CHAPTER 2

Parties to the Contract

"2. Between .....

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

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

General

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

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

Identifying the parties

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

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

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

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

The importance of the signature

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

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

Looking at the factual background

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

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

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

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

Misnomer

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

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

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

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

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

Agreements providing for the nomination or substitution of parties

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

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

Contracts made by or through agents

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

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

The authority of the agent

An agent's actual authority

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

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

One-ship companies and groups of companies

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

A shipbroker's actual authority

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

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

An agent's apparent authority

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

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

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

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

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

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

How a messenger can bind his principal to a contract

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

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

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

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

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

A shipbroker's apparent authority to contract

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

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

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

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

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

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

Disclosed principals

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

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

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

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

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

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

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

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

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

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

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

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

carriage of PL 480 grains. The panel awarded damages based on the difference between the hire payable under the charter and the revenue that the owner had actually derived in mitigation.

4A.44 In *The Tharinee Naree*, SMA 3811 (Arb. at N.Y. 2003), however, the owner relet the ship at less than current market rates. The panel ruled that the owner could only recover the difference between hire promised under the charter and the market rate at the time the ship was relet. It appears that the distinguishing factor between *The Golden Gate* and *The Tharinee Naree* is that in the former case, the owner was able to justify its lost revenue as a reasonable business decision.

Place of redelivery

4A.45 The owner is entitled to a redelivery of the ship at the place or in the range stated in the charter. The owner, however, may waive this right if it is to his benefit to do so. For example, in *Munson S.S. Line* v. *Elswick Steam Shipping Co.*, 207 F. 984 (S.D.N.Y. 1913), *aff'd per curiam*, 214 F. 84 (2d Cir. 1914), the time charter called for redelivery at a European port. The ship lost a significant amount of time en route to the discharge port, Buenos Aires, by a series of unexpected and unforeseen delays, however, and did not complete discharging until some three weeks after the end of the agreed charter period had passed. In these circumstances, the owner was held to be entitled to insist on redelivery of the ship at Buenos Aires. See discussion below at paragraphs 6A.1 *et seq.*

4A.46 The charterer, of course, is entitled to make redelivery at any place within the specified range. In *The Federal Voyager*, 1955 AMC 880 (Arb. at N.Y. 1953), the charterer had the option of redelivering the ship within a range of areas, including the United Kingdom, Continent, U.S. Gulf, U.S.N.H. or British North America. Near the end of the charter period, the charterer entered into a sub-charter which called for redelivery at a U.S.N.H. port, and so advised the owner. The owner then fixed employment for the ship on the assumption that she would be redelivered at a U.S.N.H. port. Subsequently, the sub-charter was cancelled, and the charterer in fact made redelivery in Holland. The arbitrators held that the charterer was justified in making redelivery in Holland, and that the owner acted at its own risk in arranging a future charter on the assumption redelivery would be made at a U.S.N.H. port.

Notice of redelivery

4A.47 In *The Procyon*, SMA 2674 (Arb. at N.Y. 1990), the panel held that charterer breached its obligation pursuant to an addendum to give owner seven days' definite notice of redelivery, despite the fact that this "lapse" was probably due to the difficulties which charterer experienced while the ship was docked in an area where a devastating earthquake occurred. The charterer was directed to pay the owner for the required notice period.

CHAPTER 5

Trading Limits

"15. ..... within below mentioned trading limits."

Purpose of the trading limits

5.1 Lines 13 to 15 of the New York Produce form articulate the essence of the time charter bargain: ". . . Owners agree to let, and. . . Charterers agree to hire the. . . vessel, from. . . delivery, for [the agreed period] within below mentioned trading limits". The owners place the employment of their ship in the hands of the charterers. The question immediately arises: what limits, if any, exist upon the charterers' freedom to direct what the ship is to do. That question is answered by the reference in Line 15 to the trading limits described in Lines 24 to 34, which will very often be supplemented or modified by the terms of the particular fixture.

5.2 Thus, in *Temple Steamship* v. *Sovfracht* (1944) 77 Ll.L.Rep. 257, a case of a trip time charter for a round voyage, Scott, L.J., said of the trading limits clause in time charters, at page 265: "It originated in and belongs to pure time charters. In such a charterparty there is nothing to limit the geographical range of the voyages on which the charterer is free to send the ship: he may send it to any navigable waters in the wide world that he likes (apart from navigation and trading dangers). That is the fundamental distinction from a voyage charter, which *ipso facto* defines the geographical employment of the ship. The object of a trading limit clause in time charter-parties is obvious. It is not to grant a liberty (because *ex hypothesi* the charterer already has it), but to impose a limit or restriction, by cutting down the otherwise unlimited and universal liberty of the charterer and excluding him from certain areas." (For the decision of the House of Lords in this case, see below; and for comments on the distinction between time and voyage charters see paragraphs I.7 and I.8, above.)

5.3 For a case on misrepresentation of the extent of trading limits see *The Lucy* [1983] 1 Lloyd's Rep. 188, referred to in paragraph G.33, below.

Types of limit

5.4 The trading limits in Lines 24 to 34 of the New York Produce form concern the two fundamental parameters of cargo and voyages: what can the charterers require the ship to carry and from and to where can they require her to carry it? Cargo must be "lawful merchandise, including petroleum or its products, in proper containers, excluding [as may be agreed in the particular fixture]". This aspect is considered in more detail in chapter 9. Voyages must be "between safe port and/or ports" within the stipulated range(s) and limits. This is considered in more detail in chapter 10.

5.5 Line 27 also requires the ship to be employed (only) in "lawful trades". The trades in which a time chartered ship will be engaged are those of carriage by sea and (except on voyages within one country) the import and export of goods. Illegality in any of those activities will contravene the Line 27 trading limit. As with "lawful merchandise" (paragraph 9.1, below), illegality by the law of the

place of performance will suffice and also (it is suggested) illegality by either the law of the ship's flag or the law governing the charter. Thus, for example, it is suggested it would be an unlawful trade under a charter governed by English law, or a charter of a ship flying the British flag, to carry cargo being exported in breach of international sanctions given effect to under English law.

Charter for trip defined more narrowly than trading limits

5.6 Where a voyage is specified and wider trading limits are also stated, the description of the voyage will be regarded as paramount.

The *Temple Moat* was chartered on an amended Baltime (1920) form, with delivery in the Bristol Channel and redelivery in the Cape Town/Lourenço Marques range "for a period of one round voyage to the Kara Sea". The charter also specified that she should be employed within certain wide limits which included the United Kingdom. The charterers argued that the period of the voyage described was only a way of determining how long the ship was to be available to them for trading within the permitted limits and that although after the Kara Sea the ship had to proceed substantially in the direction of South Africa, it was permitted to trade to other places on that general route.

The House of Lords held that the described voyage was paramount. On the facts found as to the meaning of "one round voyage to the Kara Sea" (which were not to be regarded as a precedent as to the meaning of "round voyage") the charter was for a voyage to the Kara Sea and thence to South Africa. The trading limits in the charter did not extend but rather limited the confines of that voyage.

Temple Steamship v. *Sovfracht* (1945) 79 Ll.L.Rep. 1 (H.L.).

(For further comments on "time charters for a trip", see paragraphs I.17, 4.1 and 4.99 *et seq*., above.)

Orders to trade outside the limits

5.7 Where the charterers order the ship to perform a service outside the trading limits set (expressly or by implication) by the charter, a number of different questions may arise, including: whether the master or owners may refuse to comply with the charterers' orders; whether, if the ordered service is performed with adverse consequences (for example, damage to the ship), the owners are entitled to damages; whether, if the ordered service is performed, the owners are entitled to additional remuneration beyond the hire agreed in the charter.

Variation

5.8 It is possible in principle for parties to vary their charter, extending the trading limits originally agreed so as to embrace the particular service ordered by the charterers, or just agreeing specifically that that service be permitted under the charter. Such a variation might be effective for the remainder of the charter period, or be limited to sanctioning the particular service ordered by the charterers as a one-off departure from the trading limits originally agreed.

5.9 No particular formality is required for a variation, but (as when initially concluding a fixture) the parties' correspondence and conduct must be consistent only with that result; the only conclusion any reasonable person in the parties' position could come to must be that the contract was being amended. In that regard, the principal focus will normally be on the tenor and terms of any correspondence from the owners (or their agents) in response to the charterers' order, since the master has no authority to vary the time charter (so that his consent to the charterers' order is no variation; likewise his compliance with that order).

5.10 If there is a variation, then the service ordered is, by the variation, within trading limits and (subject to the particular terms agreed as part of the variation) the parties' rights and liabilities are unaffected by the fact that it is outside the limits originally fixed. (Of course, those particular terms

may be especially important and it is suggested that variation is probably the best explanation for the difficult case of *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, and paragraphs 10.56 and 10.66, below. Indeed, Gatehouse, J., himself said of variation, at page 522, "This may be the best analysis of the position.")

5.11 In the rest of the discussion of orders to trade outside limits, below, it is assumed that there has been no variation.

Must the ship comply?

5.12 It is the charterers' right, but only within the trading limits, to direct the employment of the ship. The master and owners may properly refuse an order from the charterers to proceed outside these limits. Dismissing a possible inference to the contrary in the judgment of Greer, L.J., in *Lensen Shipping* v. *Anglo-Soviet Shipping* (1935) 52 Ll.L.Rep. 141, Devlin, J., said in *The Sussex Oak* (1949) 83 Ll.L.Rep. 297, at page 307: "I cannot think that the clause in a time charterparty which puts the master under the orders of the charterers as regards employment is to be construed as compelling him to obey orders which the charterers have no power to give." Nor is the master obliged to sign a bill of lading which names a port of discharge outside the trading limits. MacKinnon, L.J., said in *Halcyon Steamship* v. *Continental Grain* (1943) 75 Ll.L.Rep. 80, at page 84: "The limits of trading. . . are Institute Warranty limits, not north of Holland. If the charterers shipped a cargo in America and then tendered bills of lading to the captain under which he was to deliver to Copenhagen or Danzig, of course he would rightly refuse to sign. . ."

5.13 Mere compliance, without more, with the charterers' order to proceed outside the trading limits will not necessarily amount to a waiver of the owners' right to refuse further compliance subsequently: see the speech of Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (H.L.), at page 400, and paragraph 10.64, below. But if the owners, with full knowledge of the departure from trading limits, make clear that they have elected to accept the order to proceed despite that departure, they will probably be held to have waived their right to refuse further compliance with the order subsequently: see *The Kanchenjunga* again.

Damages?

5.14 It is the charterers' obligation to direct the ship (when they do so) only within the trading limits. It is thus a breach of the contract for the charterers to direct employment of the ship outside those limits. Although the point was conceded before him, it is suggested that Devlin, J., in *The Sussex Oak*, above, was right to think this had been established by a number of earlier cases, including *Temple Steamship* v. *Sovfracht* (1945) 79 Ll.L.Rep.1 in the House of Lords. On the other hand in *The Gregos* [1995] 1 Lloyd's Rep 1, at 9, Lord Mustill (*obiter*) expressed doubts: since the owners may refuse to follow an order to proceed outside the limits fixed by the charter and will be entitled to indemnity against loss caused by an illegitimate order (see chapter 19 below), he tended to the view that characterising the illegal order as itself a breach was an "unnecessary complication".

5.15 In *Temple Steamship* v. *Sovfracht* (1945) 79 Ll.L.Rep. 1, above (summarised at paragraph 4.99 and 5.6, above), the charterers argued that the master's acceptance of an order to proceed to Garston and the owners' failure to protest amounted to a waiver. Lord Porter dealt with this argument in the following terms, at page 11: "The ship had been detained in Murmansk for over five weeks and the owners may well have thought it advisable to make no protest against a sailing to Garston, lest the charterers should be guilty of a worse deviation. In these circumstances the failure to protest is easily comprehensible and even the receipt of chartered hire under such conditions

might well take place without being held to excuse the deviation, and, deviation or no deviation, there still remains the breach of the obligation to prosecute the voyage with the utmost despatch as required by Clause 8 and to send the ship direct to South Africa. No doubt the master obeyed the charterers' orders in sailing to Garston, but under Clause 8 of the charter-party he was under their orders as regards employment, and in accordance with the principles adopted in *Tyrer* v. *Hessler*, 7 Com. Cas. 166, his obedience would not constitute a waiver of his employers' rights." (That last comment, strictly, was an extension of the decision in *Tyrer* v. *Hessler*, since in *Tyrer*'s case there was no question of the charterers' orders being outside the limits laid down in the charter. It does not mean that the master had been obliged to follow the extra-contractual order.)

5.16 In short, waiver of a right to refuse to comply with an order does not involve waiver of a right to damages should loss result: see *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391, at page 397 *per* Lord Goff. To lose that right will require a variation or estoppel, such as was found (on the facts, rather harshly, it is suggested) in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508 and paragraphs 10.56 and 10.66, below.

5.17 In *Steven* v. *Bromley* [1919] 2 K.B. 722, below, Atkin, L.J., raised the possibility, on which he reserved his opinion, of owners who charter their ship for non-dangerous work and find her used instead for dangerous work, claiming as part of their damages for breach of contract reasonable extra remuneration for the dangerous work. It is suggested, *per contra*, that no such damages claim exists, so that in those circumstances, apart from damages for loss or expense caused by the charterers' wrongful order, the owners' only claim, if any, is that considered in paragraphs 5.19 to 5.23, below.

Repudiation?

5.18 Where a master, or his owners, takes objection to the charterers' order, as being beyond the limits set by the charter, usually either the charterers withdraw the order (perhaps under protest) or the owners agree to proceed (typically under protest). But if there is an *impasse*, the charterers insisting that an order be followed and the owners insisting that it will not be, the result will be a wrongful repudiation by whichever party was in the wrong and a damages liability incurred to the other party for the early termination of the charter (as in *The Product Star* (*No.2*) [1993] 1 Lloyd's Rep. 397, see paragraphs 19.42 *et seq.*, below).

Remuneration?

5.19 If the charterers order the ship outside the trading limits and the owners instruct the master to comply with the order under protest, it may be that the owners are entitled to hire at the current market rate (if higher than the charter rate) for the voyages performed outside the trading limits. In *Rederi Sverre Hansen* v. *Van Ommeren* (1921) 6 Ll.L.Rep. 193, a time charter was restricted to voyages between the U.K. and Holland, but certain voyages to France were undertaken under protest. The charterers having paid hire at the charter rate, the owners secured an arbitration award for damages equal to the balance of the (higher) current market rate. This far exceeded the additional cost to the owners of the voyages performed under protest, so the charterers challenged the award of damages as having left the owner better off than if the contract had been performed. The Court of Appeal upheld the monetary award, but not as damages. The voyage charter case of *Steven* v. *Bromley* [1919] 2 K.B. 722, below, was applied. Bankes, L.J., said that "The principle there laid down is that where work is done outside the contract, and the benefit of that work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration."

5.20 Since the claim, if it arises, will be for hire at the current market rate, the owners will benefit from: (*a*) any premium in the market for the services provided (as against those within the charter limits); and (*b*) any rise in market rates since the charter rate was fixed. The question is not what rate would have been fixed if the extra-contractual services had been included in the fixture, but what, in the market, those services are worth at the time they are performed: see *The Batis* [1990] 1 Lloyd's Rep. 345, at pages 352 and 353 *per* Hobhouse, J.

5.21 In *Rederi Sverre Hansen* v. *Van Ommeren* and *The Batis*, above, the charterers' instructions were performed under protest. In such a case, the result could be affected by the precise terms of the parties' communications around the disputed order. It is suggested, however, that it will generally be appropriate to infer, from the charterers' insistence that the service they have ordered be performed in the face of an objection by the owners that it is outside the limits agreed in the charter, that the charterers will pay the current value of the services if the owners' objection is well founded.

5.22 More difficult is the case where the charterers' orders are accepted and followed, without protest by, or indeed with the apparently unqualified consent of, the owners.

The *Olanda* was chartered for a voyage from a port on the River Parana to Europe, carrying wheat, maize, rye, linseed or rape seed, at 32s per ton (wheat, maize or rye) and 33s per ton (linseed or rape seed). There was an express term that linseed should not comprise more than 50% of the cargo, but considerably more than 50 per cent of the cargo shipped was linseed. The owners suffered no loss (i.e., there were no adverse consequences from the carriage of excessive linseed and, indeed, at charter rates the owners earned more freight than if the contract had been honoured). The owners claimed freight on the linseed at the market freight rate at the time of shipment, which was higher than the contract rate. The claim failed.

Lord Finlay, L.C., explained the decision as follows: "Both parties intended that this linseed should be carried under the charterparty, and the charterparty provides that linseed should be carried at the rate of 33s per ton. It would be entirely different if the owners of the ship, through their agents abroad, had protested against the putting of the linseed on board and had received the linseed under protest; but here by consent of both parties the linseed was taken as under the charter and at the chartered rate of freight. . . all that we have got is that the linseed was carried owing to a mistake both parties shared, as to the right to have more than 50 per cent of linseed carried on board the vessel. That seems to me to dispose of the claim to be paid at the current rate of freight at the time the linseed was carried."

The Olanda [1919] 2 K.B. 728 (H.L.), reported as a Note to *Steven* v. *Bromley*, below.

The *Strathcona* was sub-chartered for the carriage of steel billets from (in the event) Liverpool to Nantes, at 23s per ton. The sub-charterers shipped 1,208 tons of steel billets and 987 tons of general merchandise. A current market rate for the carriage of the latter was found to be 30s per ton. The disponent owners (who had the ship on time charter) were unaware of the departure from the sub-charter terms. Bailhache, J., gave the disponent owners judgment for freight on the general merchandise at 30s per ton. The Court of Appeal upheld his decision.

Bankes, L.J., said, at page 725, that the inference of "a fresh contract. . ., or a fresh term added to the original contract, by which the charterers came under an obligation to pay the current rate of freight in respect of general merchandise shipped in the place of steel billets" was "justified [where] a charterer tenders for shipment cargo which is not that contracted for but is a different cargo for which the current rate of freight is substantially higher than the agreed rate for the cargo under the charter". An offer by the charterer to pay at the current rate "may be inferred from the tender of [such] a cargo by the charterer to the captain, a man who to the knowledge of the charterer is not in a position to vary the original contract. This is a continuing offer which the owner may accept as soon as the act of the charterer comes to his knowledge."

Scrutton, L.J., said, at page 727, that "where work is done outside the contract, and the benefit of that work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration". The charterers had "tendered cargo which was not within the charterparty. . . to one who had no authority to vary the terms of the charterparty. The proper legal inference is a promise by the charterers to pay reasonable remuneration for carriage of the cargo outside the charterparty. . ."

Atkin, L.J., agreed, but at the start of his judgment (at page 728) identified as the key fact that "in the words of [the trial judge], 'it is not and could not be pretended that in loading general merchandise the charterers

thought that they were within their contractual rights. They knew that they were not. They did not load under the charterparty, and as they did not and knew that they did not' the charterparty rate for steel did not apply."

Steven v. *Bromley* [1919] 2 K.B. 722 (C.A.).

(See also *The Saronikos* [1986] 2 Lloyd's Rep. 277, although there the entitlement to a *quantum meruit* was conceded.)

The *Paragon*, having been time chartered for up to about 5 months ('about' being defined to mean +/- 15 days) was redelivered six days late, at the end of a last voyage performed without protest but claimed by the owners to have been illegitimate (on which, see paragraph 4.64 *et seq*, above). Clause 101 of the charter provided (in substance) that if, in breach of charter, the charterers ordered an illegitimate last voyage and the charter overran, the owners were entitled to be paid at the market rate, if higher than the charter rate, for the 30 days prior to redelivery. The Court of Appeal upheld an award ruling on a preliminary issue that Clause 101 was unenforceable, as a penalty.

In doing so, the Court of Appeal rejected an argument that if the last voyage had been illegitimate as the owners claimed, then its performance was an extra-contractual service (since the owners could have refused to perform) that, absent Clause 101, would have attracted remuneration at the market rate for the duration of the voyage.

Lord Clarke, M.R., said at [25], that "in the ordinary case in which charterers give orders for an illegitimate last voyage there is no basis for implying a request by the charterers that the owners should perform such a voyage outside the charterparty and on terms that they will pay for the voyage at the market rate".

The Paragon [2009] 2 Lloyd's Rep. 688 (C.A.).

5.23 To modern legal eyes, it may not be as clear as it was to their Lordships in *The Olanda*, above, why the charterers' honest mistake in ordering extra-contractual services should necessarily excuse them from paying the going rate for the services in fact requested and received. In many cases, if those services had not been performed purportedly pursuant to the time charter in question, the charterers would have had to pay that going rate to another ship to avoid defaulting on sub-fixture or cargo purchase commitments. It is suggested that nowadays a claim should lie in such a case, namely a claim for restitution of incontrovertible benefit conferred on the charterers by mistake and accepted by them (see Goff & Jones, *The Law of Restitution*, paragraphs 6–007 to 6–008, stated in the light of the general discussion at paragraphs 1–004 to 1–011 and 1–019 to 1–026; Goff & Jones, *The Law of Unjust Enrichment*, paragraphs 4.18–4.21 and 4.27–4.33). It may, however, require a case with suitable facts to come before the Supreme Court for the matter to be settled.

War risks clauses

5.24 As the New York Produce form does not include a war risks clause, parties contracting on that form will typically import one as an additional clause, very often one of the BIMCO clauses designed for inclusion in time charterparties, i.e. the Conwartime 1993 or 2004 or 2013. Other standard forms of time charter do include war risks provisions, for example the Shelltime 4 form deals with war risks in Clauses 34 and 35 (see paragraph 37.165 *et seq*., below), whilst Clause 20 of the Baltime form reproduces the Conwartime 1993 clause. One of the main effects of such a clause is to set limits within which the chartered ship may be required to trade, so it is convenient to consider such clauses in this chapter. To do so, we consider, first, the Conwartime 1993 clause, as set out as Clause 20 in the Baltime form.

5.25 The structure of the clause is as follows:

– Clause 20(A)(ii) (or clause 1(b) of the Conwartime 1993 clause) identifies a wide range of perils such as "war (whether actual or threatened), act of war, . . . revolution, . . . civil commotion, . . . the laying of mines (whether actual or reported), acts of piracy. . .". It provides that such perils are "War Risks" if "in the reasonable judgement of the Master and/or the Owners, [they] may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other

persons on board the Vessel". (The Conwartime 2013 clause uses the simpler expression "may be dangerous or may become dangerous".)

– Clause 20(B) provides, stating it broadly, that the ship is not to be ordered to trade to or through, or remain in, places or areas that may expose her to War Risks as defined in Clause 20(A).

– Clause 20(C) protects the ship from having to run blockades.

– Clause 20(D) allows the owners to insure against war risks and to claim from the charterers additional premiums or calls imposed for trading to areas of particular risk.

– Clause 20(E) allows the owners to claim reimbursement from charterers for additional amounts payable to crew for trading to such areas.

– Clause 20(F) allows the owners, inter alia, to obey the advice or orders of certain governments, supranational bodies and war risks underwriters.

– Clause 20(G) deals with notice to charterers of owners' intentions and gives the owners, after such notice, liberty to discharge cargo at an alternative safe port.

– Clause 20(H) prevents action or inaction in accordance with Clause 20 being treated as a deviation.

5.26 In a war risks clause, "war" will probably be given its ordinary non-technical meaning: *Kawasaki K.K.K.* v. *Bantham* (1939) 63 Ll.L.Rep. 155. But contrast *Government of the Republic of Spain* v. *North of England Steamship* (1938) 61 Ll.L.Rep. 44, paragraph 5.41 below, on the meaning given to "blockade" in a war clause (such as in Clause 20(C) in the Baltime form). As already noted, Clause 20(A) includes piracy as a "War Risk". Not all war risks clauses do so, for example Clause 35 of the Shelltime 4 form does not. In response to the rise of piracy, particularly off the Horn of Africa, in December 2008 and March 2009 (with a revision in November 2009), Intertanko and BIMCO respectively published Piracy Clauses for time charters. They have not given rise to any case law and are not separately considered in this book. For the meaning of other particular words and phrases in war risk clauses, see also paragraphs 5.36 to 5.39, 24.20, and 37.156 to 37.175, below; also *Voyage Charters*, paragraphs 26.1 *et seq*., and generally *Marine War Risks*.

Clause 20(B): prohibition on exposure to War Risks

5.27 Clause 20(B) of the Baltime form provides that unless the written consent of the owners be first obtained, the ship "shall not be ordered to or required to continue to or through, any port, place, area or zone. . ., or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks" and if the ship should be "within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it". (The Conwartime 2013 clause states, more simply, "may be exposed to War Risks" and "becomes dangerous, or may become dangerous" respectively.)

5.28 In broad terms, Clause 20(B) prohibits the charterers from ordering the ship to a place where, in the reasonable judgment of the master or the owners the ship might be at risk of harm from one of the named perils. The precise nature of the judgment required was considered in *The Triton Lark*, below, where Teare, J., held that Clause 20(b) requires the master or owners to consider whether there is at least a serious possibility that compliance with the charterers' orders would put the ship in danger from one of the War Risks (in that case, acts of piracy). It is considered that, in this context, a ship is in danger if she is at significant risk of harm despite the exercise by master and crew of due skill and care in the operation and navigation of the ship.

The time charter of the *Triton Lark* was on the New York Produce form, but incorporated the Conwartime 1993 clause. The charterers ordered her to perform a laden voyage from Hamburg to China, proceeding via the Suez Canal and Gulf of Aden. They told the owners that in their view the ship "should be safe" (from

pirates) if she followed current good practice on precautionary measures. The owners refused to go via the Gulf of Aden, saying that in their opinion taking that route would "expose vsl and crew members on board to serious risk of pirates attack". The charterers continued to insist that the ship sail via the Gulf of Aden but, despite their protests, she sailed via the Cape of Good Hope. The arbitrators upheld the owners' claim for hire for the full (prolonged) voyage. They held that the owners had been entitled under the Conwartime clause to refuse to go through the Gulf of Aden and that they had been entitled to proceed instead via the Cape. The charterers appealed.

Teare, J., allowed the appeal, concluding that the arbitrators had misdirected themselves in their reasons, and remitted the award to the arbitrators.

The main issue, on which the judge gave two judgments, was whether the Conwartime clause entitled the owners to refuse to proceed via the Gulf of Aden. In the second judgment, he considered what was meant by the phrase to "be exposed to War Risks". He held that it meant to be in danger from one of the relevant perils: see [10]. In the first judgment, he considered what was meant by the words "may be, or are likely to be. . ." in the phrase "the Vessel, her cargo [and] crew. . . may be, or are likely to be, exposed to War Risks". He held that they meant "a real likelihood", "real danger" or "serious possibility" of such exposure: see the first judgment, [38]–[40]. The result was a direction to the arbitrators to consider "whether in the reasonable [judgment] of [the owners], there was a real likelihood that the Gulf of Aden would, on account of acts of piracy, be dangerous to *Triton Lark*": see the second judgment, [15].

The charterers also argued that if the owners *were* entitled to refuse to sail through the Gulf of Aden route, they should have sailed to Port Said for orders and were not entitled to sail for the ordered destination in China via the Cape. Teare, J., upheld the arbitrators' rejection of that argument: the order to carry the cargo to China was never countermanded; the charterers had only added to it an order to sail via the Gulf of Aden that they were not entitled to give (if the owners were right on the main issue); the master's obligation was thus to proceed to China with utmost despatch (as qualified by the entitlement not to sail via the Gulf of Aden). The main issue, above, was therefore determinative.

The Triton Lark [2012] 1 Lloyd's Rep. 151 and 457.

It is suggested that the charterers' further argument, though bad on the facts in *The Triton Lark*, was coherent in principle. Had they said in terms that if the owners would not allow the ship to proceed via the Gulf of Aden, the order for China was withdrawn, or made it clear in some other way that the order for cargo to be taken to China was strictly conditional upon the Gulf of Aden route, then nothing in the Conwartime clause would have entitled the owners to override that condition and take the cargo to China anyway.

5.29 The required judgment on the part of the master or the owners must be reasonable. It was submitted in *The Triton Lark*, above, that this required that their decision be made rationally, and not capriciously, and after making reasonable enquiries. The judge rejected that and said, in his first judgment at [55], that there was ". . . no necessity to imply any term as to how that discretion or power must be exercised because the clause [says] expressly that the owner's judgment must be "reasonable". The effect of that clause is that the owners must make a judgment. It must be made in good faith; otherwise it would not be a judgment but a device to obtain a financial gain. Further, the judgment reached must be objectively reasonable. An owner who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. If he makes no enquiries at all it may be concluded that he did not reach a judgment in good faith. But if he makes those enquiries which he considers sufficient but fails to make all necessary enquiries before reaching his judgment I do not consider that his judgment will on that account be judged unreasonable if in fact it was an objectively reasonable judgment and would have been shown to be so had all necessary enquiries been made."

5.30 The provisions of Clause 20(B) apply even where the charterers' voyage orders do not expressly specify use of or transit through the port, place, area, zone, waterway or canal judged by the master or the owners to expose the ship to war risks. Whether the charter be for a period or for a trip, the ship is subject to the charterers' orders throughout, even when following a customary route, and if, with full knowledge of the route to be followed, the charterers allow the ship to

proceed into a dangerous zone, an implication that they ordered the ship to proceed into it will readily be drawn: see *The Eugenia*, below.

5.31 The owners' remedy for breach by the charterers of Clause 20(B) is not confined to the rights given to the owners under sub-Clauses (D)(ii) and (E). Those sub-Clauses come into operation if the owners consent to the ship being brought within a dangerous zone, but if the owners do not consent, and the charterers are in breach of sub-Clause (B), the owners have a remedy in damages.

The *Eugenia* was time chartered under the previous version of the Baltime form "for a trip out to India via Black Sea" from the time of delivery at Genoa. The charterers ordered the ship to load cargo at two Black Sea ports for discharge at ports on the East Coast of India, but did not give the master any express orders to proceed either via Suez or the Cape. However, at that time the Suez Canal was the customary route for such a voyage. On 29 October 1956, Israeli forces invaded Egypt and on 30 October the Canal became, as the umpire in arbitration proceedings found, a dangerous zone within the meaning of what was then Clause 21(A). The owners consented neither to the ship proceeding via Suez nor to her entering or continuing into the Canal after it became a dangerous zone. On 30 October the owners objected to the ship entering the Canal. The charterers took no action to prevent the ship entering the canal and their local agent at Port Said told the master that he had arranged for her to enter the following morning. On 31 October the ship entered the Canal and was subsequently blocked there.

It was held by the Court of Appeal, affirming Megaw, J., on this point, that the charterers were in breach of Clause 21(A) and were liable in damages to the owners on the grounds that they had ordered the ship, without the consent of the owners, to enter a dangerous zone or, alternatively, allowed the ship to continue into such a zone.

The Eugenia [1963] 2 Lloyd's Rep. 381.

5.32 Since Clause 20(B) concerns exposure to risk, the question has arisen whether, for the charterers' orders to be prohibited, the degree of risk (as reasonably assessed by the master or owners) must be materially greater than it was when the charter was entered into. In *The Product Star* (*No.2*) [1993] 1 Lloyd's Rep. 397, paragraph 37.172, below, the Court of Appeal held that the war risk clause there could not be invoked unless the owners reasonably assessed that the risks to which they objected were greater than had existed when the charter was concluded. But there was in that case a proved common intention to trade mainly to loading ports in the UAE and the owners' case for refusing to comply with the charterers' orders was that they had reasonably concluded that Ruwais, UAE, was dangerous. Any requirement for a material increase in risk should be limited to the case where some reasonably specific trade(s) or location(s) was expressly permitted by a term of the charter, or mutually contemplated when the charter was concluded, but then objected to by the owners without change of circumstance: see *The Paiwan Wisdom*, below. That is not to say that where there is such an express permission or mutual contemplation, the owners necessarily will be entitled to refuse orders upon proof of a material increase in risk. That will depend on the terms and effect of the permission or contemplation in question. If not qualified, however, by any express permission or mutual contemplation, nothing in the Conwartime clause itself creates a requirement to prove that circumstances have changed since the charter was concluded. Rather, the purport of Clause 20(B) is that the owners' general consent in advance, by entering into the time charter, to have the ship follow the charterers' orders, is qualified by an insistence on the right to decide from time to time during the charter period whether to have the ship proceed somewhere that in their reasonable opinion may be exposed to War Risks.

The *Paiwan Wisdom* was time chartered on the NYPE 93 form with additional clauses including the Conwartime 2004 clause. The trading limits stated that "Passing Gulf of Aden always allowed with H&M insurance authorization". The ship was delivered in Japan in April 2010 and the charterers' first voyage orders were for a voyage loading cement in Hoping, Taiwan for carriage to Mombasa, Kenya. The owners refused those orders, relying on the Conwartime clause, because of "recent developments in Indian Ocean in respect of piracy" and "piracy getting more severe and extending further along the coast/waters of East Africa".

Arbitrators, determining a preliminary issue in favour of the owners, held that there did not have to be a

CHAPTER 16

Hire and Withdrawal

"58 5. Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or
59. part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes
60. due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the
61. hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Char-
62. terers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. . . "

General

16.1 Clauses 4 and 5 of the New York Produce form deal with the charterers' obligation to pay hire. Clause 4 stipulates that the charterers are to "pay for the use and hire" of the ship from "the day of her delivery. . . until the hour of the day of her re-delivery" – although this obligation is qualified by the off-hire clause, Clause 15, which stipulates that "payment of hire shall cease" in certain circumstances. Clause 5 stipulates that the charterers are to pay the "said hire. . . semi-monthly in advance".

16.2 The question how these clauses operate together is discussed further in paragraphs 16.5 *et seq.*, below. However, the general scheme of these two provisions was succinctly described by Bingham, J., in *The Lutetian* [1982] 2 Lloyd's Rep. 140, at page 149, as follows: "Clause 4 of the charter-party deals with the computation of hire both as to amount and period. Clause 5 governs the mechanics of payment. . . ."

16.3 The charterers' obligation to pay on or before the due date is an absolute one. Lord Porter, in *Tankexpress* v. *Compagnie Financière Belge des Pétroles* (1948) 82 Ll.L.Rep. 43, said, at page 51: "Apart from some special circumstances excusing performance, it is enough to constitute default that payment has not in fact been made: neither deliberate nonperformance nor negligence in performing the contract is required." If hire is not paid punctually, then under clause 5, the owners are to have the right to withdraw the ship. The right to withdraw is a right to terminate the charter. The same right is also included in all the standard forms of time charter. It reflects the importance to the owners of the regular receipt of hire. Also in the *Tankexpress* case, above, Lord Wright said, at page 53: "The importance of this advance payment to be made by the charterers, is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long as the charter-party continues. Hence the stringency of his right to cancel."

16.4 The main topics dealt with in this chapter are: (*a*) the obligation to pay hire in advance; (*b*) the time and mode of payment; (*c*) the charterers' right to make deductions from hire; and (*d*) the owners' right to withdraw.

Payment in advance and the charterers' right to payment of an adjustment

In advance

16.5 Under Clause 5 of the New York Produce form, hire is to be paid "semi-monthly in advance". Under clause 11(a) of the NYPE 93 form, this has been changed to "15 days in advance". However, this means, "*every* 15 days in advance". So, for each period of 15 days, hire is to be paid no later than midnight on the day before that period begins.

16.6 Where payment is made in advance for, say, 15 days, it relates to the ensuing 15 calendar days. It is not payment for the next 15 days during which the ship may in fact be on hire: *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, *per* Scrutton, L.J., at page 564. Consequently, if any hire is not earned during those 15 days, the charterers are entitled to repayment of what was not earned.

16.7 Where hire is payable for a particular period in advance, the charterers' obligation under Clause 5 is to pay in advance hire sufficient to cover every hour of that period (although in the case of the last hire instalment this obligation is modified: see paragraph 16.26, below). This is the case even if the charterers believe, or know, that the ship will be off hire for part of that period: *The Li Hai* [2005] 2 Lloyd's Rep. 389, *per* Jonathan Hirst Q.C. at page 398. On the other hand, if the ship is off hire at the moment that the payment of hire falls due, it may be that the charterers' obligation to pay is suspended: see paragraph 16.18, below.

The owners' obligation to pay an adjustment of hire

16.8 Obviously, the obligation to pay hire in full for a month (or half-month) in advance may have the consequence that the charterers are subsequently found to have paid the owners in advance for time during which the ship was off hire under Clause 15. Likewise, it sometimes happens that a ship is redelivered earlier than was expected when the last instalment of hire was paid, so that more hire is paid in advance than is eventually earned (as to "earned" here, see paragraph 16.13 *et seq.*, below).

16.9 In such circumstances, the charterers have a right to be paid an adjustment of hire. That right is expressly stipulated by Clause 11(A), Lines 151 and 152, of the Baltime form. It is also expressly provided for (though less clearly) in Clause 18, Lines 111 and 112 of the New York Produce form.

16.10 Where a charter does not contain an express right to payment of an adjustment, such a right will be implied. In *The Trident Beauty* [1994] 1 Lloyd's Rep. 365 (H.L.), at page 368, Lord Goff said, "the charter will usually make express provision for the repayment of hire which has been overpaid. In the present charter [which was made on the New York Produce form], such a provision is to be found in cl. 18 of the printed form, which provides that 'any overpaid hire' is 'to be returned at once'. This provision gives rise to a contractual debt payable in the relevant circumstances by the shipowner to the charterer. But even in the absence of any such express contractual provision, advance hire which proves to have been paid in respect of a period during which the ship was rendered off hire under a term of the contract must ordinarily be repaid, and if necessary a term will be implied into the contract to that effect. . . All this. . . means that, as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire." For an example of the application of this decision, see *The Riza and The Sun* [1997] 2 Lloyd's Rep. 314, *per* Timothy Walker, J., at pages 320 to 321.

16.11 The obligation to pay an adjustment of hire arises in relation to hire paid in respect of: (*a*) time that the ship is off hire; and (*b*) time after redelivery of the ship or the termination of the charter. Hire paid in respect of any period of time after the ship has been withdrawn falls within the

latter category: see *The Mihalios Xilas* [1979] 2 Lloyd's Rep. 303, *per* Lord Diplock at pages 307 to 308. See further paragraph 16.114, below.

16.12 In *The Trident Beauty*, above, however, it was held that an assignee of the owners' right to receive hire in advance was not bound by the owners' contractual obligation to pay an adjustment of hire. The facts of the case are at paragraph 16.115.

The language used to refer to the owners' obligation to pay an adjustment of hire

16.13 When speaking of the owners' obligation to pay an adjustment of hire, it is usually said that the owners have a duty to repay hire which has not been "earned" (and this usage is reflected in the language of Clauses 16 and 18 of the New York Produce form). That simply means the hire in question has been paid in respect of time during which, in the event, the ship was not on hire. It does not imply that the hire was not fully due and payable when paid. In *French Marine* v. *Compagnie Napolitaine* [1921] 2 A.C. 494, the House of Lords held that a payment of hire in advance was not a mere deposit, out of which payment is to be taken at a later stage: see *per* Lord Dunedin at page 513, and Lord Sumner at page 519.

16.14 Similarly, it is sometimes said that hire paid in advance is 'provisional' or 'conditional'. These terms "mean no more than that the payment is not final since under the contract there is an obligation, express or implied, to repay to the charterer any part of the hire payment which has not been earned": *per* Lord Goff in *The Trident Beauty* [1994] 1 Lloyd's Rep. 365, at page 369.

16.15 In a number of cases, it is said that the charterers are entitled to recover unearned hire on the ground that the consideration for the unearned hire has wholly failed: see, for example, *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, *per* Scrutton, L.J., at page 564. It is perhaps doubtful whether there is a total failure of consideration where only a proportion of hire paid in advance is not earned: see Lord Sumner's comments in *French Marine* v. *Compagnie Napolitaine* [1921] 2 A.C. 494, at page 520. Be that as it may, the charterers' right to payment of an adjustment is a contractual right, in the nature of a debt. The charterers have no claim for restitution. In *The Trident Beauty* [1994] 1 Lloyd's Rep. 365, at page 368, Lord Goff said that in most cases where hire has been paid but not earned, "there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration. It is true that sometimes we find in the cases reference to there having been in such circumstances a failure of consideration. . . But it should not be inferred that such statements refer to a quasi-contractual, as opposed to a contractual, remedy."

When and how the adjustment of hire is paid

16.16 In principle, where the owners come under an obligation to pay the charterers an adjustment of hire, their obligation is to pay that adjustment forthwith: see Scrutton L.J.'s comments in *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560, at page 564. Indeed Clause 18 of the New York Produce form expressly requires that overpaid hire is returned "at once". So if, for example, if the ship is off hire, the owners' obligation to pay the consequent adjustment accrues each day that the ship is off hire.

16.17 However, in practice adjustments are normally made by way of set-off against the following month's hire. In *The Trident Beauty* [1994] 1 Lloyd's Rep. 365 (H.L.), at page 367, Lord Goff commented as follows: "given the circumstances that the charter hire was payable in advance and that the ship might be off hire under one or other of the relevant clauses during a period in respect of which hire had been paid, it was inevitable that, from time to time, there might have to be an adjustment of the hire so paid. Such adjustments are a normal feature of administration of time charters. The usual practice is, I understand, for an adjustment to be made when the next instalment of hire falls due, by making a deduction from such instalment in respect of hire previously paid in advance which has not

been earned. . . If the relevant period is the last hire period under the charter, such a deduction may not be possible. Any overpayment will then have to be repaid by the shipowner, and no doubt this will normally be taken care of in the final account drawn up at the end of the charter period."

Suspension of the obligation to pay hire in advance

Where the ship is off-hire on the due date

16.18 In *The Lutetian* [1982] 2 Lloyd's Rep. 140, Bingham, J., held that under the New York Produce form the charterers were not obliged to pay an instalment of hire on the due date if the ship was off hire at that time, as Clause 15 provided that when time was lost from the listed causes "the payment of hire shall cease". He accepted the contention that in such circumstances the charterers' obligation to make payment of the next monthly instalment of hire in advance was suspended until immediately before the ship was again at the service of the charterers: see particularly at pages 150 and 153. This is a fair reading of the language of Clause 15, but, perhaps, not the only possible reading. It is suggested that, unless and until confirmed by the Court of Appeal, charterers should be cautious about relying on Bingham, J.'s view.

Where the use of the ship is being withheld on the due date

16.19 Where the owners are wrongfully withholding the services of the ship, and the charter is on the New York Produce form, it is thought that the ship will be off hire under the "or any other cause" wording: see paragraph 25.37, below. Accordingly, the obligation to pay hire may be suspended, as discussed above. However, other off-hire clauses may not put the ship off hire in these circumstances. If the ship is not off hire, the charterers will be entitled to damages from the owners in respect of hire paid for the relevant period and will be entitled to set those damages off against subsequent hire payments: see paragraphs 16.58 *et seq*. However, the obligation to pay hire is probably not suspended.

16.20 In *Tankexpress* v. *Compagnie Financière Belge des Pétroles* (1946) 79 Ll.L.Rep. 451, Atkinson, J., held that the charterers were not in breach of charter in failing to make a particular payment of hire because on the due date the master was, on the owners' orders, wrongfully refusing to obey their instructions to load the ship. A two-judge Court of Appeal was split on this point: (1947) 80 Ll.L.Rep 365. The House of Lords decided the case on other grounds ((1948) 82 Ll.L.Rep. 43), but Lord Porter and Lord du Parcq made comments, *obiter*, suggesting that Atkinson, J., was in error and that the obligation to pay hire continued (unless of course the conduct of the owners amounted to a repudiation of the whole contract and the charterers decided to accept it and treat the contract as discharged). Lord du Parcq said, at page 60: ". . . I have not been persuaded that a charterer who has agreed to pay a month's hire in advance is absolved from making the payment if, although the owners have not sought to repudiate the contract, the ship is not in fact at the disposal of the charterer for some days immediately before and after the first day of the month of hire."

Other issues relating to time of payment

Semi-monthly and monthly

16.21 Line 58 of the New York Produce form requires hire to be paid "semi-monthly" in advance, but that is often altered by the parties to "monthly". A month in this context means a calendar month. Monthly hire will be due on the same numbered day in each calendar month. In *Freeman* v. *Reed* (1863) 4 B. & S. 174, Cockburn, C.J., said: "the calendar month. . . is complete

when, starting from the given day in the first month, you come to the corresponding day in the succeeding month whatever be the length of either." If a month does not have a corresponding day, hire will be due on its last day. For a more recent review of this subject see *Dodds* v. *Walker* [1980] 1 W.L.R. 1061, where a majority of the Court of Appeal followed the 'corresponding day' rule and held that four calendar months from 30 September expired on 30 January, despite the fact that the period then began at the end of the first month but finished before the end of the fourth. Their decision was affirmed by the House of Lords, [1981] 1 W.L.R. 1027.

16.22 In the absence of express agreement or settled practice, the charterers have until midnight on the due day in which to effect each periodic payment, regardless of the hour at which the obligation to pay hire had commenced at the beginning of the charter period: see *The Afovos* [1982] 1 Lloyd's Rep. 562 (C.A.), and [1983] 1 Lloyd's Rep. 335 (H.L.). It is suggested that, again in the absence of express agreement, the last moment for timely payment should be calculated by reference to the place where payment is to be made so that (for example) a payment to be made in New York and due on 30 April is timely if effected late in the afternoon that day in New York even if the ship is then in the Far East so that for her it is 1 May.

NYPE 93, Baltime

16.23 The Baltime form avoids the difficulty of long and short months by providing in Line 85 that hire be paid "every 30 days". For this calculation months can be disregarded. The NYPE 93 form deals with the same difficulty by stipulating payment intervals of 15 days. The phrase "15 days in advance" means "*every* 15 days in advance".

Payment due on a non-banking day

16.24 If the due day for a particular payment falls on a Sunday or some other non-banking day the charterers are not entitled to defer making payment until the next banking day: see the judgment of Ackner, J., in *The Zographia M* [1976] 2 Lloyd's Rep. 382. Similarly, in *The Laconia* [1977] 1 Lloyd's Rep. 315, at page 323, Lord Salmon made the following (*obiter*) remarks: "Punctual payment cannot be made on the day after it falls due, but I cannot see any reason in the present case why it could not be made before that day. If the hire is to be paid to the owners' bank semi-monthly in advance and an instalment happens to fall due on a Sunday when the banks are closed, then as the banks are also closed on Saturday, payment, in my view, should be tendered on the previous Friday. This will be payment in advance. If it is not tendered until the Monday it will not be made in advance of the period for which it is tendered."

The first instalment of hire

16.25 The obligation to pay hire in advance probably applies to the first instalment just as it applies to subsequent instalments. Branson, J., so held in *Kawasaki* v. *Bantham Steamship* (1938) 60 Ll.L.Rep. 70 (but compare the judgment of Roche, J., in *Budd* v. *Johnson*, *Englehart* (1920) 2 Ll.L.Rep. 27, where he reached the opposite conclusion). Thus under the New York Produce form the charterers must pay either before the expiry of the Clause 5 notice period or before they use the ship pursuant to that clause. In *The Zographia M* [1976] 2 Lloyd's Rep. 382, it was submitted that the obligation to pay in advance did not apply to the first payment of hire. The court was referred to *Budd* v. *Johnson*, *Englehart* but *Kawasaki* v. *Bantham Steamship* was not cited. It was also submitted that a term should be implied that the owners must give reasonable notice of when they will deliver. Ackner, J., at page 392, accepted these submissions.

The final instalment of hire in advance

16.26 If the charter does not expressly provide to the contrary, hire payable in advance for a month or half a month will be payable in full even where it is clear that the ship will be redelivered before the end of the month or half month: see *Tonnelier* v. *Smith* (1897) 2 Com. Cas. 258. After redelivery, the amount overpaid is to be calculated and repaid by the owners: see *Stewart* v. *Van Ommeren* [1918] 2 K.B. 560. This general rule in *Tonnelier* v. *Smith* applies to the Baltime form.

16.27 The New York Produce form provides to the contrary in Lines 58 to 60: "for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers. . ." Thus less than the full semi-monthly hire may be paid in advance where redelivery is expected to be made before the end of that period. In that case, the charterers are obliged to pay in advance only an amount calculated in accordance with their estimate as to the probable date of redelivery. But they must pay hire for the whole period up to that date. Thus Mocatta, J., held the charterers in breach in *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, when they paid hire for a period which ended three days before their own estimate of the redelivery date. Moreover, the charterers' estimate must be made on reasonable grounds; it is not sufficient that it should have been made bona fide: see *The Mihalios Xilas* [1978] 2 Lloyd's Rep. 397 (C.A.) and [1979] 2 Lloyd's Rep. 303 (H.L.), *per* Lord Diplock at page 308, where the relevant clause read: "the last month's hire to be estimated and paid in advance, less bunker cost. . . up to such time as vessel is expected to be redelivered. . .". Although the words of Lines 59 and 60 of the New York Produce form are somewhat different from those in *The Mihalios Xilas*, it is anticipated that they would be construed in the same way so far as this point is concerned.

16.28 Where the words of the charter permit deductions of specified items from the last hire payments, the amount of such deductions must also be made on objectively reasonable grounds: see *The Mihalios Xilas*, above.

NYPE 93

16.29 Clause 11(c) of the 1993 revision of the New York Produce form expands on the provisions in Lines 58 to 60 of the 1946 version, embracing the penultimate as well as the last anticipated payment if this falls during the final voyage to the redelivery port and requiring account to be taken of bunkers on board at redelivery and of owners' disbursements: see Lines 168 to 174.

Mode of payment

16.30 Line 58 requires the charterers to pay hire "in cash". However, this stipulation should not be read literally. In *The Brimnes* [1972] 2 Lloyd's Rep. 465, at page 476, Brandon, J., said: "In my view these words must be interpreted against the background of modern commercial practice. So interpreted it seems to me that they cannot mean only payment in dollar bills or other legal tender of the U.S. They must. . . have a wider meaning, comprehending any commercially-recognised method of transferring funds, the result of which is to give the transferee the unconditional right to the immediate use of the funds transferred." Edmund Davies, L.J., in the Court of Appeal [1974] 2 Lloyd's Rep. 241, at page 248, specifically agreed with that definition. Brandon, J.'s, definition was referred to with approval and clarified by the House of Lords in *The Chikuma* [1981] 1 Lloyd's Rep. 371: see paragraph 16.35, below. At page 375, Lord Bridge agreed with Robert Goff, J., who had taken "unconditional" in Brandon, J.'s, definition to have a wide and liberal sense "equivalent to unfettered or unrestricted", and added this: "The underlying concept is surely this, that when

payment is made to a bank otherwise than literally in cash, i.e. in dollar bills or other legal tender (which no one expects), there is no 'payment in cash' within the meaning of cl. 5 unless what the creditor receives is the equivalent of cash, or as good as cash."

16.31 Similarly, in *The Laconia* [1976] 1 Lloyd's Rep. 395, at page 402, Lawton, L.J., said: "The construction of the word 'cash' provides no difficulty. Amongst business men engaged in international shipping it now means such banking arrangements as can be treated as cash."

Bankers' drafts

16.32 A bankers' draft is a form of payment equivalent to cash: see *The Brimnes* [1972] 2 Lloyd's Rep. 465, *per* Brandon, J., at page 476. However, where payment is made by a bankers' draft, the issue may arise as to when the payment takes place: is it on delivery of the draft to the owner's bank or when the money is credited to his account? The answer is probably the former. This is despite the fact that the owners may not be able to make immediate use of the money because there is a period of internal processing before the owners' bank will actually credit the owners' account. As Lord Salmon pointed out in *The Laconia* [1977] 1 Lloyd's Rep. 315, in a case about payment orders, even if the charterers had literally paid in cash, a certain amount of processing would be needed before a credit was raised in an owner's account: see page 326.

16.33 In *The Brimnes* [1972] 2 Lloyd's Rep. 465, at page 468, Brandon, J., concluded that where payment was made by presentation of a bankers' draft, the payment was effected at the time of presentation. This conclusion was not challenged in the Court of Appeal: see [1974] 2 Lloyd's Rep. 241, *per* Edmund Davies, L.J., at page 247.

Electronic transfers of funds

16.34 A more common substitute for cash is an electronic funds transfer. Where the transfer is international, it is almost always made by means of a payment order sent through the SWIFT secure message system. The order is sent by the charterers' bank to the owners' bank. It instructs the owners' bank to credit the owners' account with a sum of money and tells them how they will be reimbursed. The reimbursement is effected by a transfer of funds, typically through a correspondent bank which holds accounts with both the owners' and the charterers' banks or through a chain of correspondent banks. The SWIFT message has a value date, which is the date on which the funds are to be transferred between the relevant banks.

16.35 Where a payment is made by a payment order of this kind, the order may be received by the owners' bank some days before the interbank value date. Where that is the case, the charterers are not treated as having made a payment at least until the interbank value date.

The charterers of the *Chikuma* paid an instalment of hire using a payment order. The payment order was sent by the charterers' bank to the owners' bank in Italy. It bore a 'for value' date falling four days after the date of the order. In those circumstances, in accordance with Italian banking practice, the owners' bank credited the owners' account immediately, but the credit was made on terms that the owners would not earn interest on the money until the bank had been reimbursed four days later. The House of Lords held that, in those circumstances, the receipt of the charterers' payment order and the credit made to the owners' account were not payment for the purposes of the charter: they did not provide the owners with unconditional and immediate use of the funds. Having referred to the statement of Brandon, J., in *The Brimnes*, see paragraph 16.30, above, Lord Bridge said, at page 376: "The book entry made by the owners' bank on Jan. 22 in the owners' account was clearly not the equivalent of cash. . . It could not be used to earn interest. . . It could only be drawn subject to a (probable) liability to pay interest. . . . It follows, in my view, that on Jan. 22 there was no 'payment in cash' . . . and the owners. . . were entitled to withdraw the ship, as they did, on Jan. 24."
The Chikuma [1981] 1 Lloyd's Rep. 371 (H.L.).

CHAPTER 25

Off-hire Clause

"97. 15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment,
98. grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause
99. preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by
100. defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence
101. thereof, and all extra expenses shall be deducted from the hire."

25.1 Clause 15 of the New York Produce form contains two provisions qualifying the charterers' obligation to pay hire throughout the charter period. The first of these, in Lines 97 to 99, is an off-hire provision dealing with interruptions to the charter service. The second, in Lines 99 to 101, is a provision allowing deduction from hire in the event that the ship's speed at sea is reduced by mechanical problems. This chapter deals with each of these in turn.

Interruptions to the charter service: general principles

25.2 Most, if not all, time charters contain an off-hire clause, excusing the charterers from having to pay hire while the ship is prevented from performing the charter service. Commenting on Clause 15 of the New York Produce form, Kerr, J., said in *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368, at page 381: "[T]he object is clear. The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost."

25.3 Two general principles apply to such clauses.

25.4 First, the burden is on the charterers to show that the off-hire clause operates in the relevant circumstances. Bucknill, L.J., said in *Royal Greek Government* v. *Minister of Transport* (1948) 82 Ll.L.Rep. 196, at page 199: "the cardinal rule. . . in interpreting such a charter-party as this, is that the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owners' right to hire." Similarly, Rix, L.J., in *The Doric Pride* [2006] 2 Lloyd's Rep. 175, at page 179, said, "under a time charter the risk of delay is fundamentally on a time charterer, who remains liable to pay hire in all circumstances unless the charterer can bring himself within the plain words of an off-hire provision".

25.5 Second, the off-hire clause does not depend on any breach of contract by the owners. In the words of Staughton, J., in *The Ioanna* [1985] 2 Lloyd's Rep. 164, at page 167: "Off-hire events are not necessarily a breach of contract at all. So one should not be too surprised if one finds that [the

off-hire clause] leads to a different answer than would ensue in the case of a claim for damages for breach of contract."

The components of off-hire

25.6 Under Lines 97 to 99 of Clause 15 of the New York Produce form, dealing with interruption to service, there are three matters that the charterers must establish in order to put the ship off-hire: first, the full working of the ship must have been prevented; second, it must have been prevented by one of the causes or events listed in the clause; and third, there must have been a loss of time from that cause or event. These matters are discussed in turn below.

Preventing the full working of the ship

The first question to be addressed

25.7 In every case, the charterers have to show that the full working of the ship has been prevented. The phrase "preventing the full working of the vessel" qualifies not only the immediately preceding words "any other cause" but all of the other causes listed in Lines 97 and 98 of the New York Produce form, i.e. "deficiency of men" and so on. Kerr, J., said in *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368, at page 382: "The word 'other' in the phrase 'or by any other cause preventing the full working of the vessel' in my view shows that the various events referred to in the foregoing provisions were also only intended to take effect if the full working of the vessel. . . was thereby prevented."

25.8 So one must start by asking whether the full working of the ship has been prevented. In *The Aquacharm* [1982] 1 Lloyd's Rep. 7, Lord Denning, M.R., said at page 9: "We are to inquire first whether the 'full working of the vessel' has been prevented. Only if it has, do we consider the 'cause'." See also Rix, J., in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 141: "It has therefore been said that the first question to be answered in any dispute under the clause is whether the full working of the vessel has been prevented; for if it has not, there is no need to go on to ask whether the vessel has suffered from the operation of any named cause. . . ."

Preventing the working of the ship

25.9 A ship is prevented from working when she is prevented from performing the next operation that the charter service requires of her: see *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), *per* Staughton, L.J., at page 459 and *The TS Singapore* [2009] 2 Lloyd's Rep. 54, at page 57 rhc, *per* Burton, J.. So if the next operation that the ship needs to undertake is to sail to the discharge port, but she is unable to do so, then the ship is being prevented from working. On the other hand, if the situation is that the ship is unable to sail, but the next operation required of her is to remain at berth and discharge, the full working of the ship has not been prevented.

The *Westfalia* was time chartered for trading between West African and European ports. The charter contained an off-hire clause which read, "In the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the ship is stopped for more than forty-eight consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service". The ship had a compound steam engine, with a high-pressure cylinder and a low-pressure cylinder. In the course of a voyage from West Africa to Harburg, on the Elbe, the high-pressure cylinder broke down and she was obliged to put into Las Palmas. Repairs could not be effected there. She was towed to Harburg by a tug, although some assistance was given by the ship's low-pressure cylinder. Once at Harburg, she was discharged normally, although her engine remained unrepaired. The charterers claimed the ship was off hire both during the voyage to Harburg and during discharge.

The House of Lords unanimously held that the ship was off hire during the tow from Las Palmas to Harburg. But a majority of the House of Lords held that the ship was on hire during discharge at Harburg.

Lord Halsbury, L.C., in the majority, held at pages 56 and 57: "I should read the contract as meaning this. . . that [the ship] should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if what was required of her was to lie at anchor, . . . [and] if she was efficient to do it at that time she would then become, in the language of the contract, . . . 'efficient', reading it with the other words, 'for the working of the vessel'. How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. . . of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time."

Hogarth v. *Miller* [1891] A.C. 48 (H.L.).

(Similarly a ship is not prevented from performing the next service required of her if she has defective hatch covers whilst proceeding on a ballast voyage: see *The Hermosa* [1980] 1 Lloyd's Rep. 638, appealed on other grounds [1982] 1 Lloyd's Rep. 570 (C.A.).)

25.10 In deciding whether the ship is prevented from performing the next operation that the charter service requires, the following principles must be borne in mind.

25.11 A ship is not prevented from working merely because she cannot perform the next operation that the charterers would wish, or were expecting, her to undertake. The relevant question is whether she is prevented from carrying out the next operation that the performance of the charterers' orders makes necessary. "The question is not what the charterers hoped or expected their orders would be, but what service they actually required": *per* Staughton, L.J., in *The Berge Sund* [1993] 2 Lloyd's Rep. 453 (C.A.), at page 460.

The off-hire clause in the time charter for *The Berge Sund* included the phrase "or any other cause preventing the efficient working of the vessel". After carrying a defective cargo of butane, the crew cleaned the ship's tanks on the ballast voyage. Although the crew were not negligent, their efforts proved inadequate and time was spent in further extensive cleaning at the loading port. The arbitrators and Steyn, J., held that the ship was off-hire during this further cleaning as she was not in an efficient state to provide the service required, namely the loading of her next cargo. The Court of Appeal came to the opposite conclusion on the basis that the service required was not the loading of cargo but further cleaning. Staughton, L.J., said, at page 461: "In my opinion the critical question is, what was the service required of the vessel on Dec. 20, 1982? What were the charterers' orders? They were not to load cargo; as I have said, that was the last thing that the charterers would have ordered, since the copper strip test had been failed. The orders were, in part expressly and at all relevant times by implication, to carry out further cleaning. That was the service required, and the vessel was fully fit to carry it out."

The Berge Sund [1992] 1 Lloyd's Rep. 460 and [1993] 2 Lloyd's Rep. 453 (C.A.).

(For a fuller account of this case see paragraphs 37.111 and 37.112, below.)

25.12 Generally a ship is not prevented from working if, with a view to performing the charterers' orders, she is carrying out an operation which is "in the ordinary way an activity required by a time charterer": *per* Staughton, L.J., in *The Berge Sund*, above, at page 461 of the Court of Appeal report. Obviously, a ship is performing the charter service when on a carrying voyage or loading or unloading the charterers' cargo. However, as Staughton, L.J., pointed out at page 460, she is also performing the charter service when bunkering, ballasting, lightening (as in *The Aquacharm*, below) and hold-clean*ing*.

The Aquacharm was time chartered for a trip on the New York Produce form. Having been ordered to load to maximum draft for passage through the Panama Canal, the master negligently failed to take into account that in passing through a fresh water lake which forms part of the Canal the ship's forward draft would increase. The ship was consequently refused entry to the Canal. After considerable delay part of the cargo had to be discharged, carried through the Canal in another ship and then reloaded. It was argued by the charterers that

the ship was off hire. Lloyd, J., and then the Court of Appeal both held that she was not. Lord Denning, M.R., said, at page 9, "I do not think the lightening of cargo does 'prevent the full working of the vessel'. Often enough cargo has to be unloaded into a lighter – for one reason or another – to get her off a sandbank – or into a basin. The vessel is still working fully, but she is delayed by the need to unload part of the cargo."

The Aquacharm [1980] 2 Lloyd's Rep. 237 and [1982] 1 Lloyd's Rep. 7 (C.A.).

25.13 Where she is carrying out an ordinary operation of this kind, the ship is not prevented from working merely because the operation is more than usually difficult or time-consuming to perform. In the case that follows, a ship was not prevented from working because damage to her cargo had extended the time required for discharging.

The *Mareva A.S.* was chartered on the New York Produce form and carried grain from the U.S. Gulf to Algiers. The cargo was wet damaged owing to leakage through defective hatch covers. Because of the damage, discharge at Algiers took 15 days longer than it otherwise would have done; but at all times the ship was fully capable of performing every service required of her and, in particular, fully capable of discharging cargo from all her holds. The ship was not therefore prevented from working and so was not off-hire.

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

Likewise, a ship is not prevented from working merely because she encounters an obstacle to navigation. "A vessel is not off hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency of water, blocking her path": *per* Rix, J., in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 147. (See also *Court Line* v. *Dant & Russell* (1939) 44 Com. Cas. 345, summarised at paragraph 25.40, which deals with an obstacle to navigation, although not in terms of whether the working of the ship was prevented.)

25.14 By contrast, a ship is likely to be prevented from working if she is having to do something that is not in the ordinary way an activity required by a time charterer. So the ship may be prevented from working while she undertakes repairs on a broken engine or if she is engaged in fighting a fire in her holds or if she is obliged to put back on a voyage.

The *Clipper Sao Luis* was period time chartered for trading between West Africa and South America. The ship loaded a part cargo of baled cotton at Cotonou, in Benin, then proceeded to, and loaded further cargo at, Rio de Janeiro. Just after loading at Rio had been completed, the cargo caught fire, as a result of a stevedore negligently discarding his cigarette. The ship was delayed for a number of weeks, fighting the fire. The charterers treated the ship as off-hire. The owners denied that the full working of the ship had been prevented at any time, arguing that the ship was performing the service then required of her by remaining at the quayside fighting the fire. David Steel, J., rejected that submission, calling it "wholly unreal"; see page 651.

The Clipper Sao Luis [2000] 1 Lloyd's Rep. 645.

25.15 The working of a ship may also be prevented by third party interference, for example legal or administrative action or piracy. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at page 150, Rix, J., held, "In my judgment therefore, the qualifying phrase 'preventing the full working of the vessel' does not *require* the vessel to be inefficient in herself. A vessel's working may be prevented by legal as well as physical means, and by outside as well as internal causes." So, on the facts of that case, the full working of the ship was prevented by the actions of the Bangladeshi port authorities, which prevented the ship from sailing; see the summary of the facts at paragraph 25.40, below. Or again, in *The Mastro Giorgis* [1983] 2 Lloyd's Rep. 66, where the full working of the ship was prevented by her arrest and in *The Saldanha* [2011] 1 Lloyd's Rep. 187, where the arbitrators concluded that the full working of the ship was prevented during the ship's captivity at the hands of Somali pirates. Such cases, where the cause, whilst 'external', is directed at or relates to the specific ship, should be distinguished from cases of external obstructions or impediments affecting shipping generally, such as the boom across the Yangtze in *Court Line* v. *Dant & Russell* (1939) 44 Com. Cas. 345 (summarised at paragraph 25.40 below), which will generally not prevent

the full working of the ship, though they may interrupt or delay her progress. (It is suggested that Rix, J.'s approach, above, is to be preferred to Webster, J.'s view in *The Roachbank* [1987] 2 Lloyd's Rep. 498. In that case, Webster, J., said at page 507 that, by dint of a judicial gloss on the language of the charter, the words "preventing the full working of the vessel" apply only where the ship is prevented from working by an internal cause, that is to say, one which renders the ship not fully efficient in herself. Rix, J., expressly refused to follow that view, saying, at page 150, "An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think that there is any authority binding on me that prevents me from saying so.")

25.16 The ship is not performing the service next required of her merely because she is operating in a manner that is consistent with performing that service. Thus, in *The TS Singapore* [2009] 2 Lloyd's Rep. 54, the ship was damaged in an accident in Japan and, following the accident, sailed to Guangzhou (via Hong Kong) for repairs. The first part of her route to Guangzhou happened to coincide with the route she would have taken to Shanghai, the next port ordered by charterers. But, even while the two routes overlapped, she was not performing the next service required of her.

25.17 The full working of the ship is prevented only where the charterers lose the use of her against their will. For this reason, an agreement between disponent owners and their time charterers to take the ship "off hire" to allow her head owners to perform a short voyage for their own account did not engage Clause 15: *The Fu Ning Hai* [2007] 2 Lloyd's Rep. 223, at [14].

Preventing the "full" working of the ship

25.18 Under Clause 15, the question is whether the full working of the ship has been prevented, not whether the working of the ship has been wholly prevented. Therefore, if an event within Clause 15 causes some part of the working of the ship to be prevented, or merely impairs the working of the ship that is sufficient in principle to give rise to off-hire.

The *Horden* was chartered under an earlier version of the Baltime form. The off-hire clause provided that: "In the event of loss of time caused by dry-docking or by other necessary measures to maintain the efficiency of steamer or by. . . damage to hull or other accident preventing the working of the steamer and lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service . . . ." As a result of the shifting of the ship's deckload of timber on a voyage from Archangel to Liverpool, her foremast was badly damaged. This did not affect the remainder of the voyage to Liverpool but at Liverpool she could only discharge her aft part by her own means. She could not discharge from the forward part because of the broken mast, and floating derricks had to be employed. The charterers contended that the ship was off hire for the whole period of discharge because she was inefficient throughout. The owners argued that as long as the ship could discharge, however slowly, she was efficient and hire continued.

It was held by the Court of Appeal that the full working of the ship was prevented by the partial inefficiency of the ship's discharging gear and that the ship was off hire for the whole period of discharge. Lord Roche said: "The mast being damaged did not prevent or hinder her steaming, but it did hinder or prevent her discharging in the sense in which prevention was construed in the House of Lords in *Hogarth* v. *Miller* as preventing discharge or the working of the ship happening in accordance with the contract."

Tynedale v. *Anglo-Soviet* (1936) 41 Com. Cas. 206 (C.A.).

(Similarly, in *Hogarth* v. *Miller* (see paragraph 25.9, above) the full working of the ship was prevented during the tow to Harburg, even though the ship was conveying the cargo to Harburg and the low-pressure cylinder of its compound engine was operating.)

25.19 The potential harshness of this rule is mitigated under Clause 15 of the New York Produce form by the fact that the charterers are only entitled to deduct hire equivalent to the amount of time lost during the period when the ship is not working fully: see below, paragraph 25.56. It is, in other

words, a 'net loss of time' provision. That is also true of the off-hire clauses in most modern time charter forms.

25.20 It has been suggested that the general rule stated in paragraph 25.18, above, is also subject to this further qualification, that if the charter contains express words dealing with the case where the ship is partly prevented from working while at sea, so that her speed is reduced (such as, for example, Lines 99 to 101 of the New York Produce form), the presence of an express provision of this kind may prevent the charterers treating the ship as off-hire under the primary off-hire clause (Lines 97 to 99 in the case of the New York Produce form). This unresolved issue is dealt with at paragraph 25.78, below.

Preventing "the efficient working of the vessel"

25.21 Whilst the New York Produce form refers to "the *full* working of the vessel", some other charters, notably, the Shelltime 3 and 4 forms, refer to "the *efficient* working of the vessel". In *The Manhattan Prince* [1985] 1 Lloyd's Rep. 140, at page 146, Leggatt, J., said, "the phrase 'efficient working' must enjoy the connotation of efficient physical working". Therefore, where the clause refers to the efficient working of the vessel, this is prevented by a legal or administrative constraint only if the constraint in question results from the physical condition, or the suspected physical condition, of the ship.

The *Bridgestone Maru No. 3* was period time chartered on the Shelltime 3 form. The ship loaded a cargo of liquid petroleum gas in Saudi Arabia for discharge in Livorno, Italy. When the ship berthed at Livorno, she was inspected by the harbour authorities. It was found that the condition of the ship's booster pump did not comply with local regulations. The harbour authorities refused to allow the ship to discharge and she was ordered off the berth. Hirst, J., held that the ship was off hire, saying, at page 83, "The cause of refusal to allow the vessel to discharge was the failure of the pump to comply with the RINA regulations [safety regulations applicable at that port] . . . This allegation was a potential challenge to the efficiency of part of the ship's equipment, namely the portable pump. . . . [T]he incapacity of the ship to discharge was attributable to the suspected condition of the ship itself, and as a result the crew could not use the relevant part of the machinery, namely, the pump."

The Bridgestone Maru No. 3 [1985] 2 Lloyd's Rep. 62.

(See also the comments on this case and on "efficient working" by Rix, J., in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at pages 149 and 150.)

And continuing for more than twenty-four consecutive hours

25.22 This phrase appears in Lines 147 and 148 of the off-hire clause of the Baltime form, Clause 11(A). Once the 24 hours have been exceeded, they are counted in with the rest of the delay: *Meade-King, Robinson* v. *Jacobs* [1915] 2 K.B. 640.

The off-hire causes or events

25.23 Once it has been established that the full working of the ship has been prevented, it is then necessary to ask whether that state of affairs has been caused by an event within the wording of the clause.

Deficiency of men

25.24 The expression "deficiency of men" does not apply to the situation in which there is on board a full complement of officers and men able to work but some or all of them refuse to do so.

In December 1943 the officers and crew of *The Ilissos* refused for over six days to sail from Newcastle, New South Wales, except in a convoy. The Court of Appeal held that, as there was no numerical insufficiency, the expression "deficiency of men" did not apply.

Royal Greek Government v. *Minister of Transport* (1948) 82 Ll.L.Rep. 196 (C.A.).

25.25 It is this decision which led to the widespread practice of inserting the words "or default" after "deficiency" in charters made on the New York Produce form. However, it should be noted that the off-hire clause in the *Royal Greek Government* case was unusual in that, unlike Clause 15 of the New York Produce form, it did not contain the words "or any other cause preventing the full working of the vessel" or any similar sweeping-up phrase. Where a charter does have such wording, it is probably the case that any event affecting the efficiency of the crew – whether deficiency, default or illness – that causes the full working of the ship to be interrupted would come within the sweep-up.

25.26 A deficiency of men refers to a deficiency of officers and crew. The word "men" does not include gunners employed to man guns which used to protect against enemy submarines: see *Radcliffe* v. *Compagnie Général Transatlantique* (1918) 24 Com. *Cas. 40.* Likewise presumably 'men' would not include armed anti-piracy security.

Default of men

25.27 There is a "default of men" (where that has been added to Clause 15) only if the ship's crew refuses to perform their duties or deliberately withhold their services. Negligence in the performance of those services, or other inadvertent errors or omissions, may well cause time to be lost, but does not amount to a "default of men": see *The Saldanha* [2011] 1 Lloyd's Rep. 187, at pages 191 and 192. In that case, Gross, J., accepted that the word "default" could embrace negligence but concluded that, in context of clause 15, it had to be read more restrictively. In *The Pearl C* [2012] 2 Lloyd's Rep. 533, the amendments to Clause 15 included the frequently added words "default of Master, Officers or crew", and these were accepted as apt to cover a decision to steam at reduced speed. (For the separate question of whether Lines 99 to 101 provide exclusively for delays from such a cause, see paragraph 25.78, below.)

NYPE 93

25.28 Line 220 of the 1993 revision of the New York Produce form replaces "deficiency of men" in the 1946 version with "deficiency and/or default and/or strike of officers or crew".

Breakdown to hull, machinery or equipment

25.29 The meaning of the word "breakdown" was considered by the Court of Appeal in a voyage charter case, *The Afrapearl* [2004] 2 Lloyd's Rep. 305 (C.A.), where the question was whether a discharge pipe at a shore facility had suffered "a breakdown". At page 313, Clarke, L.J., held that a distinction must be made between a breakdown and its cause: "As I see it a breakdown of equipment such as the discharge pipe occurs when it no longer functions as a pipe." On the other hand, the cause of the breakdown may be something that predates the breakdown and may be either an internal defect or some external event. Nonetheless, Clarke, L.J.'s simple functional test may not meet every case, as for example damage or destruction by collision, is more than, and different form, a breakdown, although it might be caused by a breakdown: see *The Ladytramp* [2014] 1 Lloyd's Rep. 412 *per* Tomlinson, L.J., *obiter*, at [14]–[15], citing Robert Goff, J.'s decision in *The Thanassis A* (1982) LMLN 68.

25.30 Where the condition of the ship's machinery becomes progressively worse, it has been held that a "breakdown" occurs when it becomes reasonably necessary to interrupt the charter service for repairs: see *Giertsen* v. *Turnbull*, 1908 S.C. 1101, *per* Lord Ardwell at page 1110.

The *Bauta* was time chartered for a period of six months. The charter included a clause providing "that in the event of loss of time from. . . breakdown of machinery. . . the payment of hire shall cease from the time the breakdown occurred until" the ship "be again in an efficient state to resume her service". On a voyage to Jaffa, an unusual noise was heard in the engine room. However the ship was able to maintain normal speed on the rest of the voyage to Jaffa, although from time to time the ship's engineer heard other strange noises in the ship's engine room. At Jaffa, the ship was inspected as thoroughly as was reasonably possible. However, the problem could not be identified and there was no reason to apprehend that the problem would interfere with the working of the ship. Having completed loading a cargo of oranges, the ship left Jaffa for Valencia. Over the next several days, as the ship was sailing towards Valencia, the engine continued to produce strange noises, which became progressively worse. Eight days into the voyage, the engineer concluded that the propeller must be loose in the shaft. That same day, the master decided to divert towards the nearest port, Bona, at slow speed in order to undertake repairs.

Lord Ardwell in the Court of Session held, at page 1110; "the words 'a breakdown of machinery' must be construed in a popular and reasonable sense, and. . . in such sense the vessel broke down when a defect was discovered which rendered it necessary in the opinion of a prudent navigator that she should proceed to a harbour for repairs."

Giertsen v. Turnbull, 1908 S.C. 1101

Damages to hull, machinery or equipment

25.31 Any such damage must be fortuitous rather than the natural result of the use that the charterers make of the ship: see *The Rijn* [1981] 2 Lloyd's Rep. 267, discussed further below at paragraph 25.45.

Detention by average accidents to ship or cargo

25.32 "Detention", in this context, means something more than mere delay. There must, in the words of Kerr, J., in the *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368 be "some physical or geographical constraint upon the vessel's movements in relation to her service under the charter". This definition was considered and approved by the Court of Appeal in *The Jalagouri* [2000] 1 Lloyd's Rep. 515, a case in which an issue arose as to the meaning of "detention" in an additional clause which required the owners to provide security in the event that the ship was detained by any cause; see *per* Tuckey, L.J., at page 519. In *The Mareva A.S.*, above, it was held, by Kerr, J., at page 382, that damage to cargo which caused the discharging operation to be protracted had not caused the ship to be detained.

25.33 An "average accident" means an accident which causes damage: see *The Saldanha* [2011] 1 Lloyd's Rep. 187, at page 189, adopting what was said by Kerr, J., in *The Mareva A.S.*, above, at page 381. The use of the word "average" to mean "causing damage" probably comes from the language of insurance, where "average" may mean damage which is less than a constructive total loss: *The Saldanha*, at [15]. At all events, an 'average accident' does not mean a 'general average accident': see *The Mareva A.S.*, at page 381.

25.34 The word "accident" means a fortuitous occurrence: see *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, *per* Rix, J., at page 144. In that case, at the end of discharging a cargo of rice, there was a quantity of just under 16 tonnes of residues in the ship's holds, representing around 0.16 per cent of the total mass of the cargo. The charterers argued that this indicated that there had been an average accident to cargo. Rix, J., rejected that argument, saying the arbitrators had been entitled to conclude that such a small quantity of residue was normal. But not every event

which might be seen as a fortuity from the owners' perspective is an "accident" within Clause 15. The word here connotes a lack of intent by all protagonists. For that reason, an attack on the ship by pirates is not an accident: see *The Saldanha*, above, at [12]. In *Royal Greek Government* v. *Minister of Transport (The Illisos)* (1949) 82 Ll.L.Rep.196, the Court of Appeal held that the refusal of a crew to sail save in a convoy did not come within the word.

NYPE 93

25.35 The 1993 revision of the New York Produce form adds after "cargo" the words "unless resulting from inherent vice, quality or defect of the cargo": see Lines 223 and 224. It also introduces a separate new cause, namely "detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible)": see Lines 221 and 223.

Under that provision, the reference to "subcontractors" means, it is suggested, that detention caused by the actions of, for example, sub-charterers, whether immediate or more remote, shippers or receivers, will not put the ship off hire, whether or not they were actions in the course of carrying out a task the charterers have undertaken to carry out, so as to make them actions of charterers' "agents" in the sense normally used in a time charter (see paragraph 20.14 above). In *The Global Santosh*, below, the Court of Appeal held that to be the case even for an off hire proviso limited to acts of "the Charterers or their agents", which gives "agents" in this context (off hire) a wider meaning.

The *Global Santosh* was chartered in September 2008 in the ASBATIME form, a 1981 revision of the New York Produce form, by Clause 8 of which the charterers undertook "all cargo handling". An additional clause, Clause 49, put the ship off hire until her release if she was "captured or seizured [*sic*.] or detained or arrested by any authority or by any legal process. . ., unless such capture or seizure or detention or arrest [was] occasioned by any personal act or omission or default of the Charterers or their agents." The ship was wrongfully arrested, by mistake, in proceedings brought by sub-sub-voyage charterers Transclear S.A. to secure a demurrage claim against their buyers, the receivers, IBG Investments Ltd. Having arrived at Port Harcourt, Nigeria, on 15 October 2008 to discharge a cargo of cement, congestion caused at least in part by the breakdown of IBG's offloader kept her waiting for a berth until 18 December 2008, resulting in the demurrage claimed by Transclear. She was arrested, in error, on 17 December 2008, and remained under arrest until 15 January 2009.

Arbitrators held, by a majority, that the ship was off hire whilst under arrest. The acts of Transclear and IBG were not acts of "the Charterers or their agents".

Field, J., allowed, in part, an appeal by the owners. He agreed with the charterers that acts of Transclear or IBG would only be acts of "the Charterers or their agents" if they were acts in the course of carrying out the task of cargo handling undertaken by the charterers under Clause 8. He held that the acts of Transclear in connection with the arrest of the ship were not such acts, but that the acts of IBG, in failing to procure that discharge occurred within the sale contract laytime and in failing thereafter to pay or secure Transclear's demurrage claim, were acts of cargo handling within Clause 8. He remitted the award to the arbitrators to consider causation, that is to say whether the (erroneous and wrongful) arrest was "occasioned by" those acts of IBG.

The Court of Appeal dismissed the charterers' further appeal, and allowed a cross-appeal by the owners. They held that Field, J., was wrong to say that IBG's acts were acts of cargo handling within Clause 8, but held that acts of "the Charterers or their agents" within the proviso to Clause 49 were not limited to acts in carrying out tasks, for example cargo handling, that the charterers had undertaken by the time charter to perform. Any act of any sub-contractor of the charterers (direct or indirect) was an act of their "agents" for that proviso. The remission to the arbitrators on causation was therefore widened so as to relate to Transclear's conduct as well as IBG's.

The Global Santosh [2013] 1 Lloyd's Rep. 455 (Field, J.), [2014] 2 Lloyd's Rep. 103 (C.A.). (At the time of writing, an application to the Supreme Court for permission to appeal is pending.)

25.36 The 1993 revision also incorporates part of Clause 11(B) of the Baltime charter as follows: "In the event of the Vessel being driven into port or to anchorage through stress of weather, trading