no such frustrating delay. Accordingly if the requisite test was of a delay which would frustrate the adventure the ship owners must fail ... I would therefore ... uphold the award of the arbiters."*

55 **Limerick v Stott (No 1)** [1921] 1 K.B. 568.
56 **Leeds Shipping v Bunge : The Eastern City** [1958] 2 Lloyds Rep 127.
57 **Grace v General S.N. Co** [1950] 2 K.B. 383 : 83 Lloyds Rep 297.

CHAPTER NINE

The ship to remain always afloat

The Alhambra.[58] There was a general custom that ships entering Lowestoft harbour would lye to in the Lowestoft Roads and there be discharged of a quantity of cargo before entering the port, which was too shallow for larger ships when fully loaded. The charter party allowed for ships to be ordered to ports. This implied that such ports be safe. The captain refused to go to Lowestoft on the ground that it was too shallow and therefore not a safe port. The charterer claimed the order was to be understood as Lowestoft Roads (thus the ship would be partially unloaded and thus the port would no longer be unsafe). The court held that under the charter party the order had to mean the port not the roads. The port was unsafe and so the captain was entitled to refuse. Thus a safe port must be one where the ship can unload without grounding.

Politically safe and threats of war and aggression.

Palace S.S. v Ganz.[59] The dangers on a voyage to a port must be taken into account. It is a question of degree as to whether or not a port is politically unsafe. The vessel was ordered to sail from Le Havre to Newcastle upon Tyne. The German government declared that all merchant shipping hostile to Germany around U.K. waters would be destroyed. It was held that this could be taken into account, but in the event, Newcastle was not an unsafe port. There is a right not to be bombarded. The problem with the case it that the British Courts were prepared to find that U.K. ports were safe even though the U.K. was at war, since from a public interest point of view if U.K. ports were unsafe then no vessel would sail to the U.K. in time of war. However, would the courts take this view regarding other countries?

Primary and Secondary Obligations regarding Safe Ports

When a vessel is ordered to a port there are two obligations, a primary and a secondary obligation that must be satisfied safe.

The Primary obligation.

A useful starting point on this issue is **The Tentonia.**[60] However, a caveat must be entered at this stage and you are invited to consider whether or not this case would be decided the same way again if it were to arise again in the light of **The Evia** and **The Lucille**. The Tentonia was ordered to Dunkirk. When the order was made the port was safe. War broke out after the order was given and the vessel was subsequently diverted to Dover. The question was *'Was it a justifiable deviation?'* It was held that there was no breach in ordering the ship to Dunkirk since the port was safe at the time of the order.

When must the port be safe?

The moment when the order is given the port must be prospectively safe, that is to say that it was reasonably anticipated that the port would be safe at the time when she actually arrives there and so the charterer must look ahead. If the port is prospectively safe at the time of nomination the charterers will not be liable. If when the ship arrives the port becomes unsafe because of unexpected and abnormal events the charterer will not be liable for such unexpected and abnormal events but nonetheless the law of secondary obligations may still have to be considered.

The Secondary Obligation

The secondary obligation is to countermand a previous order in certain circumstances when it becomes clear at a later stage that the port is, despite the earlier expectation3 in reality unsafe or no longer prospectively safe. Remember that the primary obligation was simply to nominate a safe port in the first place. The secondary obligation comes into play if whilst still preceding to that port, information is received that the port has become unsafe. There is a secondary obligation to countermand the original order. **The Concordia Fiord.**[61] The vessel was ordered to Beirut, in the Lebanon. It had been a safe port at the time of the order but since then the Port had became unsafe. There was in fact sufficient time for the charterer to nominate another port but he had failed to do so. Once the vessel has arrived, what happens if the vessel becomes trapped or it becomes clear that danger is imminent and that the vessel will become trapped unless

58 **The Alhambra** [1881] 6 P.D. 68: 1881-5 All E.R. 707.
59 **Palace S.S. v Ganz S.S. Lines** [1916] 1 K.B. 138.
60 **The Tentonia** [1872] L.R. 3 A & E 394 : L.R.4.P.C. 171 :
61 **The Concordia Fiord** [1984] 1 Lloyds Rep 385.

something is done quickly to get out of the port as quickly as possible? **The Evia No2**.[62] The vessel was ordered to use safe ports under Charter party. The Evia was ordered to Basrah. She arrived on the 20th August 1979 and took till the 22nd September to discharge. She was prevented from leaving due to the commencement of the Iran / Iraq War. The Ship Owner claimed damages from the charterers. The House of Lords held that Basrah was prospectively safe at the time of the nomination. However, there was a lack of safety at the port due to unexpected and abnormal events after arrival. Was there any point in making a secondary nomination ? The question is as to whether or not there was a possibility of leaving ! If yes, then there is a secondary obligation to make that nomination and leave. If No there is no point in such a nomination. Thus there was no duty to make a secondary nomination since by the time the danger was realised it was too late to do so.

What if the port is prospectively unsafe at the time of the nomination BUT in all human probability the obstacle will be removed before the ship arrives? The problem revolves around interpretation of the term 'All Human Probability'. This means that there must be a very high probability. This imposes a heavy onus of proof to be discharged by the charterer before the nomination is valid. In this context consider the problems where a ship is ordered to a port which at the time of the order is ice bound, but is expected to be free of ice when the vessel arrives. What if a cold snap returns and the port is ice bound again ? and contrast this with the requirement that "When the order is given that the port is prospectively safe for the ship to get to, stay at as necessary and leave."

In **The Lucille** [63] a vessel was ordered on the 21st 3uly to Constanza to load cement. She arrived at Basrah on the 25th August. She was waiting at Basrah because of congestion. She entered port on the 20th August and spent the time between the 21st Sept - 20th October unloading. On the 23rd October she was trapped. The Arbiter found that Basrah prospectively unsafe on the 20th September since there was evidently a war like situation developing. The Charterer broke his contractual obligation by nominating a port prospectively unsafe. The Court discussed unexpected and abnormal events. They are accumulative and conjunctive - not disjunctive. Thus an event may be abnormal but expected or unexpected but normal. Both are required for the Charterer to escape liability.

The Chemical Venture [64] involved the application of a Shell Time 3 safe port clause during the Iran/Irac War. The vessel ordered to Mina Al Ahmadi. The war spread from Karg Island into the Gulf shipping lanes. The captain initially refused to comply but changed his mind after the charterer agreed to pay $36,000 in war bonuses. The vessel was hit by an Iranian missile. It was held that since three vessels had been attacked in the preceding 11 days the charterer had failed to exercise due diligence in giving the order but that the ship owner had waived right to claim damages.

The Saga Cob [65] involved the Shell Time 3 Safe port clause which requires the charterer to exercise due diligence to ensure the vessel is only employed between and at safe ports -where she can lie always afloat - but charterer shall not be deemed to warrant the safety of any port and shall be under no liability in respect thereof save for loss or damage caused by their failure to exercise due diligence. The vessel was ordered to Massawa where it was attacked by Eritrean guerillas. The master was injured and the vessel sustained damage. The court held that the risk of seaborne attack at Massawa was minimal. One vessel had been attacked 3 months earlier but nothing had occurred before or since that event. Massawa prospectively safe at time of order and so the charterer was not liable under the clause.

The New Prosper [66] involved an fob contract for the sale of barley governed by a GAFTA standard form subject to AUSBAR terms. These stated that the vessel must comply with Australian Barley Board draft requirements. The vessel nominated could enter some but not all optional loading ports and so the nomination was rejected by the shipper. The court held that rejection was permitted. It was not a suitable vessel and in nominating an unsuitable vessel the buyer was in breach of the fob contract.

62 **The Evia No2** [1982] 2 Lloyds Rep 307 HL.
63 **The Lucille** [1984] 1 Lloyds Rep 250 C.A.
64 **The Chemical Venture** [1993] 1 Lloyds Rep 505 :
65 **The Saga Cob** [1992] 2 Lloyds Rep 545.
66 **The New Prosper** [1991] 2 Lloyds Rep 93

The Product Star No2 [67] concerned a Beepeetime charterparty. Interpretation and application of clause10 whereby Irac / Iran excluded ports : By virtue of clause 40 if the master / owner considers a port to be too dangerous a war risk he can refuse to accept the nomination. It is the duty of the charterer to nominate a substitute port of loading/discharge : clause 50 required the charterer to pay additional war risk premium : The vessel was ordered uneventfully to Rewia 4 times but the 5th time the master claimed it was too dangerous. When the ship owner refused to comply with the order the charterer refused to nominate a substitute port and claimed damages against the ship owner for repudiation of the charter party. The court held that clause 40 required a change of circumstance and an honest belief that Rewia had become too dangerous. On the evidence the position had changed. Clause 50 covered the ship owner for war risk premium so the ship owner had nothing to loose. The ship owner was in breach of contract. Damages were awarded for 2 refused voyages and for 6 months charter of an alternative vessel calculated as the difference between the charter party rate and the rate of the substitute vessel. An appeal in respect of the damages for the two lost voyages failed but the quantum of damages was reduced regarding the hiring of a substitute vessel.

In **The Kancheniunga** [68] the shipowner accepted an order to sail to Karg Island, a prospectively politically unsafe port. Having arrived there the master sailed without loading following an air raid warning. Shortly after the charter party contract fell apart. The charterer sued for breach of contract. The court held that the ship owner had waived his right to reject for breach of the contract due to nomination of an unsafe port but that another clause in the contract protected the ship owner from liability for actions of the master taken to avert danger. [69]

[67] **The Product Star No2** [1991] 2 Lloyds Rep 468

[68] **The Kancheniunga : Motor Oil Corinth v SS. Corp India** 19.2.90 Times

[69] Note that the master under **The Anastasia : Mid West SS v Henry** has a right to ignore charterer's instructions and protect the ship.

THE PERIOD OF TIME UNDER A TIME CHARTERPARTY

Introduction

We are concerned here with the global period available to the charterer under a time charter party and most particularly with mechanisms governing the proper time for the redelivery of the vessel and the allocation of liability for losses arising out of late redelivery. The charterer will seek to maximise the number of profitable adventures that he can engage in during the charter whilst the owner will seek to minimise the time lost between the return of the vessel and its handing over to a new charterer. Inevitably, despite the apparent simplicity of hiring a vessel for a specific period of time, the uncertainty inherent in maritime ventures results in tension between the charterer and ship owner at hand over time. A ship owner can find himself exposed to liability if he is unable to deliver a vessel to a charterer because the previous charter has over run its allocated time, whether that over run / over lap is intentional or not. Where this occurs the owner will, if possible, seek to recover any consequent losses.

Delivery and Commencement of the Period of "Hire"

Since the duration or global time scale for a time charter party is central to the question as to who pays for the consequences of an overrun or overlap and at what rate, it is important to determine the point of time from which computation of the charter party time scale commences. The requirements for the effective delivery of a vessel have been discussed elsewhere. [70] Assuming these have all been complied with delivery is complete when the ship and her crew are placed at the disposal of the charterers at the place stipulated and time starts to run from that point of time. [71]

In **The Madeleine,**[72] it was stated that *"An owner delivers a ship to a time charterer under this [Baltime] Charter party by placing her at the charterers' disposal and by placing the services of her master, officers and crew at the charterer's 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."* A failure to deliver on time may result in time not commencing and the charter party being terminated, though the charterer can choose to waive the breach, continue with the charter and reserve the right to damages, through protest, to cover any losses arising out of the late delivery. The right to terminate the charter party for late delivery of the vessel may be implied at common law and is expressly provided for in charters which stipulate a final date of delivery coupled with a cancellation clause.

LINERTIME Clause 2 : Cancelling Clause : "*Should the Vessel not be delivered by the date indicated in Box 19, The charterers to have the option of cancelling. If the vessel cannot be delivered by the cancelling date, the Charterers, if required, to declare within 48 hours (Sundays and Holidays excluded) after receiving notice thereof whether they cancel or will take delivery of the vessel."*

GENCON Clause 10 : Cancelling Clause : *"Should the vessel not be ready to load (whether in berth or not) on or before the date indicated in Box 19, Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before the vessel's expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon."*

BALTIME Clause 22 : Cancelling : *"Should the vessel not be delivered by the date indicated in Box 23, the charterers to have the option of cancelling. If the vessel cannot be delivered by the cancelling date, the charterers, if required, to declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the vessel."*

Despite any references to letting or hiring Lord Reid in **The London Explorer,**[73] makes it clear that under a

[70] Clauses such as "..... she being in every way fitted for ordinary dry cargo service with cargo holds well swept, cleaned and ready to receive cargo before delivery under this charter" are usual.

[71] **The Golfstraum** – Anders Utkilens Rederi A/S v Compagnie Tunisienne de Navigation [1976] 2 Lloyd's Rep 97. The charterer was required to nominate an "available berth where the vessel could safely lie always afloat", for the delivery of the vessel. The court held that in the absence of the nomination of such a berth delivery was effective once the vessel reached the port. NYPE time charter forms similarly provides for delivery at the port, berth or no berth.

[72] **The Madeleine** [1967] 2 Lloyd's Rep 224 per Roskill J at 238.

[73] **London and Overseas Freighters v Timber Shipping Co** [1971] 1 Lloyd's Rep 532 at 526

simple time charter the charterer does not in fact hire the vessel at all he merely has the power outlined in **The Madeleine** to give orders for the employment of the vessel. Even though it is common practice to refer to "the redelivery of a vessel" under a simple time charterparty, it is in fact a misnomer, according to MacKinnon LJ in **Sea & Land Securities v Dickinson.**[74] The charterer never takes delivery of the vessel in the first place so there is no occasion for the vessel to be redelivered. Effectively the simple time charter provides a time scale within which the owner will comply with valid orders by the charterer and *"render services as a carrier by his servants and crew to carry the goods which are put on board his ship by the time-charterer".*

By contrast a charterer "hires" and the owner "lets" a vessel under a demise or bare boat charter. The vessel is delivered to the demise charterer and hence the charterer will ultimately redeliver the vessel at the end of the charter. This distinction between simple and demise charters is significant since it goes to the root of the question as to whether or not an order for a last voyage which results in an overrun or overlap as it is sometimes referred to, is a breach of condition.

Duration of charterparty

There are a wide variety of clauses providing for the duration of time charter parties. It is most common to refer to a time scale[75] but it is not unknown for the duration to be determined by reference to one or more voyages. [76] Specified voyages in such a charter are conditions. Whilst the latter have the appearance of voyage charter parties the respective rights and duties of the parties will bear the characteristics of a time charter party. Under a voyage charter the hire rate will be a fixed sum or will be determined by a formula based on the capacity of the vessel and the quantity subsequently loaded, prefaced by a duty to load a full and complete cargo. Allied rights and duties such as demurrage will apply. The hire due for the time charter party however will be based on the period of time the vessel is under the orders of the charterer. Similarly, allied time charter party rights and duties such as E&I Clauses and off hire provisions will apply.

SHELLTIME 3 Clause 3 : *"Owners agree to let and the charterers agree to hire the vessel for a period of [.....] months [....] days more or less in Chartererr's option commencing from the time and ate of delivery of the vessel for the purpose of carrying crude oil ..... the vessel shall be delivered by owners at [.....] at owner's option and redelivered to owners at a safe anchorage off [.....] at charterer's option."*

SHELLTIME 3 Clause 18 : *" ... notwithstanding the provisions of clause 3 hereof, should the vessel be upon a voyage at the expiry of the period of this charter, Charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided in this charter."*

LINERTIME : Time Clause 1 : **Period and Port of Delivery** *"The owners let, and the charterers hire the vessel for a period of the number of calendar months indicated in Box 15 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 7 a.m. and 10 p.m. or between 7 a.m. and noon if on Saturday, at the port stated in Box 16 in such ready berth where she can safely lie (a) always afloat* (b) always afloat or safely aground where it is customary for vessels of similar size and draught to be safe aground * (* state alternative agreed in Box 16)...."*

Time for Delivery : *The vessel to be delivered not before the date indicated in Box 17. The owners to give the Charterers not less than the number of days' notice stated in Box 18 of the date on which the vessel is expected to be ready for delivery. The Owners to keep the Charterers closely advised of possible changes in Vessel's position.*

Clause 8 : Redelivery *"The vessel to be redelivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at a safe and ice-free port in the Charterer's option in the place or within the range stated in Box 29 between 7 a.m. and 10- p.m. and 7 a.m. and noon on Saturday, but the day of redelivery shall not be a Sunday or legal holiday.*

74 **Sea & Land Securities v Dickinson** (1942) Lloyds Rep 159 at 162.

75 The basic period such a 6 months or 1 year is sometimes referred to as "the flat period".

76 **Temple S.S. Co v V/O Sovracht** [1945] 79 Lloyd's Rep 1 : Vessel chartered for two voyages firstly to Kara and then to African Port. At Kara the Russian authorities ordered the vessel to deliver cargo to another Russian port. Whilst the charterer had no option but to comply, it was nonetheless from the owner's viewpoint an unlawful order entitling the owner to damages when the vessel was redelivered late at the African Port.

Repairs for the Charterer's account as far as possilbe to be effected simultaneously with dry-docking or annual repairs, respectively; if any further repairs are required, for time occupied in effecting ruch repairs the owners to receive compensation at the hire agreed in this Charter. The Charterers always to be properly notified of the time and place when and where repairs for their account will be performed.

Notice. *The Charterers to give the owners not less than the number of days' preliminary and the number of days' final notice as stated in Box 30 of the port of re-delivery and the date on which the vessel is expected to be ready for re-delivery. The charterers to keep the owners closely advised of possible changes in the vessel's position. Should the vessel be ordered on a voyage by which the charter period may be exceeded the charterers to have the use of the vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the Charger, but for any time exceeding the termination date the Charterers to pay the market rate if higher than the rate stipulated herein."*

NYPE : Clause 13 : *Witneeseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for* ***14.*** *about ..... [insert instructions, for example "a trip via port or ports via the Pacific, duration for 4 – 6 months."* [77] *] .....*

BALTIME : Clause 7. *"The vessel to 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 charterer's option at the place or within the range stated in box 21 between 9 am and 6 pm and 9 am and 2 pm on Saturday, but the day of re-delivery shall not be a Sunday or legal holiday."*

A typical time charter determined by the duration of a voyage might read as follows : *"The Owners let and the charterers hire the vessel for one or several voyages as described in the sub-section "Trip time chartering",* followed by :- Trip time Chartering Box : *"One Time charter voyage with loading 1 or 2 ports in Sweden and discharging 1 or 2 ports in Brazil.* [78] *Redelivery on dropping outboard pilot at last discharging port. Total period estimated to 30 days."*

Beware that even standard form contracts may be amended by the parties as with the following example, of a Baltime 1920, which was amended to read "Delivery in the Bristol Channel and redelivery in the Capetown/Lourenco Marques range for a period of one round voyage to the Kara Sea." in **Temple Steamship v Sovfracht.**[79] Therefore it is essential that one should not take the provision for granted and double check exactly what each charter party in fact provides. [80]

In **Dunsford v Compania Anonima Maritima** [81] the charter was stated to be *"for 6 or 7 (in charterer's option) consecutive voyages during 1910.* " By the time the sixth voyage had been competed there was no time left for the seventh voyage so the charterers option to send the vessel on an additional voyage was no longer available.

Express and implied extensions to the hire period

Despite the fact that the period of a charter is frequently expressed in terms of days, weeks, months or years, it is virtually impossible for a charterer to ensure that a vessel will complete all the tasks assigned to it by a given date, some time in the distant future. Even though the charterer will seek to ensure that the last assigned voyage will terminate either at the port of redelivery, at the designated date, or at some other port which allows the vessel to proceed to the port of redelivery under ballast by the designated date, the charterer is likely to find it difficult to hit a specific target date with any precision. This can be specifically required in the charter party but will almost certainly result in either early or late delivery and thus result in a breach of the requirements of the charter party. [82] For this reason most charter parties provide a tolerance or *"window of opportunity"* for the vessel to be redelivered. Even if a *"window"* is not expressly provided this

77 as in **The Democritos** [1976] 2 Lloyd's Rep 149.

78 Other alternatives could include "World-wide trading within IWL" or "One time charter trip from U.K. to one or two ports Spanish Mediterranean Coast." Followed by a provision stating "Total 30 days, owners thereafter entitled to market rate if higher than charter rate."

79 **Temple Steamship v Sovfracht** (1945) 79 Lloyd's Rep 1.

80 See also **The Aragon** - Segovia Compagnia Nav v R Pagnam & Fratelli [1977] 1 Lloyd's Rep 343 "the period necessary to perform 1 time charter trip vbia safe port(s) East Coast Canada within specific trading limits."

81 **Dunsford & Co v Compania Anonima Maritima Union** (1911) 16 Com Cas 181

82 **The Arctic Skou** – Ove Skou v Rudolf Oetker [1985] 2 Lloyd's Rep 478 : Where a vessel is redelivered in a different time zone the period of hire may be calculated on the basis of the actual time involved in the hire.

may be implied at common law. **The Dione** [83] provides an analysis of the various types of provision. How much lee way is provided in a charter party for redelivery was placed into three categories by Denning L in this Court of Appeal judgement.

1) **Implied Margin** : "3 months" "6 months" etc. An example of this is **Gray v Christie** [84] where the anticipated last voyage would have resulted in redelivery 4 days after the due date for redelivery. In the event the vessel was 17 days late but the court held that there was no breach of the charter party terms and hence no damages were payable. However, hire was due for the overrun period, payable at the charter party rate. If there had been a breach hire would have been due at the market rate, if that were to be higher than the charter rate. Similarly in **The Democritos** [85] hire was for "4-6 months". The arbitrator declared a 5 day margin.

2) **No margin express or implied**. In **Watson Steamship v Merryweather** [86] a specific date was provided, so the vessel was required to be returned on time. This is the exception, not the rule. There is a presumption that a leeway will be allowed, so clear express words are required to rebut the presumption. However, if a specific date is provided, time becomes of the essence and detention of the vessel beyond the redelivery date results in a breach and the right to claim damages. Similarly see **The Mareva** [87] where the duration of the charter party was stated to be "2 to 3 months maximum" and **The Gregos** [88] where hire was stated to be for "about 50 to maximum 70 days". A variation of the method of assessing the quantum of damages applies in the event of breach. The owner is not forced to accept the market rate if it should happen to be less than the charter rate. [89] He is entitled to recover whichever happens to be the highest rate applicable at that time. Consequently, there is only likely to be litigation on such issues where there is a boom in the industry and hire rates have risen substantially after the original charter was brokered.

3) **Express Margin.** "6 months 20 days more or less". Despite dicta in previous cases such as **The London Explorer** Denning held in **The Dione** that an additional margin of 8 days over and above the maximum overlap provision, allowed by the arbitrator was not permitted. Orr LJ concurred with Denning in **The Aspa Maria** [90] stating that it could not have been the intention of the owner to provide the charterer with the benefit of two tolerance periods. See also **The Black Falcon** [91] where the NYPE time charter party provided for a + or - 15 days extension at charter party rate.

What is a reasonable margin ?

This is a question of fact to be determined case by case in the light of all the circumstances. In **The Berga Tasta** [92] which involved a consecutive voyage time charterparty, Donaldson accepted that 10 –11 days was reasonable for a 30 month charter. Wilson suggests that a 4-5% margin would be reasonable. [93]

83 **The Dione** – The Alma Shipping Corporation of Monrovia v Mantovani [1975] 1 Lloyd's Rep 115. See also Cases & Materials on Carriage of Goods by Sea – matin Dockray 2nd ed p418 et seq

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

85 **The Democritos** – Marbienes v Ferrostaal [1976] 2 Lloyd's Rep 149 : And see also The Federal Voyager [1955] AMC 880 and The Adelfoi [1972 AMC 1742

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

87 **The Mareva** – Mareva Navegation v Canaria Armadora [1977] 1 Lloyd's Rep 368 – 5 days more or less at charter's option.

88 **The Gregos** - Torvald Klaveness A/S v Arni Maritime Corp [1994] 1 WLR 1465 and see M.Dockray Cases and Materials at p420 and A.D.Hughes Casebook on Carriage of Goods by Sea at p481

89 **The London Explorer** [1972] AC 1

90 **The Aspa Maria** – Gulf Shipping Lines Ltd v Compania Nav Alanje S.A. [1976] 2 Lloyd's Rep 643 at 645. 6 months, 30 days more or less at charterer's option.

91 **The Black Falcon** – Shipping Corp of India v NSB Niederelbe [1991] 1 Lloyd's Rep 77 – " ... for about 9 months, charterers' option 3 months, charterer's option further 3 months, 15 days more or less on final period. Charterers having option to complete last round voyage under performance prior to delivery at charterparty rate."

92 **The Berga Tasta** - Skibsaktielskapet Snefonn, Skibsaksjeselskapet Bergehus & Sig Bergesen DY & Co v Kawasaki Kisen Kaisha Ltd [1975] 1 Lloyd's Rep 422

93 J.F.Wilson - Carriage of Goods by Sea 3rd Ed, Pitman p92. He also draws attention to the US view that the overlap/underlap option requires the charterer to choose a final voyage which brings the redelivery closest to the charter party target date – Britain S.S. Co v Munson Line (1929) 31 F2d 530.

Options to Shorten or Extend the Charter Period

Where the charter party contains an express provision for the extension of the charter party the provisions regarding notice become critical. If there is a requirement that in order to take advantage of the option to extend then, according to **The Trado** [94] once a charterer exercises that option the charterer cannot subsequently cancel the option and return to the original hire period. The notice is regarded as being final since in reliance on the notice the owner is likely to have made follow on arrangements for the employment of the vessel. Presumably the same rationale would apply to notice to exercise an option to redeliver early, as where the margin is stated as + or – 15 days. A failure to provide notice if required by the charter party may result in the charter party date becoming final.

The effect of Options to Cancel or Suspend Hire on the Redelivery Date

If the charterer exercises an option to cancel the charter due to the occurrence of a specified event the redelivery date becomes irrelevant. According to **Kawasaki Kisen Kabushiki Kaisha v Belships** [95] time lost during the course of a time charter due to the operation of off hire clauses [96] and other clauses entitling the charterer to suspend hire such as a war [97] etc cannot be added on to the tail end of the charter by either the owner or the charterer. Any option so provided must be exercised within a reasonable time or it will be foreited.

Notice of Redelivery.

"The charterers to give the owners not less than 10 days notice at which port and on which day the vessel will be redelivered. 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 provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the charter, but for any time exceeding the termination date the charterers to pay the market rate if higher than the rate stipulated herein."

Clauses can provide options to renew the charter party or to extend the charter party for a specific period, normally subject to a notice period. Any late delivery can result in on extra months hire being payable and the charter party being extended for that month. The problem for such provisions and regarding extensions generally, for the ship owner, is that the vessel may be committed to a new charter with another charterer and the ship owner needs to take possession of the vessel in time to deliver it to the new charterer.

Early Re-delivery

If a party attempts to wrongly repudiate a contract the innocent party can reject the wrongful repudiation and continue the contract according to **White & Carter v McGregor.**[98] However in **The Puerto Buitrago** [99] the Court of Appeal stated that in respect of the early return of a vessel damages would be sufficient and the owner could not insist on hire till the end of the charter period. [100] Thus if the owner mitigates his loss by rehiring the vessel he would receive the old hire rate for a period of unemployment of the vessel but once rehired out he would only receive the difference, if any, between the old and new hire rates as damages. Despite the fact that one might imagine that there is a duty on the owner to attempt to rehire the vessel and

94 **The Trado** – Mareille Fret S.A. v D.Oltmann Schiffahrts Gmbh & Cook G [1982] 1 Lloyd's Rep 157 and **Atlantic Lines and Navigation Co Inc v Didymi Corp** [1984] L Lloyd's Rep 583. Note that many charterparties contain a provision requiring the charterer to keep the owners informed of developments on a regular basis.

95 **Kawasaki Kisen Kabushiki Kaisha v Belships** (1939) 63 Lloyd's Rep 175,

96 Per Roskill J **Empresa Cubana de Fletes v Aviation & S.S. Co Ltd** [1969] 2 Lloyd's Rep 257 at 261 – an off hire clause does not detract from the right to exercise an option to extend. Semble **The Didymi & Leon** - Atlantic Lines Nav Co Inc v Didymi Corp & Leon Corp [1984] 1 Lloyd's Rep 583.

97 In **Westralian Farmers v Dampskibsselskab Orient** (1939) 65 Lloyd's Rep 105 it was provided that the vessel would go off hire, following the outbreak of war, pending brokerage of a war policy by the owners, but this clause would only be triggered if the vessel in port at the time and was not engaged in a voyage.

98 **White & Carter v McGregor** [1962] AC 413.

99 **The Puerto Buitrago** [1976] 1 Lloyd's Rep 250

100 In **The Ocean Frost** – Armagas Ltd v Mundogas S.A. [1986] 2 Lloyd's Rep 109 the House of Lords confirmed that an owner, subject to the duty to mitigate his losses, would be entitled to damages for early re-delivery, but in the circumstances, since the charterer's agent had exceeded his authority in committing the charterer to the charterparty, the contract was invalid. There was no charterparty and thus no early redelivery when the charterer notified the owner that the purported charter party was cancelled, and thus no damages were payable.

thus mitigate his potential losses, in **The Odenfeld** [101] Kerr J held that for a limited period the owner may continue to hold the vessel at the charterer's disposal and continue to claim hire. In **Reindeer Steamship v Forslind** [102] a clause was worded in such a way that hire was payable right up to the termination date irrespective of early redelivery. Hire was stated to be payable half monthly, in advance, until redelivery for the term of six calendar months.

The relevant time for providing final orders

The question as to what is the appropriate time for judging the legitimacy of an order for the last voyage was left unclear in **The Matija Gubec** [103] and was only finally settled by the House of Lords in **The Gregos** [104]. Their Lordships held that where it became clear at the time of the order that the voyage would take too long because of changing circumstances the order may be rejected and a fresh order requested. However, if it appears legitimate at the time, the owner cannot reject it immediately. The significant time is not when the order is made but when it is time for performance. It is desirable that the order is given as early as possible since it provides the parties with an opportunity to make appropriate arrangements. Nonetheless the ship owner is not bound by the order until the time of performance. In this particular case, at the time of performance it had become clear that it was an illegitimate order. The owner initially refused to comply and requested a fresh order. The charterer refused but subsequently agreed to an indemnity provision. The owner asserted in court that the illegitimate order was a repudiatory breach. The court rejected this assertion. The unlawful order could be put right. However, if as in this particular case the charterer refused to make a new lawful order, the owner could refuse to comply with the illegitimate order and the owner had the right to terminated the charter and claim damages.

DAMAGES FOR LATE REDELIVERY

The central issue is firstly, can an owner refuse to accept an illegitimate order, namely an order which would inevitably result in the vessel being redelivered after the expiry of the charter period (including any extension time expressly or impliedly provided for) and demand that the charterer produce a new order which complies with the charter period ? and secondly, if the owner accepts either a lawful last voyage order or complies with an unlawful or illegitimate last voyage order what happens if or when the vessel is redelivered late ? Should the additional time be paid at the charter party rate or at the current market rate [105] if it is higher, or is the owner entitled to damages, including damages for loss of subsequent freight and or any costs paid to subsequent charterer's for failure to deliver the vessel ?

Damages payable for late delivery following lawful last orders.

Where the last voyage orders under a traditional time charter party were lawfully made, but due to subsequent events beyond the control of the parties the vessel is eventually redelivered late the charterer will pay for all extensions covered by the charter party at the charter party rate [106] but will pay for all subsequent time at current market rate if higher than the charter party rate. [107] No other damages will be payable for other losses incurred by the owner, such as lost freight or damages payable to later charterers.

101 **The Odenfeld** [1978] Lloyd's

102 **Reindeer Steamship v Forslind** (1908) 13 Com Cas 214 ; See also Trechmann S.S. Co v Munson Line (1913) 203 F 692.

103 **The Matija Gubec** – Jadranska Slobodna Plovida v Gulf Shipping Line [1983] 1 Lloyd's Rep 24 – 12 months 45 days more or less in charterer's option.

104 **The Gregos** [1995] 1 Lloyd's Rep 1 House of Lords per Lords Templeman/Mustill/Slynn/Woolf

105 In **Hector v Sovfract** [1945] KB 343 it was specifically provided that any overrun would be payable at market rate. **The Johnny** – Arta Shipping Co v Thai Europe Tapioca Service [1977] 2 Lloyd's Rep 1 discusses computation of the appropriate market rate. Vessel chartered "minimum 11 / maximum 13 months." The owner sought to recover at current market rate for a theoretical voyage charter party – but the court applied the current market rate for an 11/13 month charter.

106 **The Dione** [1975] 1 Lloyd's Rep 115. Since it is impossible to predict exact redelivery time the court will imply an extension of a few days at charter party rate even if there is no express provision in the charter for this (but will not imply an extension if delivery date is express). The charter party rate will apply even if the market rate is more or less than the charter party rate per Lord Reid in **Timber Shipping Co SA v London & Overseas Freighters Ltd** [1971] 1 Lloyd's Rep 523. The vessel was redelivered 4 months late due to strikes. The market rate had fallen below the charter party rate but nonetheless the charter rate applied.

107 British S.S. Co v Munson Line (1929) 31 F2d 530 – but note that an express provision to pay at charter party rate for all overrun periods would displace the common law rule eg Clause 7 Baltime supra.

However, where lawful last voyage orders are for a round trip as required under the terms of the charterparty but due to subsequent events beyond the control of the parties the vessel is eventually redelivered late, the charterer is protected against any claim for damages and will pay for all periods involved at the charter party rate according to Donaldson LJ in **The World Symphony**.[108] Clearly delays causing late delivery caused by the owner will preclude the recovery of damages by the owner and are likely to place the vessel off hire for a period of time in any case, thus negating any hire due for late delivery. Presumably if the redelivery beyond the final cut of date is the fault of the charterer, the charterer could be held liable in damages, though what these might be, namely payment of hire at market rate if higher than the charter rate or something more extensive is not clear. Nor is it clear what the charterer could do apart from ordering the vessel on the last voyage, which would be considered to be fault. Perhaps a failure to pay dues to the authorities resulting in detention of the vessel would fall into this category.

The Lendoudis Evangelos [109] involved a Time charter for a trip duration *"70/80 days without guarantee".* The trip in fact took 103 days. The owner sued for damages and sought to recover the current market hire rate for the overrun period. The court held that if, as in this case, the order was given in good faith, the charter party rate applied for the overrun period. However, by implication, if the charterer had been well aware of the probability that there would be an overrun then damages would have been payable. The term *"without guarantee"* was crucial.

Contrast **The Black Falcon** [110] where a charterer undertook a final voyage too late to be able to redeliver on time. The NYPE time charter party allowed a *+ or - 15 days extension at charter party rate.* However, the court held that this only applies if redelivered within the 15 days. Here there was an illegitimate last voyage and the court held that hire was payable at the market rate for the whole of the period of excess hire prior to redelivery. This would mean that the benefit of extensions at charter party rates are lost if an illegitimate order is given resulting in the vessel is delivered beyond the final cut off date and all hire after the express date is payable at the market rate where higher than the charter rate. In the absence of liability for wider damages a charterer can attempt to order a vessel to undertake such a voyage with impunity if the charter rate and the current market rate are the same, assuming that the owner accepts the order.

The World Symphony discusses round voyage extensions undertaken whilst the vessel is in the redelivery range. The Shelltime 3 charter party [111] contained a redelivery clause (clause 3) *at + or - 15 days of a specific date with an extension clause* (clause 18) to cover any last voyage, notwithstanding the provisions of clause 3. The court held that the voyage ordered would inevitably exceed the 15 days extension, but **ANY** voyage within the accepted charter party range was a legitimate last voyage due to the specific wording of the round voyage extension clause even though it was clear that the 15 day target would be met. Donaldson LJ however made it clear that the mere fact that it was a round voyage extension clause would not in itself be sufficient to legitimise any last voyage. It was the words *"notwithstanding"* that were crucial to this decision.[112] It is likely that the Beepeetime 2 provisions which omit the notwithstanding phrase would not legitimise an order for a voyage which would result in a breach of the final date for redelivery. [113]

Lord Donaldson in **The World Symphony and World Renown** provided the following overview:- *"Here the general principles are not, I think in doubt in the light of the Dione and Hyundai. They are that:-*

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 ... 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.*

108 **The World Symphony & The World Renown** : Chiswell Shipping Ltd & Liberian Jaguar Transports Inc v National Iranian Tanker Co [1992] 2 Lloyds Rep 115

109 **The Lenoudis Evangelos II** [1997] 1 Lloyd's Rep 404 : and see also **Benship International Inc v Deemand S.S. Co** [1988] see J.Wilson infra at 93.

110 **The Black Falcon** [1991] 1 Lloyds Rep 77.

111 For text of Clauses 3 & 18 see supra

112 Note that the same outcome arose out of **The Pacific Sun** [1983] AMC 830 and **The Narnian Sea** [1990] AMC 274, concerning clause 11 Texacotime 2 – phrased on identical terms.

113 see **The Peonia** [1991] 1 Lloyd's Rep 100.

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."*

Damages payable for late delivery following unlawful [114] last orders.

The general rule appears to be the owner can refuse to perform an order to perform an illegitimate last voyage. If the owner agrees to perform the voyage the owner can do so on condition that the charterer pays an enchanced rate and can again refuse to perform in the absence of such an agreement. Alternatively, if the owner agrees to perform the voyage without imposing any conditions on performance the charterer will pay hire at the charter party rate up to the final date expressly provided for redelivery of the vessel and will pay at the market rate, if higher than the charterparty rate, for any overrun period.

The Gregos [115] concerned a NYPE charter party for a period of 50 to maximum 70 days, redelivery to take place at or off a port in Gibraltar, Hamburg range, vessel to be delivered at Antwerp. The vessel was scheduled, a long time in advance, to perform a final voyage which would at that time have resulted in the vessel being redelivered in time. However by the time the sailing orders were actually given it was clear that due to a port blockage the 70 day redelivery date would not be met. The owner initially refused to comply with the order and requested a new order. The charterer refused to issue a new order. The owner then offered to perform the order as a fresh spot charter at a highly advantageous rate. The charterer refused these terms but eventually the owner and the charterer agreed to go ahead at the original charter rate without prejudice to the rights of the party. Thus the question as to the quantum of damages due for the charterer's alleged breach (if any) fell to be decided, first by arbitration, then subsequently through appeals to the High Court, the Court of Appeal and finally by the House.

The House held that the relevant date to judge the legality of last voyage orders is primarily the time of giving the order, but this evaluation is not final. The validity of the order must ultimately be judged at the time of performance. An initially valid order may subsequently be rendered invalid by events. The charterer can only escape liability for late redelivery if the delaying event becomes apparent after legitimate sailing orders have been given. In the event the order was illegitimate. The court further held that the mere issuing of an illegitimate order is not a repudiatory breach. The duty to make a valid order is an *"innominate term."* The owner can reject the order and request that a fresh valid order be given. However, if the charterer refuses to issue a valid order, the charterer evinces an intention to be discharged from the contract. This amounts to an anticipatory repudiatory breach of the contract by the charterer. The owner can accept the charterer's repudiation, treat the charter as being at an end and sue for damages. Such damages would of course have if possible to be mitigated by the owner seeking to recharter the vessel. Alternatively the owner can waive the breach, perform the voyage and seek damages in respect of the overrun period.

In the circumstances the owner was entitled to the difference between the charter party rate and the rate that the owner would have received had he engaged in a spot charter (in this case the price quoted by the owner to the charter for a spot charter). The fact that this happened to provide the owner with a windfall was of no import. The charterer could have avoided this by making a valid order but chose not to. The owner would have received a mere $35,000 rather than the $300,000 damages awarded by the arbitrator if he had complied with the order without the protest and without having proposed that special spot charter rate. Clearly, faced with an illegitimate last voyage order owners would be well advised in future to engage in hard negotiations with charterers, assuming the market permits.

The Peonia [116] makes it clear that where a charterer orders a vessel on a last voyage which would inevitably

[114] In **The London Explorer** [1972] AC 1 HL Lord Reid refers to legitimate and illegitimate last orders. This expression was adopted by Denning in The Dione, and subsequently used in The Democritos, The Aspa Maria [1976] 2 Lloyd's Rep 643, The Mareva A.S. and The Matija Gubec.

[115] **The Gregos** [1995] 1 Lloyds Rep 1 House of Lords per Lord Mustill

[116] **The Peonia :** Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd [1991] 1 Lloyds Rep 100 – see also Casebook on Carriage of Goods by Sea – A.D.Hughes – Blackstone PRess 2nd ed at p472.

result in the vessel being redelivered beyond the final delivery date, including any allowances legitimately afforded for mishaps and miscalculations, then the charterer is liable for general damages for late delivery and cannot simply continue to pay at the standard charter party rate. The only excuse for late delivery resulting in payment of the standard charter party rate is where a legitimate voyage is delayed for circumstances beyond the charterer's control. The charterer sub-chartered the vessel for a last voyage which would result in delivery a month after the final redelivery date. The ship owner offered to undertake the voyage for extra money. The charterer refused so the ship owner withdrew the vessel. Bingham LJ held that whilst the court would always imply a reasonable addition to the charter period or enforce the extension time provided in a charter party, if the order would clearly result in the vessel being redelivered after that time the ship owner is entitled to an additional rate plus damages or alternatively the owner could withdraw the vessel. [117]

The Appropriate Place For Delivery / Redelivery

The port of redelivery is either nominated in the charterparty, or prescribed as being within a certain defined range, for example *"Vessel to be delivered (redelivered) on dropping outward pilot at XYZ town"* or *"Vessel to be delivered (port at owner's option) and redelivered (port at charterer's option) in the Mediterranean"*.

It fell for the court to decide in **The Sanko Honour** [118] whether or not the charterer's chosen port of redelivery complied with the charter terms, namely within a *"Range from Japan to Persian Gulf"*. The court held that this geographical range embraced Japan to Honolulu, the port where the vessel was delivered. Hobhouse J indicated that under the provision Japan was the central locus. Hence, the charterer was not in breach of the redelivery clause.

Parker J held in **The Bunga Kenanga** [119] that damages for delivery at the wrong location are assessed at net loss to the owner after taking into account any remuneration received for alternative employment. The vessel was re-delivered at Rotterdam when a Far East port was specified in the charter party.

However, Mustill J in **The Rijn** [120] held that where a particularly disadvantageous substitute fixture back to the nominated port was negotiated by the owners, after a vessel had been redelivered to the wrong port, damages would be based on the most economic form of voyage that would have righted the wrong. In this case the cheapest solution would have been to sail the vessel back into range under ballast. The court may not have been that sympathetic with the owners since they had rejected an invalid order for a final voyage, which would have got the vessel back in range albeit outside the charter period. It would appear that the poor condition of the vessel had resulted in extensive off hire periods, which in turn contributed to the issuing of the invalid order. However, since an arbitrator had held that the poor condition of the vessel was not so bad as to invalidate the charter itself, there were no grounds for concluding that the owners had caused the problem in the first place.

Condition of the vessel on redelivery

The ship owner can recover from the charterer for any damage suffered by the vessel which is attributable to the charterer, in particular incidents covered by E & I Clauses. Thus in **The Maistro** [121] Staunton J held that the charterer was liable for the costs incurred by the owner in cleaning the vessel in readiness for a subsequent hire. Since it is the owner's duty to maintain the vessel, the charterer would not be liable for defects that the owner had a duty to repair. It is common for the charter party to provide a clause such as the following :- "the vessel to be redelivered on the expiration of the charter in the same good order as when delivered to the charterers (fair wear and tear excepted)." [122] Fair wear and tear would embrace any damage that would be normally attributable to the conduct of a particular trade and thus not recoverable. **Chellew Navigation v Appelquist.**[123]

117 Contrast **The World Symphony & The World Renown** [1992] 2 Lloyds Rep 115.

118 **The Sanko Honour** – Reardon Smith Line Ltd v Sanko Steamship Co Ltd [1985] 1 Lloyd's Rep 418.

119 **The Bunga Kenanga** - Malaysia International S.S. Corp v Empresa Cubana de Fletes [1981] 1 Lloyd's Rep 518

120 **The Rijn** [1981] 2 Lloyd's Rep 267

121 **The Maistro** - Aurora Borealis Compagnia Armadora SA & Buenamar Compagnia Nav S.A. v Marine Midland Bank N.A. [1984] 1 Lloyd's Rep 646

122 **Chellew Nav Co v Appelquist Kolimport AG** (1933) 38 Com Cas 218

123 Chellew Navigation v Appelquist [1933] 38 Com Cas 218.

The owner cannot refuse to accept redelivery if the vessel has not been repaired, **Wye SS Co v Compagnie Paris-Orleans**,[124] but can then have the work done and bill the charterer, according to **The Puerto Buitrago** [125] which concerned a demise charter party and **The Rozel**.[126] In such a case the ship owner cannot claim hire for the repair time. However, the owner can claim lost profit which perhaps amounts to the same thing, or better even since this would be based on the market rate in any case. [127] Mustill J confirmed that the charter party must be terminated in **The Rijn**. [128] An express clause to cover this might be as follows "Against paying x $ in lump sum compensation to the owners, charterers have the right to redeliver the vessel in lieu of cleaning." In **The Pantelis A Lemos** [129] it was specified that the owner only had to take redelivery of the vessel in the event of general damage but that in the event of damage affecting the vessel's class repairs had to be effected before redelivery. Nonetheless where the charterer failed to carry out the repairs the owner could not refuse to take redelivery of the vessel.

It is usual for the charter party to provide for a survey at termination either by independent surveyors or by surveyors appointed by the charterer or owners or even both. For examaple :- "Unless otherwise mutually agreed the owners and charterers shall each appoint surveyors for the purpose of determining the condition of the vessel at the time of delivery and redelivery hereunder. Surveys whenever possible to be done during service, but if impossible any time lost for on-hire survey to be for owners' account and any time lost for off-hire survey to be for charterer's account." *or alternatively* "A joint survey at delivery to be arranged by owners and effected in their time. A joint survey on redelivery to be arranged by charterers and effected ion their time. Cost for both surveys to be shared equally."

Fuel/ bunkers and port dues on delivery and redelivery.
Subject to the express provisions of the charter party it is usual for the charterer to become liable for fuel costs [130] and port and lighterage dues or the duration of the charter party. Thus :-

Linertime : Clause 6 Bunkers : *The charterers at port of delivery and the owners at port of re-delivery* [131] *to take over and pay for all fuel remaining in the vessel's bunkers at (a) current price, at the respective ports* (b) a fixed price per ton* (*state alternative agreed in Box 24)*

Clause 5 (see also Baltime): *The Charterers to pay all dock, harbour, light and tonnage dues at the ports of delivery and redelivery (unless incurred though cargo carried before delivery or after re-delivery).*

In **The Eurostar** [132] a hire clause provided *"charterer to pay for all bunkers on board on delivery : ship owner to reimburse for bunkers on board during redelivery : hire for last hire period can be reduced to take into account remaining bunkers."* The vessel broke down. The owner had mortgaged the vessel to the plaintiffs who redeemed the mortgage following a default on repayments by the owners. The court appraised and sold the vessel. The charterers as interveners claimed payment out of the fund, held by the court as a result of the sale, for bunkers remaining on board. The court held that the bunkers remained the charterer's property and so the charterers were entitled to a claim from the fund.

124 **Wye SS Co v Compagnie Paris-Orleans** [1922] 1 KB 617

125 **The Puerto Buitrago** – Attica Sea Carriers Corp v Ferrostaal-Poseidon Bulk Reederei Gmbh [1976] 1 Lloyd's Rep 253 and see M.Dockray at p424. The facts are peculiar. The vessel was so old and decrepid the charterers had it towed across the Atlantic, discharged cargo then had it towed to Kiel. The vessel was worth a mere $500,000 in scrap but required $2M repairs. Even if repaired its value would only be $1M. The charterers admitted liability for $400,000 worth of repairs.

126 **The Rozel** [1994] 2 Lloyd's Rep 161.

127 **Wye SS Co v Compagnie Paris-Orleans** [1922] 1 KB 617

128 **The Rijn** – Santa Martha Baay Scheepvaart & Handelsmaatschappij NV v Scanbulk A/S [1981] 2 Lloyd's Rep 267 – and see M.Dockray at p426

129 **The Pantelis A Lemos** – Somelas Corp v Gerrards Rederi A/S [1980] 2 Lloyd's Rep 102

130 In the absence of a provision to the contrary the owner will repay at a reasonable market rate – and not necessarily at the rate paid by the charterer – **The Good Helmsman** – Harmony S.S. Co SA v Saudi-Europe Line Ltd [1981] 1 Lloyd'' Rep 377.

131 **The Captain Diamantis** – Mammoth Bulk Carriers Ltd v Holland Bulk Transport BV [1978] 1 Lloyd's Rep 346 – the charterer is only allowed to bunker for the purposes of the charter period. If the charterer deliberately seeks to engage in excess bunkering the owner can order the master not to take the excess on board and can refuse to pay for any excess present on the vessel on redelivery.

132 **The Eurostar** [1993] 1 Lloyds Rep 106