CHAPTER 3

Description of the Ship

[clause 1 continued]

. . . the 1
steamer or motor vessel named in Box 5 of the gross/net Register 2
tons indicated in Box 6 and carrying about the number of tons of 3
deadweight cargo stated in Box 7 . . . 4

[clause 1 is continued below]

Contractual effect of descriptive statements

3.1 As a general rule words in a charter which describe the ship or her equipment are not mere representations, but are terms of the charter.[1] As a result, if the ship fails to comply with the description the charterer will be entitled to damages for breach of contract. If the term is a condition, or if the breach goes to the root of the contract, the charterer will also be entitled, if he so elects, to refuse to ship the cargo and to terminate the charter. Alternatively, he may exercise any right to rescind or to claim damages which may be available to him in respect of any actionable misrepresentation.[2]

Condition, warranty or intermediate term

3.2 Assuming that a statement in the charter describing the ship is a term of the contract, the question arises whether it is a condition, a warranty or an intermediate term. In *The Diana Prosperity*,[3] the charterer advanced an argument that every aspect of the vessel's description was a condition, with the result that any departure would entitle the charterer to terminate the contract. This argument was rejected by the House of Lords, where Lord Wilberforce indorsed the approach adopted in *Cargo Ships "El-Yam"* v. *"Invotra"*[4] and *Hongkong Fir Shipping* v. *Kawasaki Kisen Kaisha*[5] of "attending to the nature and gravity of the breach or departure rather than accepting rigid categories which do or do not automatically give a right to rescind".

3.3 On this approach many items of description are likely to be regarded as intermediate terms. Earlier cases in which they have been regarded as conditions, such as *Pennsylvania Shipping*

1 See the cases cited in paras 3.2–3.3 below.
2 See Chapter 1.
3 *Reardon Smith Line* v. *Hansen Tangen (The Diana Prosperity)* [1976] 2 Lloyd's Rep. 60 (Mocatta J. and C.A.); [1976] 2 Lloyd's Rep. 621 (H.L.). See para. 3.5, below.
4 [1958] 1 Lloyd's Rep. 39. Below, para. 3.24.
5 [1962] 2 Q.B. 26; [1961] 2 Lloyd's Rep. 478.

v. *Cie. Nationale de Navigation*[6] (guarantee of diameter of cargo lines) and *Behn* v. *Burness*[7] (position of vessel) may have to be reconsidered.

When the ship must comply

3.4 On the face of it, statements in the charter describing the vessel relate to the time when the charter is entered into. The question thus arises whether it is sufficient that the vessel complies with the description at the date of the charter, or whether she must also comply at the date of loading the cargo, or even throughout the voyage. Decisions on this question vary depending upon the item of description in question. For example, it has been held that a statement of the vessel's speed and consumption applied not only when the contract was made, but also on delivery.[8] On the other hand, a statement of the vessel's classification has been held to relate solely to the date of the charterparty, and not to give rise to any implied obligation to take reasonable steps to keep her in class, or to keep her in class subject to the excepted perils.[9] If any uniform approach is possible it is submitted that it should be that adopted in *Isaacs* v. *McAllum*,[10] namely, that the description relates to the ship at the date of the charter, but there is an implied term that the owner will not alter the ship so as to prejudice the services to be rendered to the charterer.

Name of the vessel

3.5 Unless the charter is for a vessel "to be nominated", or confers upon the owners a right of substitution, the charterparty is for the specific ship named in the charter and no other. Hence, the charterers are not obliged to load any other ship, even if she is identical in characteristics to the ship named in the charter; and owners are in repudiatory breach if they charter the named ship to a third party such that she cannot perform the charter with charterers.[11] However, while performance by the specific named vessel is of the essence, it is submitted that the name is merely a means of identifying the vessel to be used, and is not used as a description of an essential characteristic of the vessel; the owner would therefore be entitled to change the vessel's name and tender her for loading under the charter. This approach has been adopted where a newbuilding was described in the charter by her yard number.

> A time charter for a newbuilding provided that the ship was "to be built by Osaka Shipbuilding Co. Ltd and known as Hull No. 354 until named". The Osaka yard had sub-contracted the construction to another yard, where the vessel was being built to the Osaka yard's design and under their supervision, and the vessel remained on the Osaka yard's books, bearing the yard number stated. The charterers refused to accept delivery on the grounds that the vessel was not built by the Osaka yard.
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> The House of Lords held that the words quoted above were words of identification rather than of contractual description. The question was thus whether the vessel tendered could be clearly identified as the specific vessel to which the charter referred. Clearly it could and the claim to reject therefore failed. Lord Wilberforce described the references to the shipyard and yard number as fulfilling the same purpose as a reference to the name of a ship already in service. Even if the words were words of description in the true sense, they were an intermediate term rather than a condition.
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> (*Reardon Smith Line Ltd* v. *Hansen-Tangen (The Diana Prosperity)* [1976] 2 Lloyd's Rep. 60, 621 (H.L.). See also *The Sanko Steamship Co. Ltd* v. *Kano Trading Ltd* [1978] 1 Lloyd's Rep. 156.)

6 (1936) 55 Ll. L. Rep. 271.
7 (1863) 3 B. & S. 751.
8 *The Apollonius* [1978] 1 Lloyd's Rep. 53.
9 See below, paras 3.26 *et seq*.
10 (1921) 6 Ll. L. Rep. 289. Below, para. 3.32.
11 *Progress Bulk Carriers Ltd* v. *Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] 1 Lloyd's Rep. 501.

However, where it is contemplated by the parties that the name of the vessel is an important characteristic which is of value to the charterer, it may be that a term is to be implied that the owners will not change her name so as to deprive the charterers of a substantial or material part of the vessel's value for the chartered service.[12]

Vessel "to be nominated"

3.6 The charterparty may provide that the vessel is to be nominated, and the effect of such a provision has been described as follows by Lord Goff in *Union Transport* v. *Continental Lines*[13]:

> Nomination of a vessel under such a contract is not a mere naming of a vessel; it is rather the identification of the subject-matter of the contract, with the effect that the name of the vessel, once nominated, becomes written into the contract.[14]

It follows that, in the absence of express provision, no right to change the nomination exists. Where the charter provides that the nomination shall be made within a specified time, a failure to nominate punctually is a breach of condition.[15]

Liberty to substitute

3.7 There is no implied liberty to substitute another vessel for the one named in the charter, but one is sometimes conferred by the express provisions of the charter. Where the owner's right to substitute is unconditional, and the charter contains no description of the required characteristics of the vessel to be substituted, it is submitted that a term is to be implied that the substitute vessel shall have characteristics not materially less favourable to the charterers than the named vessel.

3.8 There is a conflict of view over the question whether a liberty to substitute imposes any obligation to do so if the performance of the charter by the named vessel becomes impossible or is subject to delay sufficient to frustrate the charter.

> A consecutive voyage charter for as many voyages as the vessel could perform in 12 months contained a provision: "Owners have the liberty of substituting a . . . vessel of similar size and position at any time before or during this charter-party . . ." The issue in the case was whether the owners were entitled to exercise the right of substitution more than once. Both Devlin J. and the Court of Appeal held that they were. Devlin J. expressed the view, *obiter*, that such a clause, despite the use of the word "liberty" might confer a right of selection rather than a pure option: "It might well be that the charterers in this case could say, if they so desired, 'You have an option to perform the charter-party in some other way and you do not excuse yourself from further performance of the charter-party merely by saying that the named ship has been sunk. You must show also that you have no other ship available with which you can perform the charter-party.'" The Court of Appeal expressed no view on the question.
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> (*S.A. Maritime et Commerciale* v. *Anglo-Iranian Oil Co.* [1953] 2 Lloyd's Rep. 466, at p. 469, [1954] 1 Lloyd's Rep. 1. For the distinction between a right of selection and a true option, see further paras 7.21 *et seq.*)

However, the opposite view was taken by McNair J. in *Niarchos* v. *Shell Tankers*,[16] where the owners had a "right" to substitute. The question must therefore be regarded as an open one, and ultimately dependent upon the language and context of the substitution clause.

12 Compare the approach with regard to the ship's flag, below, paras 3.32 *et seq.*

13 [1992] 1 Lloyd's Rep. 229, 234.

14 In *P* v. *A* [2008] 2 Lloyd's Rep. 415, para. 16, this principle was held to apply notwithstanding that the charterer was required to confirm the nomination.

15 See *Greenwich Marine* v. *Federal Commerce & Navigation Co. (The Mavro Vetranic)* [1985] 1 Lloyd's Rep. 580.

16 [1961] 2 Lloyd's Rep. 496, 505–506.

3.9 A related but distinct question is whether a right of substitution can survive an event which would, in the absence of such a right, frustrate the charter, such as the loss of the vessel, or damage to the vessel which could not be repaired without frustrating delay. It is clear from the passage in Devlin J.'s judgment quoted above that he was of the opinion that the right could survive, and it is submitted that this view is correct.[17]

3.10 The decision in *S.A. Maritime et Commerciale* v. *Anglo-Iranian Oil Co.*,[18] to the effect that successive substitutions were permitted under the clause, was reached in the context of a charter of lengthy duration, and a clause which expressly permitted substitution "at any time before or during this charter-party". In the absence of clear words the same conclusion might not hold good in a charter for a single voyage.

3.11 Although a substitution clause may be primarily intended to cater for the case where the named vessel is unable to perform, there appears to be no reason, in the absence of any contrary indication in the charter, to restrict its operation to that case. In *Société Navale de l'Ouest* v. *Sutherland*,[19] where the clause provided: "Owners to substitute a reasonably similar steamer for the chartered steamer at any time throughout the charter . . ." and where the owners had voluntarily disposed of their interest in the named steamer before delivery and purported to substitute another vessel, it was held that the owners had committed a repudiatory breach of the charter. However, the decision seems to have been based on the ground that the words of the clause did not permit substitution before delivery.

3.12 In *The Christos*,[20] Mance J. expressed the view that a clause conferring a right of substitution, contained in a charter entered into by the owner of the named vessel, did not require him, if he wished to exercise the right, to substitute a vessel owned by him.

Chartered tonnage

3.13 Where the carrier under the charter is described as "chartered" or "disponent" owner, or as "freight contractor", he is not required to perform the charter personally, and is entitled to provide a chartered vessel.[21] It is otherwise, however, when he is described in the charter as "owner". Thus, in *Alquife Mines* v. *Miller*,[22] where the carriers entered into a tonnage contract as "owners of ships to be named", Lord Halsbury stated[23]: "The intention of the [charterers] was to enter into a contract with the respondents as owners of certain ships to be named, and not as mere general providers of freight." It seems that in such a case the person described as owner, although he is not obliged to retain title to the named vessel throughout the charter, is nevertheless obliged to exercise such a degree of control over the vessel that he may fairly be said to be performing the contracted service personally rather than vicariously.

> By a berth contract made between the plaintiffs as "owners" of the *Rosalia* and the defendants it was agreed that the ship should carry a full cargo from Odessa to northwest Europe. At the end of her previous voyage, the plaintiffs sold the vessel to the purchasers, who undertook and fully accepted the execution of the berth contract. The arbitrator found that both the plaintiffs and the purchasers were at all times ready and willing to do all things necessary on their part towards the fulfilment of the contract. The defendants refused to load the ship, arguing that the plaintiffs had put it out of their power to perform the contract personally.

17 The opposite conclusion has been reached in time charter cases: see *The Badagry* [1985] 1 Lloyd's Rep. 195 and the views expressed in *Niarchos* v. *Shell Tankers* [1961] 2 Lloyd's Rep. 496. However, the reasoning in those cases is based largely on the difficulty of implying any term as to the date of commencement of hire for the substitute vessel, a difficulty which does not arise under a voyage charter.

18 See above, para. 3.8.

19 (1920) 4 Ll. L. Rep. 58.

20 [1995] 1 Lloyd's Rep. 106, 110.

21 See *Phosphate Co.* v. *Rankin* (1915) 21 Com. Cas. 248

22 (1919) 1 Ll. L. Rep. 321.

23 At p. 322.

The Court of Appeal held that the contract was such that it required the plaintiffs to perform personally rather than vicariously, but that, on the findings of the arbitrator, they remained ready and willing to do so.

(*Fratelli Sorrentino* v. *Buerger* [1915] 3 K.B. 367 (C.A.).)

Following this decision, it was held in *Omnium d'Entreprises* v. *Sutherland*[24] that where an owner sold the chartered vessel, without retaining any rights against the purchaser relating to the performance of the charter, he had repudiated it.

3.14 The Gencon form states that the carrier *contracts* "as owner" rather than that he *is* owner, which may be an indication that the word relates merely to his role in the contract rather than his ownership or control of the vessel; and unlike some other charters the form contains no alternative description of "chartered" or "disponent" owner, although there will be many cases where that will be the true position. However, it may well be thought to be over-subtle to draw a distinction between "as owner" and "owner", and the better view is probably that the person who contracts "as owner" under the Gencon form, without amendment to indicate that he is a chartered owner, engages that he owns or controls the vessel at the time of the contract and that he will perform it personally rather than vicariously.

Owner's right of transhipment

3.15 A partial exception to the duty of the shipowner to perform the chartered service in the named vessel is the implied right of transhipment. This right arises when, after the cargo has been loaded, completion of the voyage in the original vessel becomes impossible as a result of damage which could only be repaired at unreasonable expense or after unreasonable delay. In such circumstances the master has the right, but not the duty, to tranship the cargo and carry it to the destination in another vessel so as to earn the freight. In *Kulukundis* v. *Norwich Union*,[25] Greer L.J. suggested that in certain circumstances there might be a duty as well as a right to tranship where, for example, the original vessel was close to the discharging port when the damage occurred, and the cargo could therefore be carried to the destination in lighters. However, Goff J. dissented from this view in *The Pythia*.[26] If any such obligation does arise it seems clear that it does not extend to the case where transhipment into another ocean vessel is necessary if the voyage is to be completed.[27]

3.16 The owner who wishes to tranship may use his own vessel or may charter in.[28] Whichever course he takes, the terms of the original charter relating to the carriage of the cargo will remain in force between the owner and charterer, and the charterer is unaffected by the terms upon which the vessel used for transhipment may be chartered. Thus, the owner is entitled to full freight on delivery, even though the transhipment vessel may have been engaged at a lower rate of freight than the chartered freight.[29] Equally the owner will be liable for any loss or damage which occurs after transhipment and which is not excepted under the terms of the original charter, whether or not it is excepted under the terms of the charter on which the substitute ship is engaged.[30] It is a more open question whether the laytime and demurrage terms of the original charter, which are arguably "vessel specific", apply to the transhipment vessel. In *The Christos*,[31]

24 [1919] 1 K.B. 618. See also *Société Navale de l'Ouest* v. *Sutherland* (1920) 4 Ll. L. Rep. 58, above at para. 3.11.
25 [1937] 1 K.B. 1, at pp. 17–18.
26 *Western Sealanes Corp.* v. *Unimarine S.A. (The Pythia)* [1982] 2 Lloyd's Rep. 160, 166–167.
27 See *per* Greer L.J. in *Kulukundis* at p. 19.
28 See *E.G. Cornelius & Co.* v. *Christos Maritime (The Christos)* [1995] 1 Lloyd's Rep. 106, 110.
29 See *Shipton* v. *Thornton* (1838) 9 A. & E. 114.
30 *The Bernina* (1886) 12 P.D. 36.
31 [1995] 1 Lloyd's Rep. 106, 110.

where the charter contained an express liberty to tranship, Mance J. held that the charter terms continued to apply. He was assisted in this decision by the presence of a substitution clause in the charter, but it seems likely that he would have reached the same decision in any event. However, he expressly left open the question whether the charterparty laytime and demurrage provisions would apply after the exercise of the implied liberty to tranship.

3.17 The owner must decide within a reasonable time whether to exercise his power of transhipment or to abandon the voyage, and is liable to the charterer or cargo owner for any loss which they may incur as a result of unreasonable delay.[32] If the owner abandons the voyage he may nevertheless, by agreement with the cargo owner, forward the cargo to the destination, but in such a case he does so as agent for the cargo owner and for his account.

Registered tonnage[33]

3.18 It is difficult in principle to draw any distinction between statements of deadweight or bale capacity, which are regarded as intermediate terms, and statements of registered tonnage. It will no doubt be less common for the charterer to suffer loss as a result of a misrepresentation of her registered tonnage, or for such a misrepresentation to go to the root of the contract, but where it does cause loss there would appear to be no good reason why the charterer should not be entitled to claim damages or, in appropriate circumstances, to rescind.

Deadweight[34] and bale capacity[35]

3.19 Statements of deadweight and bale capacity are intermediate terms. Thus, in *Cargo Ships "El-Yam"* v. *"Invotra"*,[36] Devlin J. held that a misdescription of the vessel's bale capacity would only entitle the charterer to rescind if it was sufficient to make a fundamental difference between the vessel as tendered and that which he had contracted to take. With regard to deadweight capacity it has been held in *Barker* v. *Windle*[37] that the charterer would be entitled to reject the ship if the difference between the stated and the actual deadweight was unreasonably great or such as to be of material importance to the contract.

3.20 It is a question of construction of the charter as a whole whether a statement or guarantee of the ship's deadweight refers only to her abstract lifting capacity, or whether it relates to her capacity for the contemplated cargo. However, in the absence of some indication to the contrary, it will normally be construed in the former sense. Even when it is construed as relating to the contemplated cargo, the owner will not be in breach if the stowage of the cargo is more broken than he could reasonably have expected.

A charterparty provided for carriage of general merchandise at a lumpsum freight: "owners guarantee that the vessel shall carry not less than 2,000 tons deadweight . . . should the vessel not carry the guaranteed deadweight as above any expenses from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight". The charterers intended to load partly railway machinery and partly coal, and a marginal note of the charterparty set out the quantity and dimensions of the largest pieces to be carried. In fact the charterers loaded considerably more large pieces, and as a result the vessel could not take on board the 2,000 tons of cargo. The charterers claimed the *pro rata* reduction of freight.

32 See *Hansen* v. *Dunn* (1906) 11 Com. Cas. 100.
33 The total internal volume of a vessel, where a register ton is 100 cu. ft. (2.83168 m^3).
34 The maximum weight a ship can safely carry.
35 A measure of capacity for cargo in bales or on pallets that does not conform to the internal ship shape.
36 [1958] 1 Lloyd's Rep. 39.
37 (1856) 6 E. & B. 675. See also *Hunter* v. *Fry* (1819) 2 B. & Ald. 421.

The House of Lords held that the guarantee could not reasonably be construed as relating to any cargo of whatever stowage factor that the charterer might choose to load, but related to a cargo of the type which it was in the mutual contemplation that the charterers would ship. Since the ship could have carried 2,000 tons of such a cargo, the claim failed.
(*MacKill* v. *Wright* (1888) 14 App. Cas. 106.)

The Freden was voyage-chartered to load a full cargo of maize. The charter provided: "The owners guarantee the ship's deadweight capacity to be 3,200 tons and freight to be paid on this quantity." Because of insufficient cubic capacity the ship was unable to load more than 3,081 tons.
The Court of Appeal held that there was no breach, since the guarantee related merely to the ship's abstract lifting capacity. The reasoning in *MacKill* v. *Wright* (where the court had treated the guarantee as relating to the contemplated cargo) was distinguished on the grounds of the differences in wording of the guarantee provisions.
(*Millar* v. *Freden* [1918] 1 K.B. 611.)

A charter contained a guarantee by owners to place at the charterers' disposal a stated deadweight and bale capacity. There was a shortfall in the vessel's deadweight capacity for cargo as a result of the presence on board of dunnage necessary for proper stowage of the cargo. It was held that the owners were not liable for the shortfall.
(*Thomson* v. *Brocklebank* [1918] 1 K.B. 655.)

3.21 In *MacKill* v. *Wright* the guarantee stated that the vessel "shall carry . . .", and the freight was, by express agreement, to be adjusted on the amount actually carried. *Millar* v. *Freden* may therefore be considered as expressing the general rule of construction, and its reasoning will apply *a fortiori* in a case where there is also a statement or guarantee of the bale or grain capacity of the ship. Where the charterparty contained a guarantee of both deadweight and cubic capacity, failing which a *pro rata* reduction in freight was to be made, it was held that the reduction should be made for lack of deadweight even though the charterer had loaded a measurement of cargo to the full volume guaranteed.[38]

3.22 In the Gencon charter the statement of the vessel's deadweight and bale capacity relates solely to cargo, and therefore does not fall to be reduced by any allowance for bunkers, water or stores.[39] Where the charter does not indicate whether or not such an allowance is to be made, it has been held that an allowance should be made for bunkers, stores and for boiler feed water, but not for water in the boilers themselves (excluded as being part of the ship's equipment).[40] A statement of the vessel's deadweight is sometimes coupled with one as to her draught. It has been held that, where the parties contemplated that the vessel might load in fresh water, a guarantee of the vessel's draught related to fresh water as well as salt water.[41]

"About"

3.23 In the Gencon form, the statement of the ship's deadweight carrying capacity is qualified by the word "about". The standard form is also often modified so as to include a further description of the ship including, for example, bale capacity and hatch dimensions, also similarly qualified as "about". If the ship, although not exactly of the stated capacity, is within the margin of error permitted by the word "about", there is no misrepresentation or breach of contract on the part of the owner. In the absence of any words such as "about" the ship must comply exactly with the description subject only to the tolerance allowed by the *de minimis* rule.[42]

38 *Societa Anonima Ungherese* v. *Tyset Line* (1902) 8 Com. Cas. 25. *Seq. quaere.*
39 *Cf. The Resolven* (1892) 9 T.L.R. 75.
40 *Soc. Minière du Tonkin* v. *Sutherland & Co.*, unreported, 27 April 1917.
41 *The Norway (No. 2)* (1865) 3 Moo. P.C.(N.S.) 245.
42 See para. 6.21 and Lond. Arb. 18/06 (2006) 702 L.M.L.N. 3.

3.24 The margin of error which is permissible on this ground is not easy to describe in precise terms. Essentially the question is whether those engaged in the business of letting out ships on charter and of shipping cargoes would consider that the discrepancy in question was fairly comprehended by the word "about".

A charterparty for the *Tel Aviv* described her as "of about 478,000 cubic feet bale capacity", but her actual bale capacity was 484,015 cu. ft. Devlin J. held that even if this was a misdescription and therefore a breach by owners, their breach was not repudiatory. He also expressed the following view on the meaning of "about": "If I had to determine whether the margin of 1.2 per cent was within the phrase 'about', it might be a point on the evidence that I have had which would require some careful consideration. *Prima facie*, I must say that I should have thought it was a small percentage and might well have been within the phrase 'about' but [counsel for the shipowner] rightly relies upon the evidence on this point. . .as showing that 1000 cu. ft. or thereabouts would be the sort of margin as a matter of business so contemplated within the meaning of the word 'about'."
(*Cargo Ships "El-Yam"* v. *"Invotra"* [1958] 1 Lloyd's Rep. 39, 52. See also Lond. Arb. 18/06 (2006) 702 L.M.L.N. 3.)[43]

3.25 In earlier cases concerned with deadweight capacity, "about" was held to permit a considerably larger margin in percentage terms. In *Morris* v. *Levison*,[44] where the ship was chartered to load a full and complete cargo "say about 1,100 tons", a margin of 3 per cent was allowed, and in *The Resolven*,[45] where the ship was chartered to carry "2,000 tons or thereabouts" a margin of 5 per cent was held to be appropriate. In *Dreyfus* v. *Parnaso*,[46] the Court of Appeal held that a shortfall of 331 tons, on a declared cargo quantity of "10,450 tons approximative", was permissible. It is probable, however, that in larger capacity ships a smaller margin, in percentage terms, is appropriate.

Classification

3.26 In a number of nineteenth-century cases a statement in the charterparty of the ship's classification was held to amount to a "warranty".[47] However, it seems clear that the word "warranty" was there used not in contrast with "condition", but as meaning a contractual term rather than a mere representation. It is apparent from *Ollive* v. *Booker* and *Routh* v. *MacMillan*[48] that the court envisaged that the contractual term constituted by the statement of the ship's class was one which, if broken, would entitle the charterer to refuse to load as well as to claim damages, and this view was adopted in *French* v. *Newgass*[49] and by Mocatta J. in *The Apollonius*.[50] A contrary view, that the statement is not a condition, was expressed by Atkinson J. in *Lorentzen* v. *White*.[51]

3.27 It was held in *French* v. *Newgass*[52] that a representation as to the ship's class relates only to the date of the charterparty; there is no continuing warranty that she will remain in class, or that the owner will exercise due diligence to keep her in class. The decision, although of some

43 Where the tribunal considered that the fact that cubic capacity was readily capable of precise measurement counted against a broad margin being allowed by the term "about".
44 (1876) 1 C.P.D. 155. See also *Rederi A/B Urania* v. *Zacharides* (1931) 41 Ll. L. Rep. 145.
45 (1892) 9 T.L.R. 75.
46 [1960] 2 Q.B. 49.
47 See *Ollive* v. *Booker* (1847) 1 Exch. 416, 423, 424; *Hurst* v. *Usborne* (1856) 18 C.B. 144; *Routh* v. *MacMillan* (1863) 2 H. & C. 750, 761.
48 *Ibid.*, n. 46.
49 (1878) 3 C.P.D. 163.
50 [1978] 1 Lloyd's Rep. 53, 61.
51 (1942) 74 Ll. L. Rep. 161, 163.
52 (1878) 3 C.P.D. 163, approving *Hurst* v. *Usborne* (1856) 18 C.B. 144.

antiquity, is probably not affected by any modern tendency to regard items of description as applying to the commencement of the chartered service rather than to the date of the charter. Mocatta J. in *The Apollonius*,[53] while deciding that a statement of the vessel's speed should apply at the date of delivery, distinguished the cases concerned with classification on the grounds that a ship's class depends upon the decisions and the opinions of the classification society. If the statement as to class took effect at any date after the date of the charter the shipowner could be rendered in breach by the wrongful act of the classification society in withdrawing her class; for as pointed out in *French* v. *Newgass*, a statement that the ship is classed involves no statement that she is rightly classed, and, by parity of reasoning, the statement is not complied with by showing that the ship's condition is such that it merits the relevant classification, if that classification has in fact been withdrawn. However, by analogy with the situation regarding flag and nationality, it is submitted that there is an implied term that the owner will not deliberately cause the ship's classification to be withdrawn. Oil majors' and others' approvals (e.g., RightShip) may be treated in the same way (see below).

3.28 Some charters, such as the Asbatankvoy, contain express provisions requiring the owner to maintain the vessel's class throughout the charter, or to exercise due diligence to maintain her class, and in practice, where the withdrawal of class is justified, it will usually involve a breach by the owner of his express or implied obligations with regard to seaworthiness.

Oil major[54] approvals

3.29 "*Approved*". In the light of current market practice, blanket/continuing approvals cannot now be obtained, and a vessel may be considered to be "approved" if an oil major has issued a letter indicating that it considers the vessel presently acceptable or "not unacceptable", although not pre-approved and always subject to further vetting and approval if submitted for any particular business.[55]

3.30 An approvals clause may, depending on its language, impose a continuing obligation in respect of approvals or amount merely to a promise at the time that it is made. In *The Rowan*,[56] the Court of Appeal considered a clause providing: "tbook vsl approved by: bp/exxon/shell/statoil/moh". It was held that this did not impose any continuing obligation, but did involve a limited degree of futurity: owners promised, as at the date of the charterparty, that to the best of their knowledge, they had procured relevant approvals and knew of no facts that would cause the vessel to lose the approvals during the course of the charterparty.[57]

3.31 Where the clause says nothing in terms about the condition/state of the vessel, it is likely to be construed as imposing only documentary obligations (i.e., obligations to have the relevant approvals in place).[58] A statement that the vessel has an approval may well be classified as a condition of the contract.[59] However, often these clauses set out a specific, exclusive code of remedies (including, for example, cancellation) that are to apply in the event that approvals are not obtained, maintained or reinstated within specified periods.

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

54 Absent other indications in the charterparty or factual matrix, "oil major" is probably to be interpreted as applying to the six established oil majors: see *Dolphin Tanker SRL* v. *Westport Petroleum Inc. (The Savina Caylyn)* [2011] 1 Lloyd's Rep. 550. But obviously the market perception as to which companies qualify as an "oil major" may change over time.

55 *Transpetrol Maritime Services Ltd* v. *SJB (Marine Energy) BV (The Rowan)* [2011] 2 Lloyd's Rep. 331, paras 29–34, [2012] 1 Lloyd's Rep. 564, paras 3–5. For further explanation of this practice, and the genesis of it, see [2011] L.M.C.L.Q. 465.

56 [2012] 1 Lloyd's Rep. 564.

57 Paragraph 18.

58 *The Rowan* [2012] 1 Lloyd's Rep. 564, paras 23–25.

59 *B.S. & N. Ltd (BVI)* v. *Micado Shipping Ltd (Malta) (The Seaflower)* [2001] Lloyd's Rep. 341.

Flag and nationality

3.32 The Gencon form does not provide for the flag or nationality of the ship to be specified, and in the following case the court refused to infer from the name of the ship any term or representation as to her flag. However, it was held to be an implied term that the shipowner will not, during the currency of the charterparty, change the ship's flag if, by so doing, he substantially affects the value of the ship to the charterer.

> A British ship, *City of Hamburg*, was chartered for 12 months, the charter containing no statement of her flag or nationality. Shortly after delivery her owners sold her, subject to charter, to Greek interests. The charterers, while continuing to perform the charter, claimed damages on the basis that they had suffered loss of sub-freights as a result of the ship's change of flag. Rowlatt J., although he decided that many of the items of damage claimed were not substantiated, held that there had been a breach of charter and that the claim succeeded in principle:
>
> "It seems to me that when parties contract for services to be rendered to the one of them by means of a specific chattel at any rate there is an implied undertaking on the part of the other contractor that the chattel shall not be altered so as to prejudice the services which are to be rendered by him . . . I think the question here is whether the change of flag was a material matter . . . I do not think it can be held for a moment that there is no difference under what flag a ship sails. The law of the flag is of importance, and the collateral effects of the law of the flag are also material. The morale of the crew and a hundred matters, it may be, are all matters capable of being of very great importance."
>
> (*Isaacs* v. *McAllum* (1921) 6 Ll. L. Rep. 289.)

3.33 An express representation in the charterparty of the ship's flag has been held to amount to a condition if it is of fundamental importance to the charterer. *Scrutton on Charterparties*[60] refers to a case in which arbitrators held that the nomination of a Spanish ship, during the Spanish-American War of 1898, was not in compliance with the carrier's obligation to nominate a "first class steamer", since the ship was liable to capture, and that the charterer was therefore under no obligation to load her. The Court of Appeal refused to order a special case to be stated. In *Behn* v. *Burness*,[61] Williams J. expressed the view that a statement of the ship's national character made in the charterparty in time of war might amount to a "warranty", whereas the same statement made in time of peace might be construed as a mere representation. However, it is submitted that a statement of the ship's nationality, if made in the charterparty, would not now be construed as a mere representation even in time of peace, and the courts would be likely to regard the statement as an intermediate term.

Condition of the vessel and her gear

3.34 Since the implied obligation to provide a seaworthy ship is not a condition but an intermediate term, an express provision describing the condition of the ship, or the capacity of her gear,[62] is usually treated as having the same effect. This is to be contrasted with statements relating to the ship's status, such as her classification,[63] or whether she has major oil company approval,[64] which will more readily be treated as conditions.[65] By parity of reasoning a statement in the charter that the vessel is fully insured against hull and machinery or against P. & I. risks might be treated as a condition. An obligation on the part of the owner to keep a

60 22nd edn, p. 144, n. 26.

61 (1863) 3 B. & S. 751, at p. 757.

62 See *The Arianna* [1987] 2 Lloyd's Rep. 376.

63 See para. 3.26, above.

64 *The Seaflower* [2001] 1 Lloyd's Rep. 341.

65 See paras 63–64 of the judgment of Rix L.J. in *The Seaflower*.

to be extended."[94] Courts have rejected claims of quasi-deviation predicated on misdelivery, even if committed with criminal intent,[95] and in cases of negligence.[96] Still, the Ninth Circuit has ruled that a carrier's "intentional"—but not negligent or reckless—act to cause destruction of cargo is a quasi-deviation that relieves the carrier of its package limitation.[97] It appears that a carrier has the requisite intent when it has knowledge that damage is "substantially certain" to result.[98] Thus, the analysis hinges on the knowledge and expectations of the party or parties acting on the carrier's behalf.[99]

12A.58 It is unclear precisely to what extent quasi-deviation claims can exist in cases not involving unauthorized on-deck stowage. Decisions from the Second Circuit suggest that quasi-deviation is so limited and does not arise due to other misconduct.[100] Yet the Second Circuit has found deviation where the carrier has issued a bill of lading that is known to misrepresent the cargo at the time it is issued.[101] At least one commentator has suggested that the Second Circuit's case law strictly limiting quasi-deviation to unauthorized on-deck storage is inconsistent with its allowance of such claims premised on "fundamental breach."[102]

12A.59 In *Rockwell International Corp.* v. *M/V Incontrans Spirit*,[103] the Fifth Circuit refused to expand the doctrine of non-geographic deviation to void the COGSA package limitation in a case of negligent overloading. The court affirmed that no act or omission on the part of the carrier constituted a deviation that would abrogate the statutory limitation. The court reasoned that the pier-to-pier term of the bill of lading did not change the result, even though it gave the carrier the authority to place the cargo in containers and load it upon the ship and to direct its discharge.

94 *B.M.A. Indus., Ltd.* v. *Nigerian Star Line, Ltd.*, 1986 AMC 1662, 1665, 786 F.2d 90, 92 (2d Cir. 1986) (quoting *Iligan Integrated Steel Mills, Inc.* v. *SS. John Weyerhaeuser*, 1975 AMC 33, 507 F.2d 68, 72 (2d Cir. 1974)).

95 See *B.M.A.*, 1986 AMC at 1664–1665, 786 F.2d at 91–92; see also *C.A. Articulos Nacionales de Goma Gomaven* v. *M/V Aragua*, 1986 AMC 2087, 2093–2094, 756 F.2d 1156, 1160–1161 (5th Cir. 1985).

96 *Rockwell Int'l Corp.* v. *M/V Incotrans*, 1994 AMC 71, 74, 998 F.2d 316, 318 (5th Cir. 1993); *Universal Leaf Tobacco Co.* v. *Companhia de Navegacao Maritima Netumar*, 1993 AMC 2439, 2445, 993 F.2d 414, 417 (4th Cir. 1993); *Sedco, Inc.* v. *SS. Strathewe*, 1986 AMC 2801, 2806–2807, 800 F.2d 27, 31–32 (2d Cir. 1986).

97 See *Vision Air*, 1999 AMC at 1183, 155 F.3d at 1175.

98 See *Jindo* v. *Tolten*, 2003 AMC 1312, 1318 (C.D. Cal. 2001).

99 See *ibid.* at 1318–1319.

100 See *Sedco, Inc.* v. *SS. Strathewe*, 1986 AMC 2801, 2807, 800 F.2d 27, 31 (2d Cir. 1986) ("Nonetheless, having accepted the doctrine, we have limited it to two situations: geographic deviation and unauthorized on-deck stowage ('quasi-deviation')."); see also *B.M.A. Indus., Ltd.* v. *Nigerian Star Line, Ltd.*, 1986 AMC 1662, 1664–1665, 786 F.2d 90, 92 (2d Cir. 1986) ("Appellant suggests that we further extend the doctrine to cover instances of corrupt or criminal misdelivery. For several reasons, we decline to do so . . . Our court repeatedly has declined to extend the doctrine of deviation on the basis of culpability or crime."); *Atl. Coast Yacht Sales, Inc.* v. *M/V Leon*, 2003 AMC 1871, 1876 (D. Md. 2003) (unreasonable deviation is limited to geographic deviation and unauthorized on-deck stowage).

101 See *Mitsui Marine Fire & Ins. Co.* v. *Direct Container Line, Inc.*, 2002 AMC 190, 194–196, 119 F. Supp. 2d 412, 415–417 (S.D.N.Y. 2000); *Berisford Metals Corp.* v. *S/S Salvador*, 1986 AMC 874, 779 F.2d 841, 846 (2d Cir. 1985) ("Although we have declined to extend full liability in some contexts that have been likened to deviations or 'quasi-deviations' in a voyage, we have steadfastly adhered to . . . the proposition that the $500 per package limitation of liability may not be invoked by a carrier that has issued an on board bill of lading erroneously representing that goods were loaded aboard its ship, regardless whether or not the carrier acted fraudulently." (citations omitted)).

102 See Mary Pace Livingstone, Comment, *Has the Deviation Doctrine Deviated Unreasonably?*, 26 Tul Mar.L.J. 321, 351–352 (2001).

103 1994 AMC 71 (5th Cir. 1993).

CHAPTER 13

Freight

[clause 1 continued]

. . . on being paid freight on delivered or intaken quantity as indicated in Box 13 at the rate stated in Box 13.

. . .

4. Payment of Freight

The freight to be paid in the manner prescribed in Box 14 in cash without discount on delivery of the cargo at mean rate of exchange ruling on day or days of payments the receivers of the cargo being bound to pay freight on account during delivery, if required by Captain or Owners.

Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent, to cover insurance and other expenses.

The meaning of freight

13.1 Freight is the remuneration payable for the carriage of the cargo. The law on the subject was developed in relation to the carriage of goods by sea, but many aspects of it have since been applied in relation to all forms of carriage[1] and to cases where a freight forwarder organises carriage.[2]

13.2 In order to earn freight, the shipowner must, unless otherwise agreed, carry the cargo to the destination provided for in the charterparty and be ready to deliver it there.[3] If he fails to deliver any cargo, no freight is payable; if he delivers part of the cargo loaded, it is payable only on the part delivered. The principle was stated by Willes J. as follows:

> . . . the true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they may be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carries part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried

1 *United Carriers* v. *Heritage Food Group* [1995] 2 Lloyd's Rep. 269.

2 *Britannia Distribution* v. *Factor Pace* [1998] 2 Lloyd's Rep. 420.

3 See for an example of the strictness of the principle where the parties agreed a "freight deemed earned" provision, Lond. Arb. 22/91 (L.M.L.N. 316).

unless the charterparty makes the carriage of the whole a condition precedent to the earning of any freight—a case which has not within our experience arisen in practice . . .
(*Dakin* v. *Oxley* (1864) 15 C.B. (N.S.) 646, *per* Willes J. at pp. 664–665.)

13.3 Under the printed terms of the Gencon charterparty the common law rules as to the earning of freight are modified by the provision in clause 4 for an advance of cash at the loading port, and they may be modified more extensively, depending upon the way in which Box 13 is completed. In addition, the printed terms are frequently varied by special provisions which affect the question when freight has been earned. These matters are discussed later in this chapter.

The quantity of cargo on which freight is payable

13.4 The Gencon form allows the parties to select whether freight is payable on the "delivered" or on the "intaken" quantity. However, the effect of either provision is ambiguous because there are two distinct reasons why delivered and intaken quantities may differ. First, the goods may, without any loss or destruction on the voyage, lose or gain weight or volume, as a result of variations in moisture or temperature, or other causes, and the parties may therefore wish to stipulate the time at which the cargo is to be measured for the purpose of calculating freight. Secondly, the whole or some part of the cargo loaded may be lost or destroyed on the voyage, for example, by being washed overboard, or by theft or seizure, and the parties may wish to stipulate whether freight is payable on such cargo. It is open to the parties to make different stipulations with regard to each of these two matters, and some charters provide that, for the purpose of calculating freight, the goods shall be measured on shipment but that freight shall not be payable on goods which are lost during the voyage.[4] However, the freight calculation provisions of the Gencon charter do not expressly state whether they are referring to the place of measurement of the cargo or the cargo on which freight is payable, or both.

13.5 Whereas it is clear that, in the absence of agreement to the contrary, freight is not payable on goods which are lost during the voyage and not delivered, the common law rule with regard to goods which alter in weight or volume during the voyage is unclear. In *Dakin* v. *Oxley*[5] Wilde J. expressed the view that freight was payable on the intaken measure "because that is what the contract refers to", but this view has not been universally accepted.

A charter provided that freight should be payable at "75s. per ton of 50 cubic feet delivered". Cotton was shipped in compressed bales which expanded after discharge from the ship, but before delivery to the consignee.

The Exchequer Chamber held that the clause was directed to the cargo by reference to which freight was to be paid, not to the time of measurement, and therefore that it did not displace the "rule" that freight was to be calculated and paid on the amount which was put on board, carried throughout the voyage and delivered to the consignee.
(*Buckle* v. *Knoop* (1867) L.R. 2 Exch. 125, 333, applying *Gibson* v. *Sturge* (1855) 10 Exch. 622.)

However, in both *Gibson* v. *Sturge* and *Buckle* v. *Knoop* the result would have been the same if the intaken measure had been adopted, and there is no reported case in which the point has arisen directly for decision.

"Freight on intaken quantity"

13.6 If the parties stipulate simply that freight is payable on intaken quantity, such a provision will probably govern both the place of measurement of the cargo and the question

4 See, e.g., *Spaight* v. *Farnworth* (1880) 5 Q.B.D. 115, where freight was payable on "intake measure of quantity delivered".
5 (1864) 15 C.B.(N.S.) 646.

whether freight has been earned on cargo lost or destroyed on the voyage, at any rate where the cargo is shipped in bulk.

The Metula was chartered to carry a cargo of oil in bulk under a charterparty on the Exxonvoy 1969 form which provided: "Freight shall be computed on intake quantity . . . as shown on the Inspector's Certificate of Inspection. Payment of freight shall be made by Charterer without discount upon delivery of cargo at destination." The vessel stranded on the voyage and about 52,000 tons of cargo were lost. The charterers contended that the provisions of the charter related only to the place of measurement, and did not affect the common law that freight was not earned on lost cargo, and therefore that they were only liable to pay freight on the quantity delivered, grossed up by 0.5 per cent (to cover ordinary diminution caused by evaporation and clingage) in order to arrive at the intaken quantity of the cargo delivered.

Donaldson J. and the Court of Appeal held that freight was payable on the entire quantity loaded. The provisions of the charter indicated that the amount of cargo on which freight was payable should be ascertained on loading and there were no provisions for remeasurement or adjustment at the port of discharge. The amount of freight was therefore fixed on loading, although it was not payable until delivery.
(*Shell International Petroleum Co.* v. *Seabridge Shipping* (*The Metula*) [1977] 2 Lloyd's Rep. 436, [1978] 2 Lloyd's Rep. 5.)

13.7 However, it is always a question of construction of the particular terms of the contract whether a provision that freight is to be calculated on intaken quantity displaces the common law rule so as to entitle the shipowner to freight on goods accidentally lost on the voyage, or whether it relates solely to the time and place of measurement. Thus, in *London Transport Co.* v. *Trechmann*[6] the charter provided for carriage of a cargo of bagged sugar, with freight payable ". . . at the rate of 10s. 6d. per ton, gross weight shipped, payable on right and true delivery of the cargo . . ." The Court of Appeal held that freight was not payable on bags which had been jettisoned. This decision was doubted in *The Metula*, but may be distinguished from that case on the ground that the cargo was shipped in bags, so that it was possible to ascertain the shipped weight of the cargo delivered. Where cargo is shipped in bulk, this will normally be difficult or impossible. Nevertheless, where Box 13 is completed so as to provide for payment for freight on intaken quantity, the likelihood is that the court would be inclined to follow *The Metula* and to hold that this provision governed both the place of measurement and the liability to pay for goods lost on the voyage, and would adopt this approach whether the cargo was shipped in bulk or not, unless there was some provision in the charter which pointed to a different conclusion.

13.8 Even in such a case as *The Metula* it is necessary that some cargo in excess of an amount which is commercially insignificant be delivered if freight on the intaken weight is to become payable, since if no cargo is delivered the time for payment will never arrive. It would be otherwise if the charter provided that freight should be deemed earned at an earlier date, although not payable until delivery or after delivery.[7]

"Freight on delivered quantity"

13.9 Where Box 13 provides that freight should be payable on delivered quantity it is again a question of construction of the charter as a whole whether this stipulation refers to the time of measurement or the goods upon which freight is payable, or both.

Green bark was shipped from Penang to London under a bill of lading which stipulated that freight should be paid at "£3 per ton, nett weight delivered". During the voyage the bark dried out and lost weight.

6 (1904) 90 L.T. 132.
7 See *Vagres Compania Maritima* v. *Nissho-Iwai American Corp. (The Karin Vatis)* [1988] 2 Lloyd's Rep. 330.

It was held that the freight clause governed the time and place of measurement as well as the cargo on which freight was to be paid, with the result that freight was payable on the dried-out weight at the destination.

(*Coulthurst* v. *Sweet* (1866) L.R. 1 C.P. 649; but in *Buckle* v. *Knoop* (1867) L.R. 2 Exch. 333 (see above), where the change in measurement occurred between discharge and delivery, it was held that a provision that freight should be paid at "75s. per ton of 50 cubic feet delivered" was not clear enough to govern the place of measurement as well as the cargo on which freight was payable.)

Other stipulations: conclusive evidence

13.10 When the charterparty, or the bill of lading, contains no provision that the bill of lading shall be conclusive evidence of the quantity shipped it is in general open to either party to show that the quantity stated in the bill of lading is incorrect.[8] However, the bill of lading is *prima facie* evidence of the shipment of the goods as described therein, both at common law, and under Article III rule 4 of the Hague-Visby Rules, where they apply, and in certain circumstances the bill of lading may create an estoppel.[9]

13.11 It is sometimes stipulated that the bill of lading shall be conclusive evidence of the quantity shipped, and such a stipulation will be given full effect for the purpose of calculating freight. Where the bill of lading refers not only to the quantity, but also to the weight or measure of the goods, the effect of such a clause will be to make the bill of lading conclusive evidence of all such matters.

The Pocahontas carried a cargo of deals and other timber under a charter which provided that freight was payable ". . . on the intake measure of the quantity delivered as ascertained at port of discharge . . . Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to the ship . . ." The bill of lading acknowledged receipt of 39,104 deals and of various quantities of other types of timber, and stated the total measurement of each type. There was a short delivery of deals, and an over-delivery of other types of wood, in circumstances which indicated that the full bill of lading quantity of deals had never been shipped and more than the bill of lading quantity of other goods had been shipped. The shipowner claimed full freight on the bill of lading measures.

The Court of Appeal held that the freight on the deals was to be calculated on the bill of lading measure reduced in proportion to the short delivery, and the freight on the other pieces was to be calculated on the bill of lading measure, since the bill of lading was conclusive of the measure of each type.

(*Mediterranean & New York SS. Co.* v. *Mackay* [1903] 1 K.B. 297.)

13.12 Similarly, where freight is payable on "invoiced quantity as per bill of lading", the bill of lading is conclusive and such a stipulation is not affected by a provision in the bill of lading "quantity and quality unknown".[10] It may be therefore that a "quantity and weight unknown" bill of lading is effective for the ascertainment of freight which is referable to the bill of lading quantity, even if not for the purposes of proving the shipment of a specific quantity or weight of goods. This is not necessarily surprising because a master will sign a "quantity weight unknown" bill of lading in order to protect the shipowner from a claim for short delivery when the bill of lading figure is greater than the true loaded figure, but such a greater figure could only increase the freight payable and if a shipper/charterer is willing to present a bill of lading

8 See *Mclean* v. *Fleming* (1871) L.R. 2 Sc. & Div. 128.

9 But *cf.* where it is marked "quantity, weight unknown", it is not evidence of the loading of any quantity or weight at all: *The Atlas* [1996] 1 Lloyd's Rep. 642; *The Mata K* [1998] 2 Lloyd's Rep. 614.

10 See *Tully* v. *Terry* (1873) L.R. 8 C.P. 679 (but contrast *Red. Gustav Erikson* v. *Ismail (The Herroe and Askoe)* [1986] 2 Lloyd's Rep. 281), where, in the context of a claim for short delivery, the printed words "quantity unknown" in the bill of lading were held to render a conclusive evidence clause, to be incorporated from a charterparty, ineffectual.

with an inflated loaded quantity on it, he must be taken to accept the increased freight liability. The parties may agree that freight is payable on the quantity stated in a particular document (e.g., a customs declaration), in which case the quantity stated in that document will be conclusive, even if erroneous.[11]

The rate of freight

13.13 Freight is normally agreed to be calculated by reference to the weight or volume of the goods, or sometimes by reference to the number of units shipped. In certain trades, freights are customarily fixed by reference to published scales, such as "Worldscale" (Worldwide Tanker Nominal Freight Scale) or "Intascale" (International Tanker Nominal Scale).

13.14 When the parties agree that freight is to be calculated by reference to a published scale which is periodically revised, they will normally be taken to have agreed to incorporate all revisions and amendments to the scale current at the time when freight becomes payable. This will be so even if the charter does not expressly stipulate that freight is to be calculated by the scale "as amended from time to time".[12] It is otherwise, however, if the terms of the charterparty make it clear that the parties did not intend to incorporate amendments made after the date of the charter.[13]

13.15 Where the parties agree that all freight shall be fixed by reference to the scale "as amended", all current additions to the scale will be incorporated, even though they are entirely new provisions of the scale and not simply alterations of rates.[14] When amendments to the scale are incorporated, the amendments will usually be held to apply in accordance with their own terms. Thus, where the charter provided that freight should be calculated in accordance with Worldscale and any amendments thereto, it was held that this did not incorporate an amendment, which had come into force before the date on which freight was payable, but which, in its own terms, applied only to voyages which commenced after the date in question.[15] It has been held that, where freight is calculated by reference to Worldscale, the freight is not to be escalated in accordance with the bunker indices in Worldscale, unless there is an express agreement or a clear implication to that effect.[16]

13.16 Some charters provide for freight rates which vary according to the route used. For instances of the operation of such clauses see *The Seiko Maru*[17] and *Achille Lauro* v. *Total*[18] (Suez Canal clause).

13.17 If no rate of freight is stipulated in the charter or in any separate agreement, the charterer must pay a reasonable rate of freight, unless the circumstances are such as to give rise to the inference that the parties intended the carriage to be gratuitous.[19] The mere fact that the goods shipped may, in certain events, become the property of the shipowner will not of itself give rise to such an inference.[20]

11 Lond. Arb. 8/07.

12 *Mitsui OSK* v. *Agip* [1978] 1 Lloyd's Rep. 263.

13 *The Mersin* [1973] 1 Lloyd's Rep. 532.

14 *The Seiko Maru* [1970] 2 Lloyd's Rep. 235.

15 *The Yoho Maru* [1973] 1 Lloyd's Rep. 409.

16 *The Maritsa* [1979] 1 Lloyd's Rep. 581.

17 [1970] 2 Lloyd's Rep. 235.

18 [1969] 2 Lloyd's Rep. 65.

19 *The Ursula Bright* (1903) 8 Com. Cas. 171, and see the Supply of Goods and Services Act 1982, s. 15. Applied in *BP Oil International Ltd* v. *Target Shipping Ltd (The Target)* [2012] 2 Lloyd's Rep. 245, para.162, in relation to overage freight; reversed on other grounds [2013] 1 Lloyd's Rep. 561.

20 *Gumm* v. *Tyrie* (1865) 6 B. & S. 298,

Overage freight

13.18 Questions may arise as to whether freight is payable, and if so at what rate, on any quantity of cargo additional to a specified minimum quantity (the "overage"). Parties sometimes agree that no overage freight is payable or that overage is payable at some percentage (often 50 per cent) of the freight rate. However, in *The Target*[21] the Court of Appeal held (disagreeing with Andrew Smith J.) that the parties had expressly provided that a specified freight rate applied to all the cargo, both the stated minimum and the excess over that minimum. If charterers wish to avoid this result, they should ensure that the charter includes clear words to indicate what is intended in relation to overage.

Lumpsum freight

13.19 Many charterparties provide that the freight, instead of being payable at an agreed rate on the quantity of goods shipped or delivered shall be an overall fixed sum. Such a sum is a "lump freight" or "lumpsum freight", and has been described as not being freight properly so-called, but "more properly a sum in the nature of a rent to be paid for the use and hire of the vessel on the agreed voyage(s)".[22] However, *Thomas* v. *Harrowing SS. Co.*[23] shows that the comparison with rent or hire will not be taken too far, and, under most provisions for lumpsum freight, the substance of the contract remains the carriage of goods rather than the making available of the vessel.

Lumpsum freight where no cargo is shipped or delivered

13.20 Where lumpsum freight is earned and payable on delivery and no goods are delivered, nothing is payable, since the event upon which payment becomes due has not occurred.[24] However, the charter may provide that freight shall be earned or deemed earned irrespective of delivery and it may then be recovered where delivery becomes impossible, for example, after the sinking of the vessel.[25] Equally, in the absence of provision to the contrary, lumpsum freight will not be payable if no cargo is shipped, the substance of the contract being the carriage of goods, and the freight being the remuneration for that service. When the non-shipment results from the fault of the charterer, the shipowner, being unable to perform the contract and earn freight without the co-operation of the charterer, would in practice have no choice but to terminate the contract and claim damages for the charterer's breach.[26]

Lumpsum freight when cargo is short-shipped or when some cargo is lost

13.21 It was held in *The Norway*[27] and *Merchant Shipping* v. *Armitage*[28] that where the charter provides for lumpsum freight, payable on delivery, the entire freight is payable even if part of the cargo is lost or disposed of before arrival at destination. In those cases the cargo was lost by excepted perils, and certain of the judgments lay considerable stress on this feature, as if to suggest that the position would be different if the loss was caused by a breach of contract by

21 *BP Oil International Ltd* v. *Target Shipping Ltd (The Target)* [2013] 1 Lloyd's Rep. 561.

22 Knight-Bruce L.J. in *The Owners of the Norway* v. *Ashburner (The Norway) (No. 2)* (1865) 3 Moo. P.C.(N.S.) 245. See also *Merchant Shipping Co.* v. *Armitage* (1873) L.R. 9 Q.B. 99, 107, *per* Lord Coleridge C.J.

23 [1915] A.C. 58; see below para. 13.24.

24 See *per* Bramwell B. in *Merchant Shipping* v. *Armitage* (1873) L.R. 9 Q.B. 99, at p. 111.

25 *Vagres Compania Maritima* v. *Nissho-Iwai American Corp. (The Karin Vatis)* [1988] 2 Lloyd's Rep. 330.

26 See paras 21.92 *et seq*.

27 *The Owners of the Norway* v. *Ashburner (The Norway) (No. 2)* (1865) 3 Moo. P.C. 254.

28 (1873) L.R. 9 Q.B. 99, following *The Norway* and *Robinson* v. *Knights* (1873) L.R. 8 C.P. 465.

the owner.[29] However, on principle this should not affect the matter; the charterer will have a claim to damages, but the rule against set-off prevents him from setting up this claim in reduction of the freight.[30] Moreover, since there seems to be no basis for apportioning lumpsum freight when part of the cargo is not delivered, the only alternative to allowing full recovery would be to hold that no freight at all is recoverable, a clearly unreasonable result.[31]

13.22 The charterparty in *Merchant Shipping Co.* v. *Armitage* also contained a provision that if the freights reserved by the bills of lading were less than the lumpsum freight, the difference was to be paid to the master before leaving the loading port and it was argued that this provision was exhaustive of the shipowner's rights, and showed that the shipowner was otherwise taking the risk of bill of lading freight not being payable in full by reason of a loss of cargo on the voyage. However, the court rejected the argument, holding that the provision was for the purpose of security only. It is therefore clear that any similar argument based on clause 9 of the Gencon form would also fail.

13.23 Just as the shipowner is entitled to full lumpsum freight if part of the cargo is not delivered, he is equally entitled to the full freight if part of the cargo is not shipped, even where the short-shipment results from fault on the part of the shipowner. As with short delivery, the charterer will have a claim for damages in respect of such fault, if actionable, but cannot set up this claim in reduction or extinction of his liability for freight.

> *The Elena* was chartered at a lumpsum freight for the carriage of livestock upon terms that the floor space of the holds was 4,757 sq. ft. and that the holds were to be fit to receive livestock to the satisfaction of a veterinary surgeon. At the loading port, the veterinary surgeon was not satisfied with the ventilation and restricted the available floor area to 3,364 sq. ft., so that the charterers were unable to load a full cargo of livestock. They claimed to deduct their loss from the freight payable.
>
> Steyn J. held that the shipowners were entitled to their full freight and the charterers were not entitled to make any deduction, even though the shipowners' breach manifested itself before loading even began.
>
> (*Elena Shipping* v. *Aidenfield (The Elena)* [1986] 1 Lloyd's Rep. 425. See also *Ritchie* v. *Atkinson* (1808) 10 East. 295, *Seeger* v. *Duthie* (1860) 8 C.B.(N.S.) 45 and *Pust* v. *Dowie* (1864) 5 B. & S. 20.)

Freight on transhipment

13.24 When the shipowner exercises his right of transhipment, he is entitled to freight for completing the voyage and delivering the cargo in the substituted ship, or by another means of transport, on the same basis as if he had delivered it in the chartered ship. The fact that the charter contains a provision for lump freight does not deprive the shipowner of his right to freight on transhipment.

> *The Ethelwalda* was chartered to carry a cargo of pit props from Finland to Port Talbot and to deliver the cargo on being paid a lumpsum freight of £1,600. While waiting to enter Port Talbot she was driven ashore by perils of the seas. Most of her cargo was washed up and was collected by local agents and taken in carts to the port. The shipowner claimed, on the authority of *The Norway* and *Merchant Shipping Co.* v. *Armitage*, that, having delivered such of the cargo as was not lost by excepted perils, he was entitled to the full lumpsum.

29 See in particular *per* Lord Coleridge at (1873) L.R. 9 Q.B. at p. 107. Contrast Lord Lindley in *Williams* v. *Canton Insurance* [1901] A.C. 462, 473.

30 See below, paras 13.22 *et seq*. The rule was held to apply to lumpsum freight in *The Elena* [1986] 1 Lloyd's Rep. 425.

31 See the judgment of Bramwell B. in *Merchant Shipping* v. *Armitage* at pp. 110–111. As to the non-apportionability of lumpsum freight see also *Pust* v. *Dowie* (1864) 5 B. & S. 20; *Blanchet* v. *Powell's Llantivit Collieries* (1874) L.R. 9 Ex. 74.

The charterer raised two defences to the claim. The first was that the cargo had not been carried to the port of delivery by the shipowner, but by a combination of wind and waves, and the act of a third party. The argument was rejected, on the grounds that the local agent was acting on behalf of the shipowner, and the case was therefore to be equated with any other where the voyage is completed by transhipment.

The second defence was that, since a charter for lumpsum freight was in effect a contract for the use of the named vessel on the voyage, it was an essential feature of the contract that the named vessel itself should complete the voyage, and therefore it was not open to the shipowner to earn freight by delivery otherwise than from the chartered vessel. The House of Lords rejected this argument, on the grounds that "the substance of the contract is the carriage of the cargo and the ship is the instrument by means of which the cargo is carried, and considerations relating to the ship are subordinate to considerations relating to the cargo" (*per* Viscount Haldane L.C.).

(*Thomas* v. *Harrowing SS. Co.* [1915] A.C. 58.)

Fault of the charterer preventing the earning of freight

13.25 The charterer, by a breach of the charter, may prevent the owner from earning full freight, or any freight, for example by failing to load a full and complete cargo,[32] or any cargo, failing to make a valid nomination of a discharging port[33] where freight is earned and payable on delivery there, or failing to present bills of lading when freight is payable upon signature.[34] In some such cases the courts have allowed recovery of freight as such, simply on the grounds that the event which prevented the completion of the voyage as originally agreed was brought about by the charterer's own default, or that his conduct amounted to a waiver of the owner's obligation to complete the voyage.[35] Later authorities,[36] however, have tended to hold that the proper entitlement in such cases is damages rather than freight, and in such a case the shipowner will be entitled to damages assessed upon usual principles.[37] It follows that, where the owner has no opportunity of mitigating his loss, the damages will be equal to the full amount of the freight.[38] Where the charterer's breach, although it prevents the owner from performing the charter in the contemplated manner, does not prevent the occurrence of the event upon which freight is earned, the owner is entitled to freight as such, and not merely to damages. For example, under a charter which provides for freight to be earned on shipment, if the charterer refuses to ship any goods the owner's claim is for damages rather than freight, but if, after shipment, the charterer refuses to nominate a discharging port, the owner is entitled to freight as such, since he has already earned it.

13.26 The owner is entitled to the full freight if the cargo owner requests and obtains delivery at an intermediate port. The shipowner being otherwise willing and able to carry the goods to

32 See Chapter 54 on deadfreight.

33 *Akt. Olivebank* v. *Dansk Svovlsyre Fabrik (The Springbank)* [1919] 2 K.B. 162.

34 *Oriental SS. Co.* v. *Tylor* [1893] 2 Q.B. 518.

35 See *Cargo ex Galam* (1863) 2 Moo. P.C.(N.S.); *The Soblomsten* (1886) L.R. 1 A. & E. 293. In the latter case the cargo owner's failure to discharge a salvor's lien resulted in a sale of the cargo at a port of refuge and thus prevented the completion of the voyage. Although pro rata freight only was claimed, the view was expressed that full freight might have been recovered. Although the rule of construction that a person is not permitted to take advantage of his own wrong is still active (see *Alghussein Establishment* v. *Eton College* [1988] 1 W.L.R. 587) there appears to be no recent reported case where it has been applied where the issue is whether a carrier is entitled to freight or damages, and it seems unlikely that the court would readily apply it, particularly where the carrier is able substantially to mitigate his loss. However, an analogy may be drawn with the case where an "off-hire" event occurs as a result of a breach by a time charterer, as to which see *Time Charters*, paras 25.46 *et seq*.

36 See the cases cited in nn. 33 and 34 above, and para. 13.106, below

37 See Chapter 21.

38 As was the case in *The Springbank* and *Oriental SS. Co.* v. *Tylor* (above nn. 33 and 34).

the destination, an agreement to pay freight can be inferred.[39] The situation where freight is payable on delivery and the charterer refuses to accept delivery at the destination is discussed later in this chapter.[40]

Pro rata freight for delivery short of destination

13.27 There is no general rule that when only part of the voyage has been performed and the goods have been delivered short of their destination a proportion of the freight is payable. As Willes J. said in *Dakin* v. *Oxley*,[41] "if the shipowner fails to carry the goods to the port of destination the freight is not earned". Unless the charter itself contains a provision for pro rata freight, the shipowner who wishes to maintain a claim for pro rata freight must show that the parties have entered into a fresh contract[42] whereby a proportion of the freight is payable. The fresh contract may be express or implied, but the circumstances in which a contract is implied are rare, because if the shipowner abandons the voyage,[43] or if he is unable or unwilling to complete it without such delay as would frustrate the adventure, the goods owner is entitled to receive them at the place where the voyage terminates, and his receipt of the goods[44] or the proceeds of their sale[45] does not normally give rise to the inference that he has agreed to pay pro rata freight. On the other hand, if the shipowner is ready and willing to complete the carriage to destination, whether in the same ship or by transhipment if necessary, but the cargo owner requests delivery at the port of refuge, or makes it impossible for the shipowner to complete the voyage, for example, by failing to discharge a salvor's lien with the result that the goods are sold there, the usual conclusion is that the cargo owner has simply waived his right to have the goods carried to destination, and is liable for freight in full.[46]

13.28 Nevertheless, there are some instances, typically where the shipowner has been unable to complete the voyage but the cargo owner's acceptance of the goods short of destination is truly voluntary, where an agreement has been implied.[47] Since the liability arises under a fresh contract, normally between the shipowner and the goods owner, it is questionable whether a charterer who does not participate in the making of that contract would be liable for pro rata freight.

13.29 In the cases referred to above freight was payable on delivery. There seems to be no reason in principle why a fresh agreement under which pro rata freight becomes payable should not come into existence when freight is earned or payable at an earlier stage. Such an agreement would, in many cases, operate to reduce the freight otherwise payable, and it is difficult to envisage circumstances in which, if the parties have not made an express agreement, it would be appropriate to infer one.[48]

39 *The Soblomsten* (1886) L.R. 1 A. & E. 293. In certain circumstances the correct inference might be that there was an agreement to pay pro rata freight: see paras 13.27 *et seq*.

40 Below, paras 13.73 *et seq*.

41 (1864) 15 C.B.(N.S.) 646 at 664.

42 See *per* Blackburn J. in *Appleby* v. *Myers* (1867) L.R. 2 C.P. 651, 661. It is possible that in some cases a claim could be based on restitutionary principles, but see *Procter & Gamble* v. *Peter Cremer* [1988] 3 All E.R. 843 for an illustration of the problems of proving that the carriage of the goods has conferred an incontrovertible benefit on their owner.

43 See *The Cito* (1887) 7 P.D. 5. As to what constitutes abandonment see *Bradley* v. *Newsom* [1919] A.C. 16.

44 As in *Metcalfe* v. *Britannia Ironworks* (1877) 2 Q.B.D. 423.

45 See *Vlierboom* v. *Chapman* (1844) 13 M. & W. 230; *Hopper* v. *Burness* (1876) 1 C.P.C. 137.

46 See para. 13.26, above.

47 *Christy* v. *Row* (1808) 1 Taunt. 299; *Mitchell* v. *Darthez* (1836) 2 Bing. N.C. 555.

48 There appears to be no case where it has been contended that pre-earned freight should be reduced where delivery is taken short of destination. The point was not raised in *The Lefthero* [1991] 2 Lloyd's Rep. 599, where there were difficulties in completing the voyage followed by a "without prejudice" agreement to accept delivery short of destination.

CHAPTER 19

Cancelling 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.

Nature of the rights derived from the cancelling clause

19.1 The cancelling clause gives the charterer an express contractual right to terminate the charterparty if the vessel is not ready in accordance with the requirements of the charter by a particular named date or time. This contractual right is separate and distinct from any other rights a party may have to terminate the charter; "it does not destroy a right which exists in either party to terminate a contract if an event has happened which frustrates the commercial adventure . . ."[1]

19.2 The charterer's right to terminate does not depend on any breach by the owner.

> Next the cancelling clause. Its effect is that, although there may have been no breach by the owners nevertheless the charterers are, for their own protection, entitled to cancel if the vessel is not delivered in a proper condition by the cancelling date. That is the sole effect.[2]

Therefore, it is irrelevant to the operation of the clause that the vessel is prevented from meeting the cancelling date by an excepted peril.

> The vessel was chartered to a load port at three safe places and then to proceed to London and discharge with perils of the seas always excepted. The cancelling clause gave the charterers an option to cancel if the vessel was not at the first loading port in free pratique and ready to load by 15 December 1981. She arrived off the first loading port, Burriana, on 13 December but could not enter the port or obtain free pratique because of heavy weather until 17 December. The charterers meanwhile cancelled the charter on 16 December. The jury found that Burriana was a safe loading place.

1 *Per* Scrutton L.J. in *Bank Line Ltd* v. *Arthur Capel & Co.* (unreported) in the Court of Appeal (approved by the House of Lords at [1919] A.C. 435).

2 *Marbienes Compania Naviera S.A.* v. *Ferrostaal A.G. (The Democritos)* [1976] 2 Lloyd's Rep. 149, *per* Lord Denning M.R. at p. 152.

> The Divisional Court (Lord Coleridge C.J., Matthew J. and A. L. Smith J.) held that the charterers were entitled to cancel. The reasoning of the court was summarised by A. L. Smith J. as follows[3]:
> "The shipowner does not contract to get there by a certain day, but says: 'If I do not get there you may cancel.' It is an absolute engagement that if the vessel does not get there the charterers may cancel."
> (*Smith* v. *Dart & Son* (1884) 14 Q.B.D. 105.)

19.3 Whilst a cancelling clause does not, of itself, import any absolute promise by the owner that the vessel will be ready by the stipulated date, the owner may be under a more qualified obligation, either

(1) to use reasonable diligence to present the vessel in a fit condition by the cancelling date, or
(2) to commence the approach voyage by such time as the ship, proceeding normally, will arrive and be ready to load by the cancelling date.

These and other potential obligations of the owner with regard to the date of arrival and readiness of the vessel are discussed elsewhere.[4] The existence of the right to cancel, whether or not it is exercised, does not deprive the charterer of the right to claim damages if he can establish that the vessel's failure to arrive by the cancelling date was the result of a breach by the owner of one of those obligations.

19.4 If the charterer does not exercise the option to cancel the charter remains in full effect, binding on both parties. The charterer remains bound to provide a cargo and to load it within the laydays, failing which he will be liable for demurrage and damages in the ordinary way. Thus, in *The Nikmary*,[5] where the vessel missed her cancelling date in circumstances which involved no breach of contract on the part of the owner, the charterer, who had not exercised the option to cancel, was held liable for demurrage even though his failure to load within the laydays was attributable to the late arrival of the vessel. The result might have been different if the late arrival had resulted from a breach by the owner, because the charterer would have been able to defend the demurrage claim on the ground that the delay was caused by fault on the part of the owner.[6]

Cancellation of consecutive voyage charters

19.5 Where a vessel is chartered for consecutive voyages, it is a question of construction of the charter whether a cancelling clause permits the cancellation of the whole charter or just the first or other relevant voyage.[7]

The mode of exercise of the charterer's option

19.6 Like options in other areas of the law, the option to cancel must be exercised strictly in accordance with its terms and within time limits specified.[8] Once the right of cancellation has

3 (1884) 14 Q.B.D. 105 at p. 110.

4 See Chapter 4 (especially, with regard to the relevance of the cancelling date), and the discussion of the doctrine of stages in Chapter 11.

5 *Triton Navigation* v. *Vitol (The Nikmary)* [2004] 1 Lloyd's Rep. 55.

6 See Chapter 16.

7 *Ambatielos* v. *Grace Brothers* (1922) 13 Ll. L. Rep. 227, where a clause permitting the cancellation "of the charter" was held by the House of Lords to have precisely that effect.

8 See, e.g., *Hare* v. *Nicol* [1966] 2 Q.B. 132 and *United Scientific Holdings* v. *Burnley Council* [1978] A.C. 904 esp. at p. 928 on "break clauses", but *cf. Mannai Investments* v. *Eagle Star* [1997] A.C. 749.

arisen (see below), unless the charterparty stipulates a particular mode of exercise of the option, all the charterer need do is give notice of it to the shipowners; this may be done orally but in the interests of certainty it is preferable that it be in writing.

19.7 In the absence of express contrary provision, the charterer is not bound to do anything to exercise the option until the vessel is actually presented in a state of readiness.[9] Some charters, however, are more precise in their terms. The Gencon form, for example, stipulates that, if the owner so requires, the option must be exercised at least 48 hours before the ship's expected arrival at the loading port. Some charters provide that the option is to be "declared on notice of readiness being given". A late exercise of the option is invalid, and in truth no exercise at all. The shipowner may therefore ignore it, or he may accept it, with the result that the charter will terminate either consensually or as a result of the owner's acceptance of the charterer's repudiation.[10] However the late declaration of the option to cancel, while it may amount to an anticipatory breach of the charter as a whole, involves no actual breach of the charter for which discrete damages can be claimed. In *Den Norske Afrika Linie* v. *Port Said Salt Association*,[11] where the charterer was late in exercising the option to cancel, the owner (who had found a more profitable cargo and thus suffered no overall loss) accepted the cancellation and sought to claim damages for the detention of the vessel during the period of delay in the exercise of the option. It was held that no such damages were recoverable.

Accrual of the right to cancel

Burden of proof

19.8 Cancelling clauses are usually said to be inserted for the benefit of the charterer and have been likened to forfeiture clauses:

> It must always be remembered that this is a forfeiture clause and so not to be applied lightly. It would be a misfortune, I think, if defects of no real significance in the venture were to be used as a means of throwing up a charter at the last minute.[12]

Therefore, the burden of proving that the right to cancel under the clause has accrued is on the charterer. In *The Madeleine*[13] Roskill J., after quoting the above passage, concluded: ". . . Plainly it is for the charterers to establish the right which they have sought to exercise." If, therefore, delivery or readiness under the charter is dependent upon some act of nomination or instruction by the charterer, his failure in that regard may preclude his right of cancellation although much will depend upon the extent to which the charterparty itself gives sufficient definition of where the vessel is to be.[14]

19.9 The Gencon cancelling clause has one feature, however, which is for the benefit of the owner. The owner is entitled, if he so wishes, to force the charterer to state whether he will cancel a vessel which will arrive after the cancelling date. The extent of this right is considered below. However, this feature of the clause is not considered to alter the position as stated above.

9 *Moel Tryvan Ship Co. Ltd* v. *Andrew Weir & Co.* [1910] 2 K.B. 844 (see in more detail para. 19.33).
10 See para. 19.42.
11 (1924) 20 Ll. L. Rep. 184.
12 *Per* Devlin J. in *Noemijulia Steamship Co.* v. *Minister of Food (The San George)* [1951] 1 K.B. 223 at p. 228; (1950) 83 Ll. L. Rep. 500 at p. 507 (affirmed by the Court of Appeal). See also, in the context of a time charter, *Georgian Maritime Corporation* v. *Sealand Industries (Bermuda) (The North Sea)* [1997] 2 Lloyd's Rep. 324 (Mance J.) and [1999] 1 Lloyd's Rep. 21 (C.A.).
13 See para. 19.21, below.
14 *The North Sea*, above.

Readiness

19.10 Readiness is a concept well established in the cases concerning the commencement of laytime. However, the precise relationship between readiness in the context of laytime on the one hand and the cancelling clause on the other is unclear.

1. The role of the notice of readiness in cancelling

19.11 Clause 10 states that: "Should the vessel not be ready to load . . . on or before the date indicated in Box 19 . . ." the charterer shall have the option of cancelling the charter. What is required of the vessel is readiness to load, but this is not tied to the giving of a valid notice of readiness. Thus, the charterer may have no right to cancel if the vessel is in fact ready, even if the vessel has not in fact tendered a valid notice of readiness.

The Gevalia was chartered under a charterparty which provided:

"3.(b) . . . time to count when written notice of readiness to receive cargo is handed in to the office of the Charterers' agents on weekdays between . . . 9.00 a.m. and 6.00 p.m. and noon on Saturdays.

7. If steamer be prevented from entering . . . docks or from arriving at or off loading place by reason of congestion of shipping or shore traffic . . . she is to be treated as a ready steamer from first high water on or after arrival . . . and entitled thereupon to give written notice of readiness . . .

11. Charterers to have the option of cancelling this Charter . . . if she is not ready from any cause on or before April 3 at 6.00 a.m."

She arrived off Hull on 31 March 1923 which was the Saturday before Easter, but was unable to enter the docks because of congestion. The charterers purported to cancel because no written notice of readiness had been given.

The Court of Appeal held that the cancelling clause was not tied to the laytime/notice of readiness provisions. Atkin J. said (p. 314):

"I think it is important to observe the distinction between the obligation of the charterer to load, which is generally stated in an express clause fixing the time at which his obligation is to start—and in nearly every case, unless it is excluded, a notice of readiness on the part of the ship is required before the charterer's obligation arises—and the right of the charterer to cancel the whole contract. Now, while a notice of readiness given by the ship may be a condition precedent, whether express or implied, to the duty of the charterer to load, as at present advised I see no reason for assuming that it is a condition precedent to his right—a very far-reaching right—to put the contract to an end if the ship is not ready or does not arrive by a particular date. In the cancelling clause there is no express provision that notice of readiness must be given. All that is provided in this contract is that if she is not ready from any cause before April 3 at 6 a.m., the charterers are to have the option of cancelling. In this particular charterparty I think the draughtsman has provided his own dictionary, because I think by Clause 7 he has provided that when the ship is ready (and she is ready if she is prevented from entering the docks by reason of congestion of shipping) she is to be treated as a ready steamer from the first high water, and is (he goes on to say) 'to be entitled thereon to give notice of readiness.' For these reasons it appears to me that in this charterparty it is plain that what is needed to support the right to cancel is that the ship should not be ready. Here she was ready; and notice of readiness does not come into account at all. Therefore, I reserve any questions that may arise on other charterparties except to say this, that it appears to me that the notice of readiness is a different and distinct act and a later act than the act of being ready; and for my part I find it difficult to see how you can give a notice of readiness until there is a preliminary existing fact, namely, readiness and therefore the mere fact that you are required or asked to give notice of readiness seems to me to assume that there is something in existence of which you are giving notice, namely, that the ship is ready, which would appear to be a condition the existence of which, one way or the other, is necessary for determining the right of the charterer to cancel."

(*Aktiebolaget Nordiska Lloyd* v. *J. Brownlie & Co. (The Gevalia)* (1925) 30 Com. Cas. 307. See also *Soufflet Negoce* v. *Bunge S.A.* [2011] 1 Lloyd's Rep. 531 §§ 12–16 where notice of "*readiness to load*" within the delivery period under an FOB contract was not to be equated with a notice of readiness for laytime purposes.)

19.12 It is submitted that this decision is of general application since if the giving of a notice of readiness is normally an implied requirement in the context of the cancelling clause it is difficult to see why clause 7 of the charterparty in that case provided any indication that notice was unnecessary. Of possibly more importance in negating an inference that notice was a requirement were the provisions of the charter which stipulated particular periods when notice of readiness could be tendered, whereas the last possible time for readiness under the cancelling clause fell outside those periods.[15] It may be that there can be an implied requirement of a notice of readiness where the laytime and cancelling codes are clearly interlinked or where the last time for readiness under a cancelling clause is clearly selected to fall in a period when a notice of readiness may legitimately be given.[16]

19.13 These difficulties may be resolved by the express wording of the charter and many other forms of charter specifically link cancellation to the giving of a notice of readiness. For instance, the Norgrain charter provides:

> Should the vessel's notice of readiness not be tendered and accepted as per Clause 17 before 12.00 on . . ., the Charterers or their agents shall at any time thereafter, but not later than one hour after the notice of readiness is tendered, have the option of cancelling this Charterparty.

The above form of cancelling clause may be thought to be more satisfactory, since under clause 10 of the Gencon charter the vessel may be ready so as to prevent the charterer's right to cancel from arising, even though the charterer has no way of knowing this.

2. Where need the vessel be ready?

19.14 Although the giving of a notice of readiness is not necessarily a requirement of readiness for the purpose of cancellation, the position from which a vessel can tender a notice of readiness will usually coincide with the place she must reach in order to be ready for this purpose. In *Hudson's Bay Co.* v. *Domingo Mumbru S.A.*[17] the vessel had reached the port by the cancelling date, but had not reached the area where she was entitled to give a notice of readiness, and it was held that the charterer was entitled to cancel, Banks L.J. observing:

> . . . having regard to the finding that the vessel was not at a place in the port of Buenos Ayres where the charterers could have loaded her she could not be called or treated as an arrived ship, and if she was not an arrived ship she was not ready to load within the meaning of [the cancelling clause] of the charterparty.[18]

Thus, in the case of a berth charter, in the absence of contrary provision it seems that the vessel must actually be in berth by the cancelling date.

19.15 It is consistent with the general approach to cancelling clauses[19] that a vessel need at least be no closer to her terminus than required by the charter for the giving of notice of readiness for the commencement of laytime. Thus, although in a berth charter the terminus is the berth,

15 See the judgment of Scrutton L.J. at p. 313.

16 See the discussion on the Asbatankvoy form, Chapter 56. But see *Soufflet Negoce* v. *Bunge SA* [2011] 1 Lloyd's Rep. 531 §§ 12–16 where an express provision for the giving of a notice of readiness for laytime purposes supported the conclusion that "*readiness to load*" within the delivery period under an FOB contract required only that the ship was physically and legally able to load.

17 (1922) 10 Ll. L. Rep. 476. Other issues which arose in the case are discussed below.

18 *Ibid.*, p. 477. The cancelling clause was a typical lay-can provision of the kind found in the Asbatankvoy charter. In the light of decision of the House of Lords in *The Johanna Oldendorff* [1973] 2 Lloyd's Rep 285 the vessel would probably now have been held to be an arrived ship.

19 See in particular the cases cited in paras 19.11 and 19.16–19.19.

notice of readiness may often be given "whether in berth or not" and in order to prevent cancellation the vessel need only be at a position from which she can legitimately tender notice of readiness. The Gencon cancelling clause expressly provides that the vessel may be ready "whether in berth or not".

3. How ready need the ship be?

19.16 As far as the condition of the vessel is concerned, broadly, in laytime cases, it has been held that any material defect in the vessel, even if it can be remedied quickly, will result in the vessel not being "ready".[20] It is unclear whether the same test is applicable with the same level of stringency in determining whether the vessel is "ready to load" for the purposes of the cancelling clause.

> *The San George* was chartered to load grain in bags or bulk, which was to be brought to and taken from alongside by the shipowners at the charterer's risk and expense. The charterparty specified no particular method of loading nor did it give the charterers the right to use the vessel's gear. The vessel arrived at the loading port and tendered notice of readiness three hours before the cancelling time, but the charterers purported to cancel the charter on two grounds, one of which was that she had no loading gear rigged for the after holds.
>
> Devlin J. and the Court of Appeal held that the cancellation was wrongful. The readiness of the gear did not prevent the vessel from being ready because it was not inevitable that the gear would be used in loading at all. The choice of the loading method was vested in the shipowners, not the charterers. They distinguished the readiness of the cargo spaces (where they accepted the criteria of readiness appropriate to the commencement of laytime) from the readiness of the gear (where they applied less stringent criteria of readiness for the purposes of cancellation, at least where the charter conferred no rights or obligations with regard to the gear). They thought that a charterer wishing to cancel in such circumstances must at least prove that at the cancelling date the vessel was in such a condition that the shipowner would necessarily be unable to comply with his loading obligations when called upon to do so.
>
> (*Noemijulia Steamship* v. *Minister of Food (The San George)* [1951] 1 K.B. 223; the courts seemed to think it might have been different if the charterers had had the right to use the gear. For a further discussion of the case see Chapter 15. *Cf. Sun Shipping* v. *Watson & Youell Shipping Agency* (1926) 42 T.L.R. 240 where a vessel loading bulk grain was held not to be ready to load, for the purpose of the commencement of laytime, until the necessary shifting boards had been fitted.)

19.17 The approach of the courts in that case appears to indicate a less stringent test for readiness for the purposes of cancellation than for the commencement of laytime, and in particular that readiness of parts of the ship other than the holds is not essential at the moment of tender as long as they can be made ready by the time that their services are required. Support for such a view may be gleaned from an *obiter dictum* of Greer J. in *New York and Cuba Mail Steamship Company* v. *Eriksen and Christensen*,[21] a case concerning a cancellation on the ground of the unreadiness of boilers which would take weeks to repair, where he said:

> If she be, in fact, fit to lie afloat and take in cargo, but has some small defects, which can, with reasonable certainty, be made right during the loading and without interfering with the due course of loading, she would, in my judgment, be in every way fitted for the intended voyage, notwithstanding those small defects; but if she is in such a condition that she cannot be made ready by her cancelling date and there is no reasonable certainty that she will be ready by the time her loading is finished . . . she cannot be said to be "tight, staunch strong and in every way fitted for the intended voyage".

20 *Compania de Naviera Nedelka S.A.* v. *Tradax International (The Tres Flores)* [1974] Q.B. 264 (see generally *Shipping Developments Corpn.* v. *Sojuzneftexport (The Delian Spirit)* [1972] 1 Q.B. 103, and Chapter 15).

21 (1922) 27 Com. Cas. 330, 336.

19.18 However, in the Court of Appeal in *The Tres Flores*,[22] which was concerned with the commencement of laytime rather than cancellation, Roskill L.J. appeared to doubt whether any distinction should be drawn between the two situations:

> . . . in this class of case, where questions not only of laytime and demurrage arise, but also the right of a charterer to cancel because a ship is not ready by a stated date, it is of crucial importance that the basic principle must be able to be simply applied to the given facts of a particular case. Certainty is essential in commercial matters and certainty is more important than that there may be hardship in a particular case because the application of the principle may cast the incidence of liability one way rather than the other. One only has to take this example. If [counsel's] contention be right, what would be the position where there was only a short interval of time between the geographical arrival of the vessel and the cancelling date and notice of readiness was given in the expectation that a particular defect making the ship unfit to load might be remedied within a matter of hours, but this prediction was falsified in the event? What is the position of the parties to be if that defect has not in the event been remedied before the cancelling date? Is the notice of readiness, *prima facie* good on [counsel's] argument, suddenly to become retrospectively bad because of an unexpected turn of events? The complications of such a situation are endless. The sure way of avoiding such complications is to have a rule which can be applied with absolute certainty.

The issue appears to centre not upon whether a material defect will prevent the vessel from being ready for laytime purposes but not for cancellation purposes, but what is "material" according to the context, remembering that there is a difference in the burden of proof, with the shipowner bearing the burden of proving material readiness for laytime purposes, but the charterer bearing the burden of proving material unreadiness for cancelling purposes.

19.19 In *Noemijulia*, Devlin J., characterising the cancelling clause as a forfeiture clause, remarked that "it would be a misfortune if defects of no real significance in the venture were to be used as a means of throwing up a charter at the last moment" and the concept of "real significance" was adopted by Webster J. in *The Arianna*.[23] Thus, in *The North Sea*[24] it was held that, whereas the shortage of bunkers could in some circumstances render a vessel unsafe and imperil her cargo, it would not always have that effect and, unless the charter otherwise required, the shortage of bunkers on delivery would not necessarily be "material" or of "real significance"; contrast the effect of the lack of sufficient bunkers in the context of laytime.[25] The materiality of a particular defect is heavily dependent upon the commercial purpose of the charter and is thus primarily a question of fact, although in form a question of law. However, it is not to be confused with the question whether a breach goes to the "root of the contract".

4. Supervening unreadiness

19.20 It may happen that a vessel arrives and is ready before the cancelling date, but that something subsequently happens causing her to become unready and she remains in that state as at the cancelling date. In such a case, the question arises as to whether the charterer can cancel the charter on or after the cancelling date notwithstanding her earlier readiness. The wording of the Gencon clause requires that the vessel is not ready to load "on or before" the cancelling date, but clearly this cannot mean that it is enough if the vessel is not ready at either one of these two times, for otherwise there could be a valid cancellation if the vessel arrived fully ready to load only *on* the cancelling date. Thus, it is submitted that once a vessel has validly arrived ready at a time before the cancelling date, the contractual option ceases to be exercisable. The charterer

22 *Cia de Naviera Nedelka* v. *Tradax Export S.A.* [1974] Q.B. 264, 278.
23 *Athenian Tankers Management S.A.* v. *Pyrena Shipping Inc.* [1987] 2 Lloyd's Rep. 376.
24 [1997] 2 Lloyd's Rep. 324; [1999] 1 Lloyd's Rep. 21. See below para. 19.25.
25 See *Unifert International* v. *Panous Shipping (The Virginia M)* [1989] 1 Lloyd's Rep. 603.

is not necessarily disadvantaged by this, however. If the unreadiness results from a breach of charter by the shipowner, the breach will sound in damages and, if its consequences are sufficiently serious, it may also allow termination on general principles; the seriousness of the effects will necessarily be judged in the light of all the circumstances including the cancelling date. If the unreadiness does not result from a breach of charter by the shipowner, nonetheless he will be under a duty to make the vessel once again ready. For the nature of this duty see the discussion of the doctrine of stages in Chapter 11. A failure to do so will produce the same results.

5. Time of day

19.21 Clause 10 of the Gencon charter does not provide when on the date mentioned in Box 19 the right to cancel will accrue. The Norgrain form quoted above specifically provides a time of day before which the vessel must be ready, as does the Asbatankvoy charter.[26] However, even when the cancelling clause contains no provision relating to the time of day, the other terms of the charter may indicate that the vessel must arrive by a particular time.

> A time charterparty provided that if the vessel *Madeleine* was not delivered by 2 May the charterers would have the option of cancelling and, by a separate clause, that the vessel was to be delivered between 9.00 a.m. and 6.00 p.m., she "being in every way fitted for ordinary cargo service". The cancelling date was extended to 10 May. The vessel completed discharging her previous cargo on 9 May. However, on 10 May the port health authorities refused her a deratisation certificate and ordered fumigation. Such fumigation was not complete by 6.00 p.m. on 10 May.
> Roskill J. held:
> (1) the delivery contemplated by the cancelling clause was to be before 6.00 p.m.;
> (2) by that time the vessel was to be delivered "fit for ordinary cargo service";
> (3) an "anticipatory" cancellation at 8.00 a.m. was invalid;
> (4) the cancellation at 8.48 p.m. was valid.
> (*Cheikh Boutros Selim El-Khoury and Others* v. *Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd's Rep. 224.)

19.22 Since, in the Gencon charter, the cancelling clause and the laytime and notice of readiness provisions can be viewed independently[27] provisions as to the tendering of notice of readiness within office hours are not a firm guide as to the time after which the charterer can cancel. It is submitted that the better view is probably that the right to cancel arises at the end of the date stated in Box 19, that is, at midnight.[28]

6. Breach by the charterer

19.23 If a charter provides for a range of load ports and the charterer timeously under the charter nominates a port which the vessel clearly cannot reach by the cancelling date, the charterer is nevertheless entitled to rely on the cancelling clause, since he has given a lawful order under the charter.[29]

19.24 However, a charterer may not rely on the cancelling clause if it is his own breach which causes the vessel to arrive late.

> A vessel nearing the completion of her construction was time-chartered for delivery in one of a number of ranges. The charterers ordered the vessel towards the U.S. Gulf Range without nominating the delivery port. They later made a specific nomination of Rio de Janeiro, Brazil being one of the other

26 See Chapter 56.
27 See paras 19.11 and 19.13, above.
28 See for analogy in the context of the payment of hire *The Afovos* [1983] Lloyd's Rep. 335.
29 *Johs. Thode* v. *Vda. de Gimeno y Cia. SL* [1961] 2 Lloyd's Rep. 138.

ranges. This nomination was made at a time after the vessel had taken her course for the U.S. Gulf, which differed from the course she would have taken for Brazil. The vessel arrived at Rio de Janeiro after the cancelling date, and the charterers purported to cancel. The arbitrators found that the nomination of Rio was unreasonably late, and that had it been given without undue delay the vessel would have validly tendered at Rio before the cancelling date.

Kerr J. held that the charterers' right to cancel arose out of their own breach, and therefore they could not rely upon the consequences of that breach in order to justify cancelling.

(*Shipping Corporation of India* v. *Naviera Letasa S.A.* [1976] 1 Lloyd's Rep. 132.)

19.25 In that case it was the breach in making the late nomination that caused the vessel's failure to meet the cancelling date. However, there may be cases where the lateness of the nomination, or some other defect in the nomination, is not causative, because even if the charterer had made a proper nomination in accordance with the charter terms the vessel could not have complied with it so as to be ready at the relevant place by the cancelling date. There has been a conflict of judicial view about the correct approach in this situation.

A vessel was chartered to proceed to and load at "one or two safe loading places . . . in the port of Buenos Ayres or La Plata at Charterers' option". Orders for the first loading place were to be given (*inter alia*) within four hours of the master's application to the charterers or their agents in Buenos Ayres, and the cancelling date was 6 p.m. on 31 May. On the morning of 31 May, when the vessel was in the roads, but not in the loading area, of the port of Buenos Ayres, the master went ashore and asked for orders. The charterers delayed for the full permitted four hours, and then gave him orders to proceed to "the port of Buenos Ayres". Owing to a breakdown of the tug service the master was delayed in re-boarding the vessel, and by the time he did so it was impossible for him to reach the loading area of the port by 6 p.m. and the charterers cancelled the charter.

Bailhache J. and the Court of Appeal held that the cancellation was lawful. The vessel was not an arrived ship in the roads, either for the purpose of tendering notice of readiness or for the purpose of meeting the conditions of the cancelling clause. (This aspect of the case is dealt with in paragraph 19.14 above.) However, in the Court of Appeal the owners raised a new argument, namely that the charterers' order to proceed to "the port of Buenos Ayres" was not a proper order under the terms of the charter, which, on its true construction, required the charterers to designate the actual loading spot within the port. The Court of Appeal reached no decision on whether this construction was correct, and expressed divergent views on the point. However, all were agreed that the argument was ultimately of no assistance to the owners, since even if the charterers had ordered the vessel to a particular loading spot, she could still not have reached it by her cancelling date.

(*Hudson's Bay Co.* v. *Domingo Mumbru S.A.* (1922) 10 Ll. L. Rep. 476.)

The Court of Appeal did not explain the legal principles which led them to this decision, which was not referred to in any of the judgments in the following case.

A time charter of *The North Sea* provided: "Vessel shall be placed at the disposal of the charterers at charterers' berth Hong Kong or DLOSP Hong Kong in charterers' option . . . as the charterers may direct." Charterers failed to give any orders as to the place where the vessel should be delivered, and when the cancelling date arrived the vessel was at the anchorage at Hong Kong. Charterers cancelled the charter, and sought to justify the cancellation on the grounds that (1) the vessel was at neither of the places for delivery specified in the charter (this ground was abandoned after the arbitrator ruled against it), and (2) she was insufficiently bunkered to comply with the provisions of the charter.

Mance J. decided that, in view of the charterers' failure to nominate the place of delivery the cancelling clause could not take effect: "The making of delivery depends . . . upon charterers identifying where delivery is to take place. The only charterparty agreement is that time runs from the placing of the vessel at charterers' disposal at the place so selected by charterer. There is no basis on which even owners, still less charterers when they were in default of selection, can claim to treat delivery as having been made on any other basis or at any other place . . . Unless and until charterers select such a place, owners cannot deliver in accordance with the charter . . . In the present case, the time for delivery never arose, and there is thus no basis on which charterers could assert that the vessel was due to be, but had not been, delivered." On this view of the case, the charterers' rights under the cancelling clause

simply fell away, and it was unnecessary to consider whether the insufficiency of bunkers prevented a valid delivery, although Mance J. was of the view that it did not.

The Court of Appeal upheld this decision, but simply on the ground that the charter provisions with regard to the quantity of bunkers on delivery constituted a separate obligation rather than an essential condition of a valid delivery. Although they did not express a concluded view on the grounds on which Mance J. decided the case, they considered that his approach had "serious difficulties" because the concept of fault was not relevant to the contractual option of cancelling, and they indicated that if, for example, the ship was clearly never going to be ready by the cancelling date it would be futile for the charterer to have to make a nomination. Hobhouse L.J. thought that the correct view might well be that the charterer had simply waived his right to require the vessel to be delivered at any particular place in Hong Kong, with the result that a valid delivery could be made at a place in Hong Kong convenient to the shipowner.

(*Georgian Maritime Corporation* v. *Sealand Industries (Bermuda) (The North Sea)* [1997] 2 Lloyd's Rep. 324; [1999] 1 Lloyd's Rep. 21.)

19.26 The two decisions of the Court of Appeal in the above cases reflect the reluctance of the law to compel parties to take steps which are obviously futile, and both decisions may be justified on the ground suggested by Hobhouse L.J. in *The North Sea*, namely that the charterer was simply waiving a right, inserted for his benefit, to select a particular place at the relevant port, leaving the shipowner capable of complying with his obligations by tendering the vessel at any place within the port. However, this analysis becomes much more problematic when the charterer's option is to order the vessel to proceed to and load at one of a number of entirely separate ports, perhaps a considerable distance apart. In such a case it is difficult to escape from the logic of Mance J.'s reasoning without recognising the existence of an anticipatory right to cancel, something which English law has so far declined to do,[30] and Hobhouse L.J. did accept that under different charter provisions Mance J.'s reasoning might be correct.

These authorities have been considered more recently in *The Ailsa Craig*.[30a] Although the views expressed were *obiter* (since it was held both at first instance and on appeal that the charterer's obligation to nominate a loading port had never arisen), there was a preference for the reasoning and approach in *The Hudson's Bay* case. As explained by Christopher Clarke J., the correct approach is to ask whether the charter provides that, in order to be able to exercise a right of cancellation, it is necessary for the charterers to have nominated a loading port *even in circumstances in which it was futile to do so*. Absent clear words, it is unlikely that the charter will now be read as so providing.

Premature cancellation

19.27 Often, one or other party may wish to have a cancellation effected before the contractual time for the exercise of the option. An owner may want the charterer to declare whether or not they wish to cancel as soon as or even before the cancellation date arrives, even if the vessel has not yet arrived at the loading port; obviously, the owner is generally keen to avoid having to make an unnecessary voyage to the loading port if the charterer intends to cancel. Likewise a charterer may wish to cancel before the cancelling date when it is clear to him that the vessel will not be ready in time. Different considerations arise.

Charterer's cancellation

19.28 Much of the litigation involving cancelling clauses has been concerned with the question of whether the charterer may cancel before the stated date, but after it has become obvious

30 See paras 19.28 *et seq*.

30a [2008] 2 Lloyd's Rep. 384 (Christopher Clarke J.) and [2009] 2 Lloyd's Rep. 371 (Court of Appeal).

the expenses reasonably so incurred, either on the principle laid down in *The Winson*, or as an expense of mitigation.

(5) If the cargo has lost its identity the cargo owner may abandon it.

(6) A charterer who is not the owner of the bailed goods is not liable for demurrage or for the expenses of caring for the goods.[81]

U.S. Law

22A.1 See *Time Charters*, paras 26A.1–26A.43.

81 *Petrinovic* v. *Mission Française des Transportes Maritimes* (1941) 71 Ll. L. Rep. 208.

CHAPTER 23

Agency

13. **Agency** 138
In every case the Owners shall appoint his own Broker or Agent both 139
at the port of loading and the port of discharge. 140

Appointment of port agents

23.1 Under the Gencon agency clause, as under many voyage charters, the right and the duty of selecting and appointing agents to attend the ship at loading and discharging ports is vested in the owners. The clause may be contrasted with the provision normally found in time charters to the effect that the master shall be under the orders and directions of the charterers as regards employment and agency, which obliges the master or owners to appoint the agent nominated by the charterers.[1]

23.2 The reference in the clause to a "broker" is perhaps surprising, since in modern commercial practice there is no reason why owners whose ship is operating under charter should require the services of a broker at either port. If the ship is employed by the charterers as a general ship it is they rather than the owners who might require the services of a loading broker. Historically, however, ships were often fixed for the return voyage by local agents at the end of the outward voyage, and the purpose of the reference may be to exclude the result reached in some cases, decided under charters which provided that the ship was to be "consigned to charterers' agents" to the effect that the charterers' selected agent was entitled not only to attend the vessel but also to find a return cargo, and for his services to recover from the owner a commission on the return freight, for which the charterer could sue as trustee for the agent.[2]

Duty and authority of port agents

23.3 The obligations and the authority of a ship's agent at the loading or discharging port are governed by the terms of the express instructions which he receives from his principal and, subject to those, by any relevant usage at the port in question. Where the agent is simply instructed in general terms, his duties were described as follows by Pearson L.J. in *Blandy Bros.* v. *Nello Simoni*[3]:

1 See *Wehner* v. *Dene* [1905] 2 K.B. 92, 99; *Larrinaga SS. Co.* v. *The Crown* (1945) 78 Ll. L. Rep. 167, 172. Some voyage charters also provide that the vessel shall be addressed to an agent nominated by the charterer: see *Scrutton on Charterparties*, 22nd edn, para. 3–023, n. 63, and, e.g., the Shellvoy 3 form considered in *The Isabelle* [1982] 2 Lloyd's Rep. 81, [1984] 1 Lloyd's Rep. 366. Such a nominee is generally to be regarded as the agent for the ship, not for the charterers.

2 See *Robertson* v. *Wait* (1853) L.R. 8 Ex. 299; *cf. Moor Line* v. *Dreyfus* [1918] 1 K.B. 89.

3 [1963] 2 Lloyd's Rep. 393, 404. See para. 23.5 below.

> The ship's agent is, in the normal case, the agent of the shipowner at the particular port, and the ship's agent, therefore, at that port stands in the shoes of the shipowner; and it is reasonable to suppose that he has the authority to do whatever the shipowner has to do at that port. We have then to consider what normally are the obligations of the shipowner.

The charterparty, a copy of which is frequently sent to the agent, may assist in defining the owners' and, therefore, the agent's, duties at the port. Normally these will consist of such matters as making arrangements for port entry, berthing and unberthing and pilotage where necessary, obtaining provisions for the vessel, and arranging for loading and stowage or discharging of cargo. Where the agent is, on the principles described above, under a duty to arrange for a particular operation, such as loading, to be carried out, he is entitled to assume, in the absence of instructions to the contrary, that he is authorised to incur the appropriate financial liability for that purpose on his principal's behalf, and to be indemnified by his principal against that liability.[4] In respect of his services the agent will be entitled to commission from his principal at the agreed rate or a reasonable rate.

23.4 An agent owes a duty to his principal to act with reasonable care, diligence and skill in carrying out the agency. If as a result of a breach of that duty the principal incurs expense, the agent is liable, and if the agent himself incurs the expense he will be deprived of his normal right of indemnity.[5] Provided that he exercises reasonable care in the selection and engagement of contractors to carry out services for his principal, an agent is not, in the absence of a custom or a specific agreement, liable for the defaults of those contractors. For the duties of a loading broker engaged to act as agent for a shipping line, see *Heskell* v. *Continental Express*,[6] where it was held that the loading broker, one of whose duties was to issue bills of lading, owed no duty of care in tort to the shipper for negligent mis-statements contained in the bills of lading.[7]

23.5 The wording of the Gencon clause seems to envisage that the agent selected by the owners will be appointed to act exclusively as the owners' agent, and that the charterers, if they require the services of a port agent, must appoint their own. This is the position if the contract makes no provision for appointment of agents.[8] In practice, however, a port agent frequently acts as "ship's agent" in a general sense, and is authorised by both owners and charterers to arrange for those operations at the port which pertain to them respectively, and in such a case the agent will be entitled to look to either owners or charterers for reimbursement of the costs of a particular operation depending upon whether, under the terms of the charter, the costs of that operation fall upon the owners or the charterers.

> The plaintiffs were appointed to act as agents at the loading port for five ships of which the defendants were charterers. The first two charters contained the Gencon agency clause, and the last three charters provided that the charterers were to appoint the agents, but in practice the plaintiffs' appointment under all the charters was made by the chartering brokers with the consent of the shipowners and the defendants. The charters, of which the plaintiffs were sent copies, were on f.i.o.s. terms. The plaintiffs arranged for the loading and stowage of the cargoes and sought to recover the costs from the defendants. The defendants refused to pay on the grounds that under the terms of their purchase contracts with the shippers the shippers were responsible for loading and stowage.
>
> It was held that the defendants were liable. The plaintiffs were entitled to assume that they were to arrange for all of those operations normally undertaken by the shipowner at the loading port, and those

4 *Ibid*., p. 404, but contrast *Anglo Overseas Transport* v. *Titan Industrial* [1959] 2 Lloyd's Rep. 152 where it seems to have been assumed that a forwarding agent was not authorised to incur personal liability in the absence of a custom that he should do so.

5 See *Lage* v. *Siemens* (1932) 42 Ll. L. Rep. 252. See also Lond. Arb. 4/99 (L.M.L.N. 504) where a port agent's claim for indemnity was refused in part on the ground that, in breach of his duty to the owners, he had failed to notice overcharging by the port authority.

6 (1950) 83 Ll. L. Rep. 438, 449.

7 See now, however, *Hedley Byrne* v. *Heller* [1964] A.C. 465.

8 See *Grace Shipping* v. *Sharp* [1987] 1 Lloyd's Rep. 207, 210.

> operations included loading and stowage. The terms of the charterparties did not make it clear that the agents were not to arrange for loading or stowage, but they did make it clear that as between owners and charterers the charterers were liable for the cost. The differing agency provisions of the charters were irrelevant, since in fact the agents were appointed under each of the charters to represent both owners and charterers.
>
> (*Blandy Bros* v. *Nello Simoni* [1963] 2 Lloyd's Rep. 24 (Megaw J.), 393 (C.A.). See also *Molthes Rederi* v. *Ellerman's Wilson Line* [1927] 1 K.B. 710 (below, paragraph 23.12), and *Sutton Shipping Co.* v. *Graham's Trading Co.* (1927) 29 Ll. L. Rep. 12, in which it was held that a ship's agent appointed to represent both owners and charterers was not entitled to pay charterers' disbursements out of funds provided by owners.)

23.6 Agents frequently wish to look to the vessel, and the ability to arrest her, as security for the amounts disbursed by them. Under English law their ability to do so depends upon demonstrating that the owner of the vessel is under a personal liability to reimburse the agent, on the grounds that the instructions to incur the expenditure were given by the owner or by another person acting with the actual or ostensible authority of the owner. In *The Gulf Venture*,[9] an owner attempted unsuccessfully to establish that he was not personally liable to a port agent for the price of services procured on the instructions of the ship's manager or a sub-agent engaged by the manager. The result will not necessarily be the same if the vessel is under charter and the expense is one for which the charterer is responsible, at any rate if that fact is known to the agent.[10]

23.7 The Commercial Agents (Council Directive) Regulations 1993[11] probably do not apply to a port agent, since he is not engaged in the purchase or sale of goods on behalf of his principal.[12]

Liability of principal for acts of port agent

23.8 The principal is contractually liable for acts carried out by his port agent, within the actual or apparent authority of the latter, as though they were carried out by him personally. The agent's actual authority depends upon his instructions, express or implied, and upon the scope of his duties, as described in the previous section. In addition, the agent has apparent authority to carry out on behalf of his principal (i) those acts which a port agent is usually authorised to carry out (see above) without regard to any limitation upon that authority of which the third party is ignorant, and (ii) any further acts which are within the authority which the principal has held out the agent as possessing. A port agent will not typically have usual authority to agree any variation of the terms of the charter. [13]

Liability of agent to third parties

23.9 The principles which determine whether an agent incurs a personal liability to third parties on contracts made by him on behalf of his principal have been discussed in Chapter 2. In *Maritime Stores* v. *Marshall*,[14] a port agent was held personally liable for the cost of cargo

9 [1984] 2 Lloyd's Rep. 445. The owner, the manager and the sub-agent were associated companies, and the court took the view that the agent had advanced the sums in question in the belief that he could look to the vessel as security for his claim.

10 See the cases referred in the previous paragraph.

11 S.I. 1993/3053 as amended, made pursuant to Council Directive 86/653.

12 Lond. Arb. 3/05 (L.M.L.N. 23.02.2005), where the agent's main functions were dealing with and issuing bills of lading, booking cargo space and collecting freights. Contrast an unreported decision of H.H.J. Boggis Q.C. in the Birmingham District Registry holding that agents who booked space on aircraft were within the scope of the Directive.

13 Lond. Arb. 21/07 (no authority to agree to vary the charter to provide for a "quick dispatch procedure").

14 [1963] 1 Lloyd's Rep. 602. Contrast *Vlassopoulos* v. *Ney Shipping* [1977] 1 Lloyd's Rep. 478.

lashing gear ordered by him on behalf of charterers. An agent may also incur personal liability on the contract of carriage itself, if he contracts in appropriate terms or if there is a custom to that effect, either to the shipper[15] or to the carrier. In *Anglo-Overseas Transport* v. *Titan Industrial*,[16] it was found that there was a custom in the London freight market that an agent who booked shipping space on a vessel for an unidentified principal incurred a personal liability to the carrier for deadfreight in the event that no cargo was shipped. In *Cory Bros* v. *Baldan*,[17] the custom was found to extend to the United Kingdom as a whole, and to render the agent liable for freight as well as deadfreight.

Receipt of freights by agent—owner's "lien"

23.10 A ship's agent at the loading or discharging port probably has implied authority to receive, respectively, advance or collect freights, at any rate where the contract of affreightment contains no conflicting provisions as to payment of freight.[18] It was held in *Broadhead* v. *Yule*,[19] that the agent employed to collect freight had no authority to allow a deduction from freight by way of compromise of a claim for cargo damage.

23.11 Whether an agent, appointed by the charterers to collect bill of lading freights, is bound to account to owners who are claiming a "lien" on sub-freights, depends upon whether the owners have a contractual right under the bill of lading to receive payment, and possibly whether they give notice of their lien to the agent before freight is paid.

> A ship was time-chartered to BD on terms which conferred on owners a lien on sub-freights in respect of hire due and unpaid. BD shipped cargo under bills of lading consigned to their order. The defendants were appointed agents on behalf of BD at the discharging port and were instructed to collect bill of lading freight from consignees and to account for £1,000 out of the freight to the plaintiffs, who were assignees of BD. Before £1,000 was collected the owners, to whom hire was overdue, claimed the freight from the defendants, in the exercise of their lien.
>
> It was held that the owners' claim to exercise a lien failed, since once the freight had been paid to the charterers' agents, it was as if it had been paid to the charterers themselves, and there remained nothing in the form of freight upon which the lien could be exercised.
>
> (*Tagart Beaton* v. *Fisher* [1903] 1 K.B. 391 (C.A.).)

Where, however, the owner is a party to the bill of lading contract, the result is different.

> The defendants time-chartered their ship to B, who sub-chartered to the plaintiffs. The plaintiffs appointed V their agent at the discharging port to collect bill of lading freight from the consignee/indorsee of the bill of lading. V collected £2,900 and the defendants then intervened and claimed and received from V £800, pursuant to their lien on sub-freights.
>
> It was held that the defendants were entitled to retain against the sub-charterers so much as was actually due to them at the time when they exercised their "lien". Since the bill of lading contract was with the owners, the latter were entitled to receive the freight thereunder, accounting to the plaintiffs for any excess over the amount required to satisfy their claim for hire.
>
> (*Wehner* v. *Dene SS. Co.* [1905] 2 K.B. 92.)

23.12 In *Wehner* v. *Dene* it was held that the agents V were acting for owners as well as charterers, but it is not clear whether this conclusion was based on any facts other than that they had received freight to which the owners were, under the bill of lading contracts, entitled.

15 As in *Landauer* v. *Smits* (1921) 6 Ll. L. Rep. 577.
16 [1959] 2 Lloyd's Rep. 152.
17 [1997] 2 Lloyd's Rep. 58.
18 See *Hibbert* v. *Owen* (1859) 2 F. & F. 502; *Bradley* v. *Goddard* (1863) 3 F. & F. 638; *Broadhead* v. *Yule* (1871) 9 S.C. (3rd) 921, and the cases referred to below.
19 *Ibid.*, n. 17.

Nevertheless, the case leaves open the question whether the owner, even where he is the contracting party under the bill of lading, can claim freight in the hands of an agent who is acting solely for the charterer. However, in *Molthes Rederi* v. *Ellerman's Wilson Line*,[20] where the agent appointed by the charterer had, before receipt of the freight, been informed of the owner's claim, it was held that the agent could not be heard to dispute that he was acting for the owner as well as the charterer and was, therefore, obliged to account to the owner for so much of the freight as was necessary to satisfy the owner's claim against the charterer. It was also held that the agent, in accounting to the owner, was not entitled to deduct expenses incurred by him in the course of his agency and which were, under the terms of the charter, the responsibility of the charterer rather than the owner. It should be noted that in all of the above cases it was accepted that the persons liable to pay freight had discharged their liability by paying the agent. In *Wehner* v. *Dene* the shipowners' attempt to exercise a lien on the cargo at the discharging port had failed for this reason.

23.13 The Gencon charter contemplates that the owner's claim for charter freight will be secured by a combination of the lien on cargo under clause 8 and the cash payment under clause 9, and the charter provides for no lien on sub-freights. However, since it is clear from *Wehner* v. *Dene* and *Molthes Rederi* v. *Ellerman's Wilson Line* that the owners to whom bill of lading freights are payable are entitled to intervene and claim them pursuant to their rights under the bill of lading contract, and independently of any lien, the absence of any provision for a lien on sub-freights should not prevent the owners from taking this course where chartered freight is unpaid. However, the existence of a lien in the shipowner's favour may be important where the terms of the bill of lading, or terms of the charter incorporated therein, provide that freight shall be paid to the charter or some person other than the shipowner.[21]

U.S. Law

23A.1 General principles of agency, including those set out in the *Restatement (Second) of Agency*, are applicable to maritime cases.[1]

23A.2 Although the printed form provides that the owner is to appoint the port agents, the parties often agree that the charterer shall do so. This does not necessarily mean, however, that the charterer is to pay the agents. In *The Machitis and Thassitis*,[2] the charter provided that charterers were to appoint the agents but was silent as to who was to pay them. The panel held that absent a specific clause making payment, too, the obligation of the charterer, it was "the practice and custom of the trade that the agency fee is payable by owners". One panel has remarked that "[i]n shipping parlance, the phrases of art, 'owners' agents,' 'charterers' agents,' do not generally describe the contractual loyalty engendered by appointment, but usually just indicate who nominates the agent."[3]

20 [1927] 1 K.B. 710.
21 Particularly in view of the Contracts (Rights of Third Parties) Act 1999, the effect of which, in this context, is discussed in Chapter 13.

1 *Kirno Hill Corp.* v. *Holt*, 618 F.2d 982 (2d Cir. 1980); *West India Industries* v. *Vance & Sons AMC-Jeep*, 671 F.2d 1384 (5th Cir. 1982); *Fermar* v. *Peninsular Ship*, 1993 AMC 1803 (E.D.La 1992) (liability for agent's negligent misrepresentation will be governed by *Restatement (Second) of Torts*). See also paras. 80A.1–80A.2, below. See also *The Olympic Sponsor*, SMA 3711 (2001) (Berg, Brown, Sheinbaum) holding that the charterer's agent was not a party to the charter, played no role in its performance, and its 1.25% commission was an "incidental" rather than a "direct economic benefit."
2 SMA 1178 (1977) (Orton, O'Riordan, van Gelder).
3 *The Mini Loaf*, SMA 2301 (1986) (Palmer, Georges, James) (holding that where the charter provided that the owner was to appoint the agent and he appointed "charterer's agent," owner remained responsible for delay caused by the agent's failure to arrange for a pilot in a timely manner).